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This issue of *Byûn* examines laws and social practices relating to women’s issues vis-à-vis marriage, in particular, to women’s right to choice in marriage. As choice is linked to decision-making, and the latter entails the expression of autonomous agency, this issue is directly linked to that of power. Not power in the abstract, or even power exercised through sanction of force; but power as vested in an individual’s ability to participate directly and actively as an agent in the routine events that make up the course of her or his daily life; to make choices that intervene in the course of events to give direction to the future. In a world that places a high value on democratic freedoms, and where laws and judicial practice claim that they are based on the premise that by definition, all citizens, regardless of gender, class, caste, religious or any other difference are deemed equal before the law, this should be a simple enough matter. But the reality is much more complex, and issues related to women’s agency are not so easily resolved. Laws pertaining to marriage are closely linked to the demands of patriline within the patriarchal matrix. They are embedded in issues pertaining to ownership of property and inheritance; to the maintenance of class/caste boundaries and the control of women’s reproductive and productive labour. This has resulted in contradictions not only within the field of personal law between dominant social interests and the imperatives of justice, but also between the laws and judicial practice that itself tends to be informed by cultural biases.

Laws are contingent on the realities of societies in which they operate, and reforms must take this into account in order to enable judicial systems to fulfil their own obligations in providing equal justice to all without discrimination. The mutual interaction between the laws, judicial practice and the ways in which a society organises its experience in a world constantly in flux, emphasises this need. The papers in this volume of *Byûn* examine the issue of a woman’s right to choice in marriage from this perspective. While examining the ways in which laws are shaped by dominant interests, they also highlight the part played by the women’s movement in bringing about law reform and emphasise the need for members of civil society to participate actively in giving a direction to this process.

The degree to which justice, that makes no distinctions on the basis of class, caste, religious, ethnic and gender differences, is a marker of a civilised state, to that degree do unequal laws also draw attention to systemic inequalities within it. Claims to judicial objectivity notwithstanding, laws and judicial practice reflect the cultures to which they belong. That they are influenced by existing social practices and norms is evidenced in the fact that women’s low access to the right to decision-making and choice, especially with regards to marriage, runs along the lines of power and familial authority in the sex/gender system. It is in the realm of personal law, in the daily routine of people’s lives that directly involves the rights of individuals relating to marriage, divorce, child custody, inheritance, etc., that a legal system stands most clearly revealed. To take up the issue of laws and social practices relating to marriage, therefore, is to enter the jealously guarded terrain which is already tilted in favour of men, and where institutional and dominant societal discourses of customary and traditional practice, collude with or contest each other.
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## OPEN COURT

**suo moto**

*the panchayat dilemma*

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THE REFORM OF THE TURKISH
CIVIL AND PENAL CODES

This article follows Turkey's long and difficult legislative journey towards overcoming many discriminatory provisions and an overarching patriarchal perspective. The author reveals that the women's movement in Turkey made huge efforts to combat resistant conservative forces in the Parliament, the government and the media in this regard, and helped steer the Turkish Parliament towards a more progressive stance in introducing Civil and Penal Code reforms necessary to assure gender equality. Discussing marital law in view of these reforms, she exposes the various flaws in the old laws and suggests necessary changes for the future.

PINAR ILKKARACAN

Background

A psychotherapist, advocate and activist-scholar, Pinar Ilkkaracan is the co-founder of several NGOs working on national and international levels, including Women for Women's Human Rights - NEW WAYS, based in Turkey. Her work includes law reform in Turkey and Germany, sexual rights, human rights education, violence against women, sexual abuse of children, migration and racism. In 2001, she initiated an international solidarity network of academicians and NGOs for the promotion of women's sexual and bodily rights in Muslim societies.

The editor of Women and Sexuality in Muslim Societies, her forthcoming works include Deconstructing Sexuality in the Middle East and North Africa: Contemporary Issues and Discourses.
The last decade has witnessed major advancements towards the realisation of women's human rights in Turkey, largely due to the determined and successful advocacy efforts of the women's movement. Until the late 90s, the national legislation in Turkey contained various discriminatory provisions and an overarching patriarchal perspective, both in civil, penal, or labor laws, despite the constitutional gender equality principle\(^1\) and numerous international documents to which Turkey is a signatory.\(^2\) This situation has been undergoing rapid change, however, beginning with the adoption of the law on protection orders aiming to prevent domestic violence in 1996, The Law on the Protection of the Family, Law No. 4320 (followed by the reform of the Civil Code in 2001) and most recently the Turkish Penal Code Reform in 2004.

Through these reforms, women have attained the legal basis to exercise their human rights and lawfully demand full gender equality to a large extent. The legislative system, which previously granted men supremacy in marriage and deprived women of their civil, economic, and social rights, thereby restricting women's decision-making power in the family; and which furthermore, regarded women's bodies and sexuality as commodities of men, the family and society, legitimising human rights violations like forced marriages, marital rape, honor killings etc., has been extensively changed with the Civil and Penal Code reforms, to embody principles of gender equality in accordance with global human rights norms.

None of these reforms has been an easy, ready-made accomplishment for the women's movement in Turkey. Often faced with a combination of resistive conservative forces from the Parliament, government officials and the media, women's groups had to overcome the challenge not only of finding effective and diverse strategies of advocacy, but also of making their demands heard and publicising their agenda in a rather volatile political atmosphere. This paper will aim to summarise the two campaigns for the Civil and Penal Code reforms, as well as to provide an overview of measures further necessary to assure gender equality in Turkey.

**THE REFORM OF THE TURKISH CIVIL CODE: A 50-YEAR STORY**

The new Turkish Civil Code, which abolishes the supremacy of men in marriage and thus establishes the full equality of men and women in the family, was approved by the Turkish Parliament on 22 November 2001, and came into effect on 1 January 2002. The new Code sets the equal division of property acquired during marriage as a default property regime, assigning an economic value to women's hitherto invisible labor for the well-being of the

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\(^1\) Article 10 of the Constitution of Turkey, 1982.
family household. It also sets eighteen as the minimum legal age for marriage for both women and men (it was previously seventeen for men and fifteen for women), gives the same inheritance rights to children born outside marriage as those born within marriage, and allows single parents to adopt children. In addition, in October 2001, Article 41 of the Constitution of Turkey, 1982, was amended, redefining the family as an entity that is “based on equality between spouses.” The new Article reads:

The family is the foundation of Turkish society and is based on equality between spouses.

The old Turkish Civil Code of 1926 was translated and adapted from the Swiss Civil Code of the time and included several articles reducing women to a subordinate position in the family. For example, the husband was defined as the head of the marriage union, thus granting him the final say over the choice of domicile and children.

In the legal domain, the first effort to reform the Turkish Civil Code of 1926 to the advantage of women took place in 1951. Since 1951 there have been numerous commissions formed by the Ministry of Justice and several proposals have been drafted for a comprehensive reform of the Civil Code; but until 2001 no such reform had taken place. In the 1960s and the 1970s, political movements with right-wing and left-wing ideologies dominated political debates and activities in Turkey as a reaction to the extremely dominant state control which had continued since the foundation of the Turkish Republic in 1923. In this environment, women’s issues were subsequently subsumed into Marxist discourses. The 1980 military coup, which was touted as the only way to put an end to the “anarchic atmosphere” of the 1970s, suppressed all kinds of opposition by force, applied a systematic depoliticisation of the masses and implemented neoliberalist economic policies as formulated by the International Monetary Fund. In this atmosphere of repression and fear, the first new social movement which demonstrated the courage to be in opposition and to articulate its demands was the feminist movement.

THE IMPACT OF THE NEW FEMINIST MOVEMENT

The rise of a new strong feminist movement after the 1980s resulted in significant gains for women and paved the way for the final enactment of the Civil Code reform. In the last two decades, the feminist movement had succeeded in achieving the annulment of Article 159 of the Civil Code, which had stated that women needed their husbands’ consent to work outside the home; the repeal of Article 438 of the old Turkish Penal Code of 1926, which provided for a reduction of one-third in the term of punishments for rapists if the victim was a sex worker, by the National Assembly of Turkey in 1990; and the enactment of a new law on domestic violence enabling a survivor of domestic violence to file a court case for a “protection order” against the perpetrator of the violence.

However, at the same time, the efforts of the new feminist movement and the impact of the global women’s movement which had resulted in United Nations (UN) treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW), were countered by parallel social and political developments in Turkey, such as the rise in religious-right movements and the social impact of the armed conflict between the separatist Kurdistan Workers’ Party and the Turkish Security Forces, which served to reinforce the already existing conservative, nationalistic, militaristic and traditionalist tendencies in Turkish society.

In 1984, four years after the military coup of 1980 and coinciding with the rise of the new feminist movement, the reform of the Civil Code again became an issue of public debate when the Ministry of Justice published a draft law. Several women’s groups combined their strength and submitted a series of petitions to the National Assembly urging its acceptance. However, the draft law failed to make its way to Parliament despite the ratification of

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3 Articles 202, 203 and 205 of the Turkish Civil Code, 2001.
4 Article 204 of the Turkish Civil Code, 2001.
5 Article 205 of the Turkish Civil Code, 2001.
6 Article 206 of the Turkish Civil Code, 2001.
7 Article 207 of the Turkish Civil Code, 2001.
8 See Appendix 1 for details.
9 The Law on the Protection of the Family, Law no. 4320.
CEDAW in 1985 and a promise to remove reservations within a short time. With this promise, Turkey had underlined its commitment to changing the discriminatory provisions in its legislation. These commitments were reiterated in the country report presented to the UN Committee on CEDAW in 1993.

In 1994, a new commission was formed to prepare a new draft of the Civil Code. In the same year, we, as Women for Women’s Human Rights (WWHR), initiated an international letter and fax campaign demanding full equality for women in the Civil Code. Hundreds of Non Government Organisations (NGOs) from all over the world took part in the campaign, demonstrating their support for our demands. Turkey’s commitments to CEDAW were repeated in the UN Conference on Women held in Beijing in 1995 and in the second and third combined reports to CEDAW in 1997. A new draft law was finally prepared by the commission and presented to the National Assembly in September 1998.

However, due to the general elections held in April 1999, a new commission had to be formed to finalise the draft code and its enactment law. There was some speculation in the Western media that the reform of the Turkish Civil Code was a result of Turkey’s European Union (EU) accession process. However, Turkey was officially named as a candidate for EU accession in December 1999, after the preparation of the draft Civil Code. Thus, even though Turkey’s accession to the EU might have accelerated the process, it cannot be considered to be its primary driving force. Moreover, the resistance of the religious conservatives and the nationalists in the Parliament, which is discussed below, took place despite the EU accession process and could only be overcome by a major campaign initiated by women’s groups all over the country.

**Women’s Groups Unite for Nationwide Campaign**

The discussion of the draft law in the Justice Commission of the National Assembly started in April 2000 and continued until June 2001. Several reforms met strong resistance from religious conservatives and nationalists in Parliament. They argued that equality between men and women would “create anarchy and chaos in the family” and thus “threaten the foundations of the Turkish nation.”

Thus, at the beginning of 2001, 126 women’s groups from all around the country joined together to initiate a major campaign. Soon after the start of the campaign, the most controversial issue became the reform of the clause regulating matrimonial property. The original draft of the new Civil Code foresaw that all matrimonial property should be split fifty-fifty. The nationalists and the religious conservatives insisted on the separate property regime, which has been the rule in Turkey since 1926. They claimed that the equal sharing between spouses of property acquired during the marriage would be against Turkish traditions, change the family from a matrimonial union to a corporation, destroy love and affection in the family, increase the rate of divorce and consequently ruin Turkish society.

As a result of the campaign initiated and coordinated by women’s groups, the opposing forces had to accept the new property regime, which entitles women to an equal share of the assets accumulated throughout the duration of the marriage. However, due to a last minute law formulated by the opposition parties, this clause was deemed to be valid only for property acquired after 1 January 2002. Women’s groups are still continuing their advocacy efforts for the annulment of this law.

The campaign, which was made possible by cooperation and coordination between 126 women’s groups representing different sectors of society, played a key role in overcoming the resistance of the religious conservatives and the nationalists and in the ultimate realisation of the reform. The campaign was successful in creating a general atmosphere where objections to equality between men and women were viewed with scorn.

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10 Articles 202, 203 and 205 of the Turkish Civil Code, 2001.
12 Article 10 of Law no. 4722, Governing the Enforcement and the Implementation of Civil Code.
A NEW APPROACH TO THE FAMILY

The new Civil Code has taken a new approach to the family and to women’s role in the family. The old legal approach, which assigned women a legislatively subordinate position in the family with rights and duties defined with respect to the husband, has been abandoned in favour of one that defines the family as a union based on equal partnership. Consequently, this new concept is also reflected in the language of the new Code. The terms the “wife” and the “husband” are replaced by the “spouses.” Moreover, the legal language has been considerably simplified and out-of-date terminology has been replaced by comprehensible, modern terms, rendering the law more accessible for everyone.

The new approach to the family is reflected in several changes:

- The husband is no longer the head of the family; spouses are equal partners, jointly running the matrimonial union with equal decision-making powers;\(^{13}\)
- Spouses have equal rights over the family abode;\(^{14}\)
- Spouses have equal rights over property acquired during marriage;\(^{15}\)
- Spouses have equal representative powers;\(^{16}\)
- The concept of “illegitimate children,” which was used for children born out of wedlock, has been abolished; the custody of children born outside marriage belongs to their mothers.\(^{17}\)

CAMPAIGN FOR THE REFORM OF THE TURKISH PENAL CODE FROM A GENDER PERSPECTIVE

Immediately following the successful outcome of the Civil Code reform, in 2002, WWHR – New Ways initiated the Campaign for the Reform of the Turkish Penal Code from a Gender Perspective. Civil codes are usually considered the primary domain in which women’s human rights are regulated in national contexts, whereas penal codes are regarded as less relevant to women’s rights and gender equality. However, in reality, penal law is of crucial significance to the realisation of women’s human rights and gender equality; in regulating several forms of sexual crimes, one of the major forms of violence against women; and in governing sexual, bodily, and reproductive rights and freedoms of women. Our Campaign was initiated in this context and aimed to bring a gender equality approach to criminal law and ensure legal protection of women’s sexual, bodily, and reproductive rights.

The Turkish Penal Code was adapted from the Italian Penal Code back in 1926. Even though the law had been subject to several amendments since then, more than fifty percent of the law still dated from the late 1920s and almost none of the amendments concerned women’s rights or gender equality. The complete reform of the Penal Code was repeatedly on the Parliament’s agenda during the late 1990s, but was never pursued to the end. It was in 2002 that the 2000 Penal Code Draft Law was reincluded in the government agenda, primarily in line with the EU accession process. As soon as the Penal Code Draft Law Sub-Justice Commission of the Parliament began to review the draft law, the Campaign was launched.

\(^{13}\) Article 186 of the Turkish Civil Code, 2001.
\(^{14}\) Ibid.
\(^{15}\) Articles 202, 203 and 205 of the Turkish Civil Code, 2001.
\(^{16}\) Article 193 of the Turkish Civil Code, 2001.
\(^{17}\) Article 498 of the Turkish Civil Code, 2001.
The reform of the Penal Code has transformed the philosophy of the old Penal Code by acknowledging women’s right to have autonomy over their bodies and sexuality.

At the beginning of 2002, WWHR-New Ways initiated and coordinated a National Working Group on the Reform of the Penal Code from a Gender Perspective with the participation of representatives of NGOs and bar-associations, as well as academicians from various regions of Turkey. After analysing both the Turkish Penal Code in effect and the 2000 Penal Code Draft Law, the group concluded that both the law in effect and the draft law embodied the same discriminatory, patriarchal outlook and contained numerous provisions legitimising women’s human rights violations. Therefore, it was essential not only to focus on individual articles, such as the elimination of the article allowing for sentence reductions to perpetrators of honour crimes – which was the only issue on the public agenda – but to strive for a holistic reform, aiming to transform the entire underlying philosophy of the Penal Code, which implicitly considered women’s bodies and sexuality to be commodities of men, family, and society; and reflected a notion that women’s sexuality must necessarily be controlled and suppressed by the state.

The Working Group analysed the draft law from this perspective and after studying penal codes from other countries, prepared its recommendations, including more than 30 amendments in the form of new articles formulated word-by-word. These recommendations and proposed articles were published as a report and sent to all Ministers of Parliament, NGOs and media representatives in 2002.18

2002: AN UNEXPECTED DEVELOPMENT, EARLY ELECTIONS, AND THE VICTORY OF THE RELIGIOUS RIGHT JUSTICE AND DEVELOPMENT PARTY

While the efforts of the Working Group were well underway, the three-party coalition government led by the social democrats resigned unexpectedly after a political crisis in 2002, an event which was then followed by a decision for early elections. According to the Constitution of Turkey, 1982, the Minister of Justice has to be replaced by an independent expert for a period of three months before a new election.19 A positive surprise was that a member of our Working Group, Ms. Ayse Celikel – an honored jurist and academician – was appointed as the independent Justice Minister for the pre-election period. During the brief period of her ministry, she formed a commission to revise the draft law which included members of the Working Group. In this commission, the draft law was substantially revised in accordance with women’s demands. The draft law in its revised form still contained provisions contradicting the proposed amendments; however, many important alterations were made, promising a hopeful headstart for the campaign.

Immediately after the elections, a booklet containing our analysis and recommendations was sent to all the Ministers of the new Parliament.20 We repeatedly asked for an appointment with the new Justice Minister, Mr. Cemil Cicek, which he declined. As expected, the new government completely disregarded our proposals and the changes made to the draft law by the pre-election Justice Minister. The draft law prepared by the new government foresaw reform of almost all articles of the Penal Code other than those pertaining to women. All articles concerning women were taken verbatim from the old Turkish Penal Code of 1926, except for one. The only proposal for change concerning women was the extension of the legal abortion period from ten to twelve weeks (which was later revoked by the Justice Sub-Commission).

The government did not consult any experts or NGO members in the process. The demands of the Working Group to obtain a copy of the draft law before it was submitted to the Parliament were ignored. In fact, we were only able to get a copy of the draft law from third parties close to the government.

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18 WWHR-New Ways Booklet (2002).
19 Article 114.
THE LAUNCH OF A MASSIVE PUBLIC CAMPAIGN: 2003-2004

Faced with a dramatic backlash and government officials’ persistent refusal to meet with members of the Working Group, we decided to launch a massive public campaign. The campaign was launched in May 2003 with a big press conference, at which the proposed amendments and the government’s resistance to them was presented to the media. The press conference also served to expand and transform our Working Group into a national platform of more than thirty NGOs, including human rights and Lesbian Gay Bi-Sexual Transvestite (LGBT) groups such as Lambda based in Istanbul and Kaos GL based in Ankara, which supported our demands. During 2003-2004, numerous conferences, meetings and press conferences were held in Ankara and Istanbul, as well as in smaller cities in Turkey. Platform members extensively lobbied members of the Justice Sub-Commission, the Justice Commission, European Union officials and media representatives and visited the Parliament several times to voice their demands. The activities of the Justice Sub-Commission, which had the task of finalising the draft, were followed closely on a day-to-day basis.

The fact that the Women’s Platform on the Turkish Penal Code was so well-prepared with the proposed amendments and employed diverse strategies, including using the media and establishing allies from the opposition party as well as Commission consultants, assisted us in having most of our demands accepted by the Sub-Commission. Subsequently, while the draft law was being discussed again by the Justice Commission, the Platform continued its advocacy efforts for the remaining demands. Major alterations had already been made in the Sub-Commission; however, some important demands regarding honour crimes and virginity testing, were still not included in the draft law. Moreover, with a doubled number of Ministers of Parliament to lobby, we had to ensure that there would be no backlashes and also advocate the remaining amendments.

During the review in the Justice Commission, there was one regression: discrimination based on sexual orientation, which had been criminalised in the Sub-Commission due to advocacy efforts of women’s and LGBT groups, was removed from the draft law due to a last minute intervention by the Minister of Justice during the Commission session. Other negative developments included new articles criminalising consensual sexual relations of youth aged 15-18 years and the formulation of a new article on “obscenity,” threatening the freedom of expression and legitimising discrimination based on sexual orientation.

The Parliament was called for a special session in September 2004 to vote on the new Penal Code. Women throughout Turkey mobilised to lobby for the remaining demands of the platform. Our advocacy for the remaining demands was shadowed by the huge public debate caused by a last minute proposal of the Prime Minister, Mr. Tayyip Erdogan, to recriminalise adultery (later withdrawn due to public and EU pressure). Right before voting on the law took place, WWHR-New Ways initiated an international fax campaign to voice our remaining demands. Finally, the draft law was accepted in the Parliament on 26 September 2004.

THE GAINS OF THE CAMPAIGN: MORE THAN THIRTY AMENDMENTS

The new Turkish Penal Code contains more than thirty amendments that constitute a major step towards gender equality and protection of women’s human rights in Turkey. The campaign succeeded in achieving a holistic reform to transform the philosophy and principles of the Penal Code in order to safeguard women’s rights, and bodily and sexual autonomy. Below, I will present a summary of the major amendments.

The reform of the Penal Code has transformed the philosophy of the old Penal Code by acknowledging women’s right to have autonomy over their bodies and sexuality. To this end, sexual crimes are regulated as crimes against individuals/crimes against the inviolability of sexual integrity, instead of as crimes against society, family or public morality. All references to vague patriarchal constructs such as chastity, morality, shame, public customs, or decency have been eliminated and definitions of such crimes against women brought in line with global human rights norms.

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21 Law No. 5237.
22 Sixth chapter (Crimes Against Sexual Inviolability) of the new Turkish Penal Code, 2004.
The new code, which states in the first article that the aim of the law is to “protect the rights and freedoms of individuals,” brings progressive definitions and higher sentences for sexual crimes; criminalises marital rape; brings measures to prevent sentence reductions granted to perpetrators of honour killings; eliminates previously existing discrimination against non-virgin and unmarried women; criminalises sexual harassment at the workplace and considers sexual assaults by security forces to be aggravated offences.

Provisions regulating the sexual abuse of children have been amended to explicitly define sexual abuse and remove the notion of “consent of the child.” Provisions legitimising rape and abduction in cases where the perpetrator marries the victim have been abolished; the article granting sentence reduction to mothers killing the newborn children born out of wedlock is removed; and the article regulating “indecent behaviour” has been amended to include only sexual intercourse in public and exhibitionism.

REMAINING DEMANDS AND BACKLASH

Despite the overall success of our campaign, four of our demands were not accepted. These include the definition of honour crimes (not only the so-called customary crimes) as aggravated homicide; the penalisation of discrimination based on sexual orientation; the criminalisation of virginity testing under all circumstances; and the extension of the legal abortion period from ten to twelve weeks.

Moreover, as explained above, during the review of the Penal Code by the Justice Commission, two new articles were added to the penal code, which constitute a backlash. One of the articles provides for the criminalisation of consensual sexual relations of youth aged fifteen to eighteen upon complaint. The other new article criminalises publication of obscene material, thereby threatening freedom of expression and legitimising discrimination based on sexual orientation.

FURTHER NECESSARY STEPS TOWARDS FULL GENDER EQUALITY IN TURKEY

As outlined above, the reforms of the Turkish Civil and Penal Codes constitute major accomplishments towards establishing gender equality in Turkey. Yet these have to be followed by several other reforms and measures in the legal, social, and political domains, which aim at eliminating inequality between the sexes. The Labor Code, 1971, was amended in 2003, introducing some improvements for women, including recognition of sexual harassment at the workplace and prohibition of dismissal on grounds of pregnancy, even though it fell short of ascertaining full equality.

Women’s groups in Turkey have been advocating for a decade for the inclusion of an article on affirmative action in the Constitution. In April 2004, Article 10 of the Constitution of Turkey, 1982, regulating nondiscrimination was amended, deeming the state responsible for establishing equality. However, despite an intensive campaign by the

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**Footnotes:**

24 Article 102 (2) of the new Turkish Penal Code, 2004.
25 Articles 29 and 82(i) of the new Turkish Penal Code, 2004.
26 Article 423 of the old Turkish Penal Code, 1926.
27 Article 105(2) of the new Turkish Penal Code, 2004.
28 Articles 94 (3) and 102 (3) of the new Turkish Penal Code, 2004.
29 Article 103 of the new Turkish Penal Code, 2004.
30 Articles 433-434 of the old Turkish Penal Code, 1926.
31 Article 453 Article 103 of the old Turkish Penal Code, 1926.
32 Article 225 of the new Turkish Penal Code, 2004.
33 Article 104 of the new Turkish Penal Code, 2004.
34 Article 226 of the new Turkish Penal Code, 2004.
36 Articles 5(3) and 74 of the Turkish Labor Code, 1971, as amended in 2003.
women's movement, the inclusion of "special temporary measures" that would pave the way for affirmative action for de facto gender equality was rejected by the government. In addition to introducing special measures for positive discrimination, the next steps should include the reform of the Citizenship Act of 1964, the Social Security Code of 1964, the Political Parties and Election Act of 1982, further amendments to the new Labor Code of 2003, as well as changes in various statutes and regulations.

It is clear that the reforms and accomplishments in the legal domain are not sufficient to prevent gender discrimination and eliminate violations of women's human rights. In Turkey, women's lives continue to be shaped by several customary and religious practices that contradict existing laws, such as early and forced marriages, honour crimes, polygamous marriages and restrictions on women's mobility. Violence against women in its various manifestations – within and outside the home – continues to be one of the most widespread violations of human rights in Turkey.

Thus, there is a need for all kinds of coordinated state programmes and services for women: for example, those aiming to eliminate violence against women, prevent discrimination against women in the educational and economic spheres and increase their participation in the political domain. Despite pressure from the women's movement, the Turkish state has been extremely reluctant to allow, and has even actively resisted, the establishment of such programmes.

In fact, in most developing countries, including Turkey, although there has been an improvement in women's rights on paper on both national and international levels, this progress is very poorly reflected in women's lives at the local level. A key tool, which might be useful in overcoming the state’s resistance to increasing financial resources for women and developing coordinated programmes aimed at gender equality, would be the inclusion of specific measures and targets in international UN documents related to women's human rights.
1. [See footnote 8]

Turkey has a history of military interventions and transitions to democracy. The Turkish military embodies two conflicting political traditions. Firstly, there is a deep-rooted tradition of intervention in politics which is largely brought about by the military’s self-perception as the “guardian of the state” and its distrust of politicians. The self-ascribed guardian role of the military, which is legitimised by the role of military elites in forming the republic and a national security ideology, gives rise to interventionist and authoritarian tendencies. Secondly, there is the legacy of the military as a “moderniser.” As a modernising force since the nineteenth century the military, especially after the Kemalist reforms, committed itself to a Western-style government which was bound to be a democratic one. The 1980 military regime had more far-reaching aims than those of 1960 and 1971, which went beyond the restructuring of the constitutional framework of the state. It tried to change the political attitude of people and to depoliticise the whole society in an attempt to prevent the political and ideological fragmentation and polarisation which had characterised pre-coup Turkey.
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A QUESTION OF CONSENT:
CHILD RIGHTS, CHILD PROTECTION AND A CHILD'S CAPACITY TO CONSENT UNDER SRI LANKAN LAW

The author explains that valid consent is an essential prerequisite for marriage, that is, it must be genuine and freely given by a party having the capacity to consent. Children are denied the capacity to grant valid consent to marriage during the term of their minority and, therefore, a marriage contracted during minority is void under law. This article examines the various amendments to Sri Lankan law which have raised the age of consent, and relates how confusion between the general law and the personal laws, particularly Muslim law, results in the non-enforcement of laws related to the protection of women and children.

JUSTICE SHIRANEE TILAKAWARDANE

Background

Justice Shiranee Tilakawardane is a Supreme Court judge in Sri Lanka. The first woman appointed as a Court of Appeal judge in her country, previously, she was a high court judge and an admiralty court judge. Tilakawardane’s efforts are focused on the fields of equality, gender education, and child rights. She has been active in India’s Sakshi gender workshops for judges, the Asia Pacific Forum for Gender Education for Judges, and serves on the International Panel of Jurists of the International Bureau for Child Rights Bureau (United Nations affiliated).
A QUESTION OF CONSENT

CHILD RIGHTS, CHILD PROTECTION AND CHILD'S CAPACITY TO CONSENT UNDER ARMS LAW

[Text not visible in the image]
The Universal Declaration of Human Rights, 1948 (UDHR), has guaranteed the right of choice as amongst the fundamental rights that have to be nurtured and protected. It is globally recognised that a free and autonomous choice is one of the characteristic features of a free and democratic society. The Sri Lankan constitution, as well as social and legal networks, therefore place a high premium on unfettered consent. The existence of valid consent is considered an essential pre-requisite in order to bind people to the commitments undertaken by them in their daily lives, both personal and commercial. Genuine consent signifies that the agent is a free actor and understands fully the consequences of his/her consent and agrees to be bound by the same. Thus, those classes of people who are deemed to be incapable of rational thought and understanding, such as children and the mentally disabled, are denied the capacity to consent. This is in order to prevent them from binding themselves to acts, the consequences of which they may be unable to comprehend and may be against their best interest.

The conceptualisation of consent with reference to children is important when dealing with issues related to child rights and protection. The concept of statutory rape is based on the rationale that children lack the maturity to rationally consider the consequences of their actions and thereafter grant consent to the act of sexual intercourse. The prohibition against child marriages also follows a similar rationale.

While Sri Lankan law has taken significant strides towards providing greater protection to children, child rights, a child's needs and child protection raise important socio-legal issues, which must be contended with when determining the stage at which a child may possess the capacity to grant consent and the extent of protection which should be provided by the state in the context of consent by a child. In a way, it is an exercise in contextualising children's consent within the power dynamics of male-female and adult-minor relations. In this context, it is also necessary to examine the extent of legal protection offered to children and the impact of certain lacunae and contradictions in the law which affect and impact their lives in an adverse manner. It is also opportune to analyse this law in the context of the incidence of non-consensual marriage and the extent to which the law favours those guilty of exercising such force on a child.

CONSENT TO BE FREELY GIVEN: CONTEXTUALISING CHILDREN’S CONSENT

In order that consent be valid or authentic, it must be genuine and freely given by a party who is recognised in law as having the capacity to consent. Minority militates against valid consent and children are therefore

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* I must place on record my thanks to Ms. Dianne Uyangoda for her research and assistance in preparing this article.

† Article 16.
denied the capacity to grant valid consent to marriage or sexual relations within a recognised legal bond during the term of their minority. As previously mentioned, a marriage contracted during minority under present law is void, and any person engaging in sexual intercourse with a person under the statutory age is guilty of statutory rape regardless of the existence of prior consent.

However, the mainstream conception of consent, particularly with respect to sexual conduct, is limited in its scope to the extent that laws ignore the power differentials that govern women’s consent and thus neglect the many ways in which women may be pressured, coerced and forced into unwanted sexual contact. The failure of the law to enforce and protect women’s choice not to have sex in many situations has the effect of enforcing women’s “consent” to unwanted and or unwelcome sexual activity.

The powers and coercions limiting consent are exacerbated when applied to children in their dealings with adults. Sexual abuse takes place within a particular power dynamic, which is exacerbated under specific circumstances such as those related to children. A legal regime which recognises the capacity of a “child” to enter into sexual relations while failing to provide structural safeguards for the safety of the child, has failed to recognise the factors which may limit the consent of a child. Therefore it is of paramount importance that due notice be taken of the background and context within which a child gives consent to sexual intercourse, and that progress of the law should be in step with the ground reality of such power relations.

**The Structure of State Obligations**

Girls children are the most vulnerable members of any community. Generally valued less than their male counterparts, girls are often victims of discrimination and exploitation at the hands of their families and communities and the state. The Convention on the Rights of the Child, 1989 (CRC), and the Convention on the Elimination of All forms of Discrimination Against Women, 1979 (CEDAW), place great emphasis on the needs of the girl child.

International Human Rights Law had traditionally recognised the right against discrimination, the arbitrary deprivation of life and liberty and the freedom from torture, cruel, inhuman and degrading treatment or punishment. These general guarantees have now been extended to deal specifically with problems associated with gender-related violence. International law has now recognised that the state is not the only repository of power and that power is both used and abused by a variety of actors both private and state. States can be held accountable under international law for failing to take proper and adequate action to prevent violence and abuse of women and children under their care.2

CEDAW and CRC have established an unprecedented legal basis for the rights of girl children and women the world over. CRC mandates that the state protect children from all forms of discrimination based on gender5 and CEDAW ensures the girl child the right to freely choose if, when and with whom she will enter into a marriage and obligates the state to change any cultural practices which serve to discriminate against women.4 CRC further enjoins the state to protect the child against all forms of sexual exploitation.5

The state is also obliged to protect the rights of children under the constitutional framework.5 Although the Second Republican Constitution of Sri Lanka, 1978, does not address gender-related issues in a specific way, it does

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2 Article 2.
3 Article 16.
4 Article 34.
5 Unless otherwise stated all references to enactments are made with respect to Sri Lankan law.
provide a basic structure of equality and non-discrimination which may be used in order to enhance the protection given to women and children when exercising their rights to remain free from coercion and exploitation in their marital and sexual relations.

**MARCH OF THE LAW: THE 1995 AMENDMENTS**

Since the 1995 Amendments to the Penal Code, 1833 and the Criminal Procedure Code, 1979, all persons under eighteen years of age are recognised as children and are therefore entitled to the protection of the state against all forms of abuse and exploitation. Accordingly, the marriageable age for the majority of the population in Sri Lanka, with the exception of those governed by Muslim law, was raised to eighteen years. The amendments to the marriage laws were undertaken with a view to reducing the incidents of child-marriage and child pregnancy in keeping with the recognition of those under eighteen as “children” and in deference to medical opinion that girls under eighteen years are physically and psychologically ill-equipped to deal with motherhood.

The amendments also increased the age of statutory rape from twelve to sixteen years. Therefore, under the present law a person between sixteen to eighteen years of age, although still legally a child, may validly consent to sexual relations with an adult but may not legitimise this relationship by contracting a valid marriage, since such a person by virtue of his or her status as a “child” is denied the capacity to consent to a marriage.

Parental consent in the post-amendment legal regime was intended to be irrelevant to the contracting of a valid marriage and could not validate a marriage contracted by a minor. In *Gurantum v. Registrar General*, the court went on to hold that “no marriage of persons below the age of eighteen years can be considered valid by virtue of the parental consent since the minority operates as an absolute bar to marriage and it necessarily overrides the parental authority to give consent to the marriage of a party below eighteen years.” This may be a welcome change since it provides a limited guarantee against children, particularly girls, being forced into marriages and sexual relations by their parents for economic, social and cultural considerations. Another important change brought about by the amendments is that, at present, the age of marriage and age of consent to sexual relations is uniformly applicable to both boys and girls alike.

However, although the amendments were undertaken with the overall intention of providing greater protection to women and children from abuse, particularly sexual abuse, and reduction of incidents of child marriage and teenage pregnancy, there is a substantial lacuna in the law and the level of protection provided by these changes to children, specifically those falling within the age group of sixteen to eighteen years. This is due to the discrepancy between the ages at which the law has fixed the capacity to enter into sexual relations, and that at which one may enter into a valid marriage. Furthermore, little protection is provided to those children governed by Muslim law, to whom the limited advantages of these amendments do not extend.

**AN IMPERFECT LAW: LACUNAE IN THE POST 1995 LEGAL REGIME**

Precisely due to its inability to contextualise and understand the dynamics of consent, the law in Sri Lanka has failed to recognise the necessary implications of adopting a permissive attitude towards child sexual

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7 Article 12(1) of the Second Republican Constitution of Sri Lanka, 1978, provides a guarantee of equality before the law and equal protection of the law.
9 Section 286 A.
10 Prior to the Amendments the marriageable age for girls was twelve years (fourteen years in the case of Burghers) and sixteen years for males. However the age of majority was set at twenty-one years (eighteen years since 1989). Thus, although they had reached marriageable age and had the capacity to marry, those under twenty-one years of age (eighteen years since 1989) being minors, required parental consent in order to contract a valid marriage.
11 A marriage contracted without parental consent was voidable, and a marriage by a minor was automatically validated upon attainment of majority.
13 Section 393(3) of the Penal Code (Amendment) Act, 1995.
14 2002 SLR 303.
activity without granting children the concomitant capacity to enter into marriage. The legal regime has failed to take into consideration the inevitable incidents of pregnancy among children falling within the vulnerable age-group of sixteen to eighteen years, and the effect of illegitimacy which may attach to children born of such parents, due to their parent’s legal incapacity to contract a valid marriage under law. The law thus serves to victimise and render vulnerable not one but two generations of children. The laudable intentions of child protection are ill-served under the present legal regime, which permits sexual relations between children while barring marriage between the same. The increased incidents of child pregnancy among children between sixteen to eighteen years of age as compared with those below the age of sixteen to whom the laws of statutory rape apply, bears out this point. Children within the vulnerable age group of sixteen to eighteen years who are faced with pregnancy, are left with few options within the legalised framework of regulated sexuality. They are thus forced to seek solutions outside the law, which include contracting a marriage with the use of a false age, getting an abortion or committing suicide; the latter two options resulting in tragic consequences for the individual concerned, their unborn child, and the social rubric we live in.

**The 1997 Amendment: Parental Consent and Non-Consensual Marriages**

A further anomaly in the law relates to the relevance of parental consent. While the amendments in 1995 have prohibited marriage between those under the age of eighteen and negated the effect of parental consent towards the validity of a marriage, the Marriage Registration Ordinance, 1907, as amended in 1997, provides that the parents or guardian of a person under eighteen years shall have the authority to give consent to the marriage of such a party, and such consent is required for the said marriage. This provision, to the extent that it permits parental consent to validate an underage marriage, clashes with Section 360B of the Penal Code, 1833, which punishes those who permit and facilitate child sexual exploitation. This provision applies to all children under eighteen years including those over sixteen years. The relevance of parental consent raises the possibility of forced marriages or non-consensual marriages.

A forced marriage is one which is contracted against the will of one of the parties and is often entered into due to the pressure and coercion exercised by parents upon their children. The possibility of coercion is far greater in the case of a minor child, and the recognition of the parent’s ability to grant consent on behalf of such a child under general law is a severe blow to the provision of effective legal protection to the child. Not only does the law fail to protect, it also favours and legitimises the acts of the parents by recognising the validity of such a union.

While there are no specific legal provisions under domestic law prohibiting such marriages, the existence of valid consent by both parties to the marriage is presupposed by all religions and, in the case of a minor, such consent, since invalid, should not be artificially validated by the act of a third party. Furthermore, international law prescribes and protects a woman’s right to choice with regard to her marriage and the non-recognition of such a right is a breach of Sri Lanka’s international obligations.

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11 Ibid, p. 3.
12 Section 5 of the Marriage Registration Ordinance, 1907, as amended by the Marriage Registration (Amendment) Act, No.18 of 1995.
13 Section 22(1) of the Marriage Registration Ordinance, 1907, as amended by the Marriage Registration (Amendment) Act, No. 12 of 1997.
16 Article 16(2) UDHR; Article 16(1) CEDAW; General Recommendation No. 21, UN Committee on the Elimination of all Forms of Discrimination Against Women.
17 CEDAW was ratified by Sri Lanka on 5 October 1981 and General Recommendation No. 21 was ratified by Sri Lanka in 1994.
RELIGIOUS FREEDOM AND THE RIGHT TO EQUAL PROTECTION OF THE LAW

The prevalent conditions relating to the non-enforcement of laws related to the protection of women and children are worsened by the confusion caused between the general law and the personal laws, particularly Muslim law. The exception carved out in Section 363(e) of the Penal Code (Amendment) Act, 1995, with regard to a wife over twelve years of age is obviously to be taken into account only when dealing with persons coming under Muslim law. However the police tend to seek refuge beneath this provision in order to validate marriages contracted between any persons. This provides a ready and easy escape for rapists who attempt to escape prosecution by entering into a marriage with the victim, at times with the active involvement of the police.

With Muslim law remaining without amendment, a Muslim child may be given in marriage soon after puberty and even children below twelve years of age may be given in marriage with the permission of the quazi of the area. Thus, Muslim children are denied the protection of laws related to sexual abuse and even those concerning compulsory education. Additionally, modern medicine has enumerated a series of health hazards that are inflicted upon such children due to childhood pregnancies and also a failure to consider the health and development aspect of the girl children who are consequently placed in such situations, often due to the ignorance and lack of awareness of their parents, and thereby suffer from long term health complications with their resultant burdens borne into adulthood. It also reduces the opportunities and choices that such children have in their adult lives.

Other personal laws also disclose certain provisions which are incompatible with the health and well-being of children. Despite the fact that Kandyen law stipulates the lawful age of marriage to be eighteen years, Sections 4(2) and 4(3) of the Kandyen Marriages and Divorce Act, 1952, sanctions underage marriages. Under these sections, a marriage may be validated by co-habitation for a year after the attainment of majority or if a child is born into the marriage during minority. The harmonious construction of these contradictory provisions is made even harder by the requirement of compulsory registration in order to constitute a valid marriage.

Personal laws, as explained by the Special Rapporteur on Violence Against Women, are maintained within the politics of communalism and women are bound by the different positions relegated to them by the personal laws by which they are bound and which regulate the most important area of their lives, the family.

The existence of personal laws which run contrary to the general law of a country, particularly on issues affecting women and children, requires a great deal of effort on the part of legislators and policy-makers. In order for laws to be effective they must form a respected part of the culture and traditions of a community. In South Asia, minority communities tend to view law as an agent of hegemony deployed by the majority in order to replace minority or indigenous cultural, religious or social traditions with a more uniform homogenous counterpart. The difficulties faced by the law-makers and policy-makers of India in bringing forward a uniform civil code, exemplifies this point. For women’s rights and children’s rights to truly extend to all communities and peoples there has to be an attempt to reach a broader consensus across cultures and traditions regarding the commitment to the woman’s right to choice and freedom from exploitation. Such a consensus may bring a much needed amount of legitimacy to the human rights movement.

However, under the changed scheme of international and domestic law one may question the relevance of this debate regarding personal laws and the extent to which religious freedom or ethnic and cultural diversity can continue to be held out as valid justification for the subordination and suppression of women and the girl child. The

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23 The term quazi generally refers to a cleric charged with judicial duties, appointed under Section 12 of the Muslim Marriage and Divorce Act, 1951.
24 Section 23, Muslim Marriage and Divorce Act, 1951.
25 Section 363(e) of the Penal Code (Amendment) Act, 1995.
26 Kandyen Sinhalese may choose to be governed by the general law or Kandyen law. The Marriage Registration Ordinance, 1907, constitutes the general law on marriage in Sri Lanka. Kandyen Marriage and Divorce Act, 1952 constitutes Kandyen law on marriage.
international legal regime, the UDHR and the International Covenant on Civil and Political Rights and many similar conventions have obligated states to prevent all forms of discriminatory practices within its territory; and traditional practices are required, under the present constitutional framework of Sri Lanka, to conform to the principles of law, morality and public order in order to maintain their validity. Furthermore, deviations from cultural and religious practices are deemed invalid on account of violating the freedom of religion only to the extent that such practices derogate against those features which are considered essential to such religious practices. Thus the existence of personal laws to the contrary may no longer hold out as a just cause for non-conformity with a country's international and constitutional obligations towards all its children.

CONCLUSION

One of the challenges for the legal community is to use legal norms to help establish a culture against violence and to provide a legal system which provides speedy and effective remedy to victims of violence. Law's response to violence against women, particularly sexual violence, has been wholly inadequate and limited in the face of the complex issues raised by such violence and abuse. While at the formal level the law has recognised a limited right of women and stigmatised many forms of violence as well as prescribed sanctions, at the practical level such legal remedies remain inaccessible to most.

Although amendments have been made to the criminal law with the specific intent of reducing incidents of gender-based abuse and exploitation and of providing better protection to the girl-child, the practical application of these changes has been limited not simply by the limitations inherent in the law but also due to judicial attitudes and the lack of initiative and imagination displayed by state authorities with regard to the implementation of these laws, especially with regard to the availability of a victim-friendly or victim-conducive environment in the Courts and police stations.

The continued relevance of personal laws as a weapon of submission and discrimination can no longer be justified in an age where international law and the jurisprudence of relativism have progressed in harmony with the prevalent rights discourse in order to render nugatory religious and cultural practices which discriminate against and oppress women. The freedom of religion must not be considered in isolation but rather within a broader framework together with the right to equality and dignity.

The absence of a Right to Life clause similar to that provided under Article 21 of the Constitution of India, 1949, is a significant drawback when determining the right to life and the security of marginal and vulnerable sections of the population. Girl children who are doubly marginalised on account of their gender as well as their vulnerable status as children would have been much advantaged had such a guarantee existed within the Sri Lankan constitutional framework. However, in the absence of such a clause, resort may be had to larger and broader systems of rights as provided through the international legal regime, and the obligations, which it places upon the state. The judiciary has taken a step forward to recognise the right to life in interpreting Article 11 with Article 13(4) of the Second Republican Constitution of Sri Lanka, 1978, in cases where the victim is not the petitioner and the dependants came before court on behalf of the deceased victim seeking relief against torture, cruel, inhuman and degrading treatment whilst in police custody or prison which was the sole cause of the victim's death.

At the domestic level, it is important that harmony be achieved in the content and implementation of the laws, in order that the loopholes be reduced and so that the law’s protection extends equally to all under its care. The

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28 Entered into force 23 March 1976; Sri Lanka acceded to the treaty on 11 September 1980.
29 Srijani Silva v. Officer in Charge, Seeduwa Police Station and others (2004 SLR 1).
umbrella of the law must both protect and accommodate the disadvantages created by the discrimination that are often evident in the effective practice of the law.
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LOCATING CONSENT:  
THE SOCIAL AND HISTORICAL CONTEXTS OF "CHOICE" IN MARRIAGE

Uma Chakravarty discusses the attempts made by feminist research in the last century to define the structure of reproduction of caste and class hierarchies which result in a tight control of women's sexuality. She explains how property and social structures together with the endogamous marriage system have moulded the marriage and kinship systems of South Asia. Tracing the legislative history of the establishment of the age of consent in India, she describes many cases where young girls have fallen victim to the law. Next, she discusses the heinous issue of honour killings in South Asia and wonders when women will be able to rid themselves of the mantle of culture-bearing icons.

UMA CHAKRAVARTI

Background

Uma Chakravarti is a feminist historian who has taught history at Miranda House, University College for Women, Delhi University for almost four decades. She is associated with the women's movement and the movement for democratic rights in India and in this capacity has been part of many joint investigations on violations of rights. She has written on gender, caste, labour and religion. Her most recent work, *Gendering Caste: Through a Feminist Lens* is focused on the relationship between caste and gender.
One afternoon, at a seminar on mapping gender in Colombo, Kumari Jayawardena, who had been fairly silent until then, suddenly began to liven up the proceedings by recounting how she resolved a dilemma about being appropriately dressed for a conventional wedding she had to attend. She explained that since she belonged to a group that did not invest much in the institution of marriage, her normal reaction to weddings was not to attend; but this was one of a close relative. In the course of this anecdote, leading to much laughter, about how she designed an appropriate outfit, she dropped a sentence that has stayed with me because it describes marriage very aptly as “an occasion when a man and woman come together to reproduce the nation.” It is that now, but in times past it was to reproduce the family, caste and community and it continues to be all of this even today. It is well to remember that especially in Asia and more so in South Asia, from which I will draw my understanding of the contexts of women’s choices in marriage.

A circa 6th century text from South Asia states quite succinctly what marriage is about:

One should marry a woman whose virginity is intact, with auspicious marks, not previously wed to another, younger than oneself, not diseased, possessed of a brother, from great lineage but not from one afflicted by a hereditary disease however wealthy it may be. The groom too should be endowed with these qualities, he must be from the same varna (caste), [and] his potency diligently tested ...

Yajnavalkya Smritis I. 52-53

An anthropologist who has explored the normative structures of marriage, writes that certain violations of the norms nullify the act of marriage because wifehood cannot arise in such cases. And the purpose of wifehood is to procreate; reproduction therefore is at the heart of legal notions of acceptable unions and reproduction has historically been a social rather than an individual act. It is also inextricably linked to the political economy of communities and the ways in which these communities organise as well as reproduce themselves. Feminist research since the seventies and eighties in the last century has attempted to outline the longstanding structures of reproduction, including the reproduction of caste and class hierarchies, which has necessitated a tight control of women’s sexuality in particular, but also of all segments of the population. Property structures and the imperatives of patriliny, and the endogamous marriage system to pass on the substance of caste blood have thus shaped the marriage and kinship systems of South Asia. The exchange of women is therefore a highly structured act. Further,

1 A well-known feminist from Sri Lanka who has written on a range of subjects including caste formation, labour and gender.

2 Smritis are Brahminical prescriptive texts that outline codes of conduct for people to follow. Yajnavalkya is the putative author of one such Brahminical text: the Yajnavalkya Smritis.

given the relationship between caste and class and the consequent links between control of property among certain castes as well as the relationship to labour of other castes (who are or have been, denied access to productive resources), and the centrality of gender structures in reproducing the map of inequality into the future through the prevalence of the endogamous marriage system, the exchange of women must perforce itself be tightly controlled. A woman's sexuality is both ritualised and bounded. For an acceptable reproduction, marriage must be within the group that seeks to reproduce itself in terms of status and control over property. The norm in South Asia, where hierarchies are not simple but elaborate, is that legitimate reproduction requires that women be formally passed on by fathers to husbands. This is explicitly stated to be the best kind of marriage in an early text and is now the norm in caste society. The structures of reproduction determine decisions in marriage.

The political economy of marriage in the context of class and caste is accompanied, or rather overlaid, by the ideological norms of marriage which are in turn embedded in notions of culture, tradition, and social constructs of honour which must be upheld by families to retain their status and their social power and which are deeply gendered. Since women's sexuality is a resource, a form of property, the honour of the men of the community is constructed as being contingent upon guarding this resource till it can be acceptably disposed. When anyone, but especially a woman, acts autonomously and/or asserts choice, the entire edifice of the class and caste system is disrupted; such choices, therefore, represent a dystopia that meant an end of the social order according to traditional ideologies. Desire, choice and love were separated from the institution of marriage, which was about social reproduction and not about individual needs and their fulfilment. (These, however, could be provided for through arrangements, always along an axis of gender – permitted for the husband and banned for the wife.) Marriage was a duty and that duty required the observance of a strict set of rules. It is therefore not surprising that South Asian oral literature and medieval tales were rarely about romances that could end in marriage but those of lovers who literally died for love. Love was doomed more often than led to a “happily-ever-after existence.” The structures of production and reproduction were quite stable. Only the monastic order provided an exit from this tight structure, but it was required that the world of production and reproduction be explicitly renounced by the renouncer. This alternative society was supported by laymen and women who themselves continued to enact their specific roles/duties and thus perpetuated the very system that the renouncers had left behind.

II

The gradual development of colonial law in the nineteenth and twentieth centuries unwittingly produced certain tensions in this fairly stable structure. In this section, I will explore some of these tensions through selected legal acts, the discussions around them, the arguments in cases where consent figures implicitly or explicitly, as well as in judicial pronouncements. What this exercise will suggest is that despite unprecedented changes introduced by British policies in the legal field, questions of marriage and consent were never centrally addressed but rather worked around and that the structures of reproduction in South Asia were not disrupted in any significant way. And yet, there were reverberations that led to more sustained interrogations in the post-independence period.

At the heart of the contradictions that emerged with British Indian administrative law with respect to marriages in most of South Asia was the custom of “infant marriages” or “child marriages,” which were euphemisms for prepubertal marriages of girls, a custom linked also to the marriage of an upper caste Hindu girl being considered a sacred union. Sacramental marriage in turn did not require consent of the marriage partners to establish it as a valid marriage, unlike under Islamic law, where marriage is a contract and requires the parties to explicitly state their consent to it. In practice, according to custom, it was the right of the agnatic kin to give the girl away in marriage across communities in South Asia. The courts of Bombay and Madras held the view that the marriage of Hindu children was an arrangement between parents and the children themselves had no volition. The order of those who had the authority to give the girl away in marriage was the father, paternal grandfather, elder brother, kinsmen and finally the mother. Further, since marriage was a sacrament in the case of Hindus, once performed it was valid even if the boy was an “idiot” or a “lunatic” (and by implication incapable of performing or consenting to his obligations in marriage).

The Widows’ Remarriage Act of 1856 first pointed to the difficulties of locating consent in the context of marriage. This Act stated that if a widow is still a virgin after being married, i.e. if her marriage is unconsummated, only her

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5 I.R. X. Bombay Series, p. 312.
agnatic kin may give her away into a second marriage. If, however, she is of full age or her marriage has been consummated even though she is a minor in the legal sense of the term, her own consent is sufficient to "constitute her marriage lawful and valid." It was a girl’s virginity that was the "property" or resource of her male agnatic kin; once this was used or when she was legally a major, she was capable of providing consent to disposing of her sexuality.

A significant area of ambivalence, tension and perhaps even contestation during the colonial period deeply impacting women’s lives was the newly constructed legal notion of "consent," which came to underpin the law on rape and, by extension, marriage. Although the legal notion of consent is neutral and could apply to both men and women — as for example in the context of a contract to buy and sell between majors — in a specific sense it came to congeal around women in a deeply gendered way. In India it entered the public sphere in 1861 when the first Age of Consent Bill was passed, making ten the age of consent in the case of girls for sexual intercourse even within marriage. The relationship between “age” and the capacity to act autonomously and with discretion, which defined the legality of a contract, was in the context of marriage in India never a factor of legality or otherwise of the marriage given the marriage system. For a variety of reasons, as outlined earlier, marriages were in the past, and continue even today, to be arranged. Further, because of the widespread prevalence of child marriage, the question of consent between the partners could never actually be located in the partners themselves but in the fathers/brother/guardians of the bride and the groom. Tensions between a formal age defining the capacity to act with discernment and make decisions for oneself in relation to marriage can be seen in the clauses of the Age of Consent Bill of 1861. The colonial state devised a legal difference between the age at which marriages were legal and the age at which sexual relations within marriage were legal. While marriage could take place at any age, the age at which sexual access to the girl was regarded as legal was fixed at ten. Since infant marriages were the norm in South Asia, and girls were therefore incapable of giving "intelligent consent" to sexual relations, and husbands and perhaps fathers could not be trusted to protect the girl-wife against physical harm, the colonial state took it upon itself to, in a sense, consent on her behalf at a fixed age. This provision introduced for the first time the possibility of rape within marriage, a point that became much more highlighted in the 1890s when the age of consent was raised from ten to twelve.\(^8\)

But before we get to the controversies of the 1880s and 90s we need to examine the consequences of the passing of the ancestor of the Special Marriage Act, 1891, that we still have in place in India, perceived by many as opening up the possibility of acting outside parental choice and of making inter-caste marriage and inter-community marriages and thus circumventing the norms of endogamous marriages. The Act recognised asserting consent as a matter of choice of marriage partners rather than made on their behalf by parents.

Act III of 1872,\(^8\) which introduced civil marriage in India, was a significant stage in testing marriage practices in South Asia. This law was merely to be “enabling” and was intended to make marriages between various communities among the Brahmos,\(^16\) the reformist group of Bengal, legal. As it turned out, it had much wider application and generated extreme anxiety from caste-oriented Hindu society, as it made possible marriage across caste and across religious communities. Most importantly, it was registered as a legitimate union between two consenting partners without need of the sanction of the families of the couple. It also introduced the notion of “love marriage” into public debate; a notion that has still to work itself out in terms of marriage practices in India: under it, theoretically any two Indians could “legitimately marry out of choice and love rather than by dictates of birth.” As the debate around this proposed law unfolded — it had three versions before it was enacted as law — it became clear that there was violent dissent from many quarters to the legitimisation of love unions through state sanctioned and legalised marriage. The import of this move was understood by the debating public, which was unwilling to admit agency on the part of the couple and the privileging of the individual over the social. For them, agency was to be located only in the community and therefore, any move towards weakening the hold of the community generated a range of responses from moral ambivalence to extreme anxiety about the survival of caste hierarchy. It was perceived as unnatural (caste on the other hand was natural) and an attack on the class, status and standing of families concerned. Among the responses to the proposed Act was the view that “native society would

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\(^{6}\) Section 7 of the Widows’ Remarriage Act, 1856.

\(^{7}\) Section 376 Indian Penal Code of 1860.

\(^{8}\) Age of Consent Act, 1891.

\(^{8}\) Civil Marriage Act, 1872.

\(^{16}\) Brahmo Samaj is a social and religious movement founded in Calcutta, India in 1828. It grew as a result of a sense of stagnation in the Hindu social system of castes and the presence of a new class of educated Indians that resulted from British occupation of India.
never countenance a state of affairs in which distinctions of caste and creed were threatened.”

Petitions to the government against the proposed Act played on the notion of brahminical purity and hierarchy, and the challenge such a law was mounting against authority. Inter-caste marriage was looked on with hatred and it was argued that the children of such a union would be regarded as bastards. One opponent went on to celebrate the rigidity of caste, “India as she now stands is proud of her unmixed blood which would scarcely be found in any other part of the world.” Further, “the chastity of her women is proverbial,” he boasted. Indian women were also extolled as “reproducers of moral communities” and as upholding the pure traditions of the land, a situation that was now bound to be corrupted. The dangers of inter-caste marriages and their impact on the caste system was such that an honorary magistrate, Lachmi Narain, wrote passionately to the government, “parents would rather kill her in her cradle than allow her, when of age to disgrace her family.”

It was outraged sentiment like this that built in provisions to ensure that eloping couples did not get the chance to marry undetected. The minimum period of two weeks before and two weeks after, rather than the original five days, was a concession to the strong reactions to the proposed Act. (In post-Independence India the period has been raised to one month before and one month after.) Such modifications made it impossible for a couple on the run to sustain themselves for the requisite period without being found out and thwarted by their families. Finally, when the Act came into operation with its modifications in the minimum age for the girl (which was raised from eighteen to twenty-one) and an increase in the residence requirement, the process of criminalising the love marriage by public opinion was well underway and it has remained that way ever since, as a later section will demonstrate. This is made possible through surveillance of the couple, but particularly the girl if she is under the age stated in the Act. Additionally, the husband can be charged with abduction, and with rape. The girl can on frequent occasions be charged with abetment to her own abduction! All this to prevent a “love marriage” from being legalised. In the post-Independence period, one can see all these contradictions further exacerbated as social, economic and political changes have introduced fresh complications in marriage structures in South Asia.

Other tensions and contradictions that the British administered laws introduced into the notion of consent in the context of sexual relations and marriage hit the public arena in the famous case of Rakhambai. A brief account of the case is in order before we can proceed to the dilemmas it generated for the British, for the emerging middle classes, and for women in particular.

Rakhambai, a sutar, was married to Dadaji, also a sutar (the sutars were carpenters and came to play a role in the house construction business in urban areas like Bombay as opportunities opened up) at the age of eleven, according to the contention of her family and thirteen, according to the contention of Dadaji’s family. Rakhambai was the sole heir to considerable urban property as her father had died willing the property to her. Her mother was remarried to a doctor, who was well known in the circle of social reformers. Rakhambai was educated and for the first few years of the marriage Dadaji lived in the house of Rakhambai as gharjwai (resident son-in-law), with the consent of both sets of families, and was sought to be educated by Rakhambai’s family. Throughout this period the marriage was never consummated. After about eight or nine years he went back to live with his mother and uncle and sought to have Rakhambai come to live with him. Rakhambai refused on the grounds that he could not support her, was consumptive, and lived under the authority of a person with questionable morals. Thereafter Dadaji moved the court to seek “institution” or restitution of conjugal rights, which had been introduced into Indian law in the 1860s; the plaint was that Rakhambai should be “ordered” by the courts to go and live with her husband.

A crucial issue that came up in the course of the arguments was the question of consent. Rakhambai used the argument that she had not consented to the marriage as she was married when she was still a legal minor, while the plaintiff’s side argued that the issue of consent was immaterial on the grounds of infancy in Hindu law because under Hindu law, girls were to be married before puberty. On the basis of the submissions the judge held that he could not compel Rakhambai to go and live with her husband, and forcibly consummate a marriage which she did not want in order to complete a “contract” entered into by her guardians, on her behalf, when she was of “tender” age.

12 National Archives of India, Act III of 1872. Petition from Kali Prasanna Baneji, ibid. p. 245.
13 Ibid.
14 Uma Chakraverti (1998), pp. 138-175.
Dadaji appealed against this judgement. Among the arguments that came up at the appellate stage was the anomaly of introducing the restitution of conjugal rights, which drew its principles from British ecclesiastical law where marriages were based on the “free consent” of partners. But the more serious dilemma was the one faced by the court of appeal at a moment when the press and the middle classes in India had dramatised the case: if consent was defined as intelligent consent freely given, as Macaulay had intended when he drafted the Indian Penal Code (which could automatically push the age to fifteen or sixteen), then all Hindu marriages would become invalid as they were predicated on the pre-pubertal requirement of marriage — that is, on the marriage occurring during what was described as “infancy.” If the court denied conjugality to the husband on the ground that the wife had not consented to the marriage, then no Hindu marriage would stand. Consent and pre-pubertal marriages were mutually contradictory; the law of the land did not require it of the girl — in whose case the taking of consent was an “impertinence;” it was argued that the bride was the subject of the contract, not a contracting party herself. The court was therefore forced to uphold the legality of non-consensual Hindu marriage as it existed in the 19th century and ordered the imprisonment of Rakhmabai for her failure to effectuate her marital obligations. Ultimately a compromise was worked out as Rakhmabai “bought her independence” from Dadaji for the sum of Rupees two thousand (Rs. 2000).

The judgement, although it satisfied the conservative lobby, which was jubilant at the imprisonment order, was an embarrassment to British judicial practice and was viewed as an outrage by Behram Malabari, who had already begun a campaign both in India and England for an end to “infant” marriage. He argued that Hindu marriage was a sanskara (sacred rite) — only when women gave intelligent assent to it. Otherwise, she was as little party to the marriage as the judges were to it. The British government was accused of functioning in the triple capacity of marriage broker, policeman and jailor in forcing Rakhmabai to act against her will.

Others argued that no marriage among the Hindus was complete without consent although it might have been lost sight of in practice. The question of false and forced consent as a fundamental facet inhering in contemporary Hindu law thus became quite apparent in public debate and in the judgement. The whole issue of non-consensual marriages and the rights of husbands over their wives was severely tested in the Rakhmabai case but stood as far as judicial practice was concerned. Further, it was recognised that the Hindu matrimonial structure would collapse if the community was unable to use social coercion against the parties, or the state were to hesitate to uphold the sanctity of Hindu marriage. And finally, the whole question of consent of the girl to a choice made on her behalf by her parents, and being forced to accept the choice, was thrown into bold relief by a restitution of the conjugal rights case.

The “age of consent” controversy of the 1890s was an extension of the problem of the non-consensual Hindu marriage. When a young girl of eleven, Phulmoni, bled to death following sexual intercourse with her thirty-five year old husband, the British government decided to raise the age of consent from ten to twelve for girls; if a man had sexual relations with a woman under the age of twelve, even if she was his wife, it was to be deemed as rape. What is notable is that it was not the age of marriage that was raised but the legal age for a woman to be regarded as a consenting partner for sexual relations whether married or not — otherwise it was rape. This was an extension of the principles underlying the Age of Consent Bill of 1861.

The Age of Consent Bill of 1891 was the most fiercely fought issue between the colonial government and upper caste men, who formed the spine of what is regarded as the nationalists in the 1890s, led by Tilak. In Bengal, it was a moment to close ranks against any form of social reform and treat the household as a private sphere, which had to be guarded against invasive colonial legislation; Hindu conjugality necessitated sacred obligations and was above individual rights.

Significantly the debate on the Bill also subjected the woman’s body to the most critical gaze in the public sphere as issues of female sexuality, the biological development of a woman, age of puberty, and her preparedness for sexual intercourse and reproduction were bandied about in the press. The problem of locating consent — female

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15 A well-known Bombay based social reformer who spearheaded an agitation to legislate against child marriage and lobbied extensively both in India and in England in the 1880s for this purpose.
16 Age of Consent Bill of 1861.
17 Bal Gangadhar Tilak was a conservative nationalist who held the view that “native society” should spearhead its own reform and that the British had no right to do so. He was amongst the fiercest opponents of the Age of Consent Bill of 1891 as it would, in his view, interfere with Hindu religious customs. He was also an opponent of Rakhmabai for her refusal to cohabit with her husband.
consent – was particularly acute: was it puberty, which varied widely, or a fixed age for all women, or the age of discretion? What was the relation of women's consent to marriage? Could there have been a relationship at all given the marriage arrangements in Hindu families where fathers or male guardians decided the marriages of their offspring? Why was Hindu marriage non-consensual in the first place both according to law and to custom? Regardless of the passage of the Bill the problem of women’s consent continued to elide a decisive location in a woman’s autonomy to decide for herself in matters of marriage and sexual relations. It is not surprising therefore that in terms of the law, elopements could be presented as “abductions.” Communal fears increased these contradictions where widows who were forced to remain celibate often eloped with men, sometimes Muslim men. The agency of women and the circumstances of their oppression as widows could not be recognised as reasons for which widows might choose to elope and therefore such cases would have to be recast as abductions. There was thus a convenient intersection of female consent and abduction in dealing with elopements in interpreting patriarchal power in the field of marriage. These legal categories and situations have continued to be an important dimension of marriage in post-independent India too, and will be elaborated in the next section.

It is also useful to remember that throughout the colonial period, at no point was the marriage system and its relationship to caste ever addressed as a central issue; only Rakhmabai, herself the victim of a non-companionate marriage (which was not regarded as a privilege women were entitled to), referred to the relationship between caste and marriage – but that too obliquely. She wrote anonymously to the newspapers on the problems of child marriage and enforced widowhood and stated that the difficulties in the marriage system were exacerbated by the fact that the caste system forbids intermarriage, suggesting thereby that women had no choice in finding suitable partners as the boundaries of caste circles had to be maintained. Many factors kept the caste system and endogamous marriages out of the purview of serious discussion in the public sphere, including a benign face that was given to caste and endogamy.

Maintaining boundaries between different castes, for example, was treated as useful by the erstwhile radical firebrand “Indian” nationalist Annie Besant, who wrote:

Manu provided the most orderly and perfectly arranged code for India. His social organisation of caste was based on the recognition of different types of human beings. India no longer needs caste but endogamy was a way to ensure that the Aryan minority was not swamped by an aboriginal majority.
Heredity was a means by which specific types of individuals were built up.16

But keeping caste going was not merely a matter of benign ideologies. We must also remember that the powerful means of disciplining individuals through excommunication by the caste to which an individual belonged was a very effective way of sustaining the practices of caste and endogamous marriage.

Towards the last few decades of colonial rule the government finally legislated directly on the age of marriage in 1929 in the Child Marriage Restraint Act and did not confine the legislation to the age of consent for sexual relations. The age of consent for legal access to the female body remained an explicit issue in marriages of choice, as we will see.

III

In the newly independent states of South Asia, questions of individual rights, including those of women and the deeply entrenched marriage practices which continue, have thrown up further tensions. The secular constitutions of these nation-states have made women the bearers of rights even as in practice these rights are violated continuously and in a variety of ways. The constitutions have also made equality before the law a principle, which should legally free women from the control of families, caste groups and communities. Property laws have also been changed such that women have better rights to property. The practice of caste discrimination too has been abolished. And yet both caste, its relationship to class and productive resources, and endogamous

16 Annie Besant (1917), p. 223.
marriages that perpetuate the structures of production and reproduction, remain fairly undisturbed by the package of constitutional and legal changes. It is the tension arising from these two contradictory situations that needs to remain in context when we look at the undercurrent of violence in marriage practices. A wide-ranging consensus, a kind of social compact, has set such an understanding in place and we need to break that consensus to examine what this violence is about, or what the obstructions to constitutional guarantees to women's right to citizenship really are. "Honour" or "izzat" is embedded in the structures; they are ways by which the structures are sought to be reimposed in a complex situation where multiple factors are at work.

To begin with, we need to have a discussion on izzat. It is a wide-ranging concept, very masculine because even women of the upper castes cannot invoke izzat outside of how it is perceived by the men in their families or communities. Further, action to uphold izzat is always a male prerogative: women may only "incite" action, as they are reputed to have done in the many recent cases in India. Izzat or sammanam or honour is a term that I am personally uncomfortable with even when, as feminists, we may put it in quotes to distance ourselves from it. The very use of it implicates us in the meanings attributed to it by a patriarchal discourse and its symbology. Since violence is sanctioned as a way to uphold izzat, the use of the term masks its real meaning for those who experience the violence. In actuality, as we will see below, the concept of honour in punishing those who are seen to "defile" it, is about maintaining the structures of "social" power. This, as we have argued, is a complex formation of maintaining control over land, status and women's sexuality intact. Social power then is located at the intersection of material power or class, status-based power or caste and power over women or patriarchy, as they work together. The concepts of dominance and dominant caste have unfortunately been treated as gender-neutral categories but they are in actuality deeply gendered and deeply permeated by patriarchal codes. I must emphasise that while class and caste have been seen as making for social power, patriarchal power has not been seen as a factor and needs to be recognised for what it does to the whole structure of hierarchy in India. But before we turn to the ways in which this power is being viciously manifested in parts of the sub-continent, we need to look at how "honour" appears in apparently "neutral" and sanitised manifestation and particularly at the meanings attached to it by women.

THE NOTION OF HONOUR/IZZAT IN THE SUB-CONTINENT

Honour is one of the most valued ideals in the sub-continental patriarchies whether Hindu or Muslim. Most communities pay constant attention to gaining and maintaining honour. In general honour or prestige – izzat – is measured by the degree of respect shown by others. No matter how much honour is ascribed to their particular caste, individual families can gain or lose honour through money and power. But since all families do not have money or power, other aspects are also critical. A family can gain or lose power through proper or improper behaviour – most critically through the behaviour of its women. In sum, actions that are appropriate maintain the purity and honour of the family, lineage, or caste, whereas actions that are inappropriate, defile the honour and purity of the caste, family or lineage. Thus, because the purity of women is crucial to maintaining not only blood purity of lineages but also the position of the family within the wider social hierarchy, women are seen to have a special place in upholding the status of the individual in families. Women are the repositories of family honour – of their own family as daughter, and of their husband's family as wife and mother. "The prestige of the family is in the hands of its daughter" is a common saying and oft repeated to girls by parents and married women by the in-laws. The implication is that if their conduct is dishonourable, women can ruin their family forever. The concept of honour serves as a link between the behaviour of an individual woman and the idealised norms of the community. By constantly evoking the twin notions of honour and dishonour, families either condition or shame women into appropriate and inappropriate behaviour.

This somewhat benign notion of izzat, along with women's own stakes and, therefore, their complicity in the material and social power of their communities, for those who have access to such power, creates the conditions for upholding the normative codes of their families and communities. Even those women who occupy the bottom rungs of the social hierarchy, and do not necessarily derive material benefits from their place in the social structure, share in the cultures of their castes and communities. They too have codes to uphold and marrying an appropriate partner, negotiated by male kinsmen, is as much an aspect of their lives as it is for other women. The endogamous marriage is ubiquitous and is practiced even by non-Hindus, as many other communities also practice caste and status differentiation.
The intricate web of social, material and cultural factors, which requires the specific marriage structures that operate, particularly in the caste-based societies in India, to perpetuate the hierarchical systems in place, are deeply threatened by “love” between partners as the basis of marriage. Once this is conceded as a principle, reining in the choice to suitable partners from within an acceptable circle becomes difficult. Elopements then are a way to demonstrate “love” or “choice,” as families actually prevent or are seen as preventing these marriages from being made. This is ground upon which the “criminality of marriage” is played out in India, as the work of Pratiksha Baxi and Parveez Mody shows, and elsewhere in the sub-continent as Neelam Hussain’s work demonstrates. The classic pattern is that the elopements are contested by parents, especially of the girl, and most invariably, the girl’s age – making her incapable to grant consent and remain under the custody of her guardian – is brought into question. Parents file complaints against the husband, charging him with “abduction” or of seducing the girl away from her lawful “custodians,” and the “love” marriage, often surreptitiously entered into, is criminalised in order to nullify it. Abduction could also be accompanied by charges of rape if the girl’s age is stated as under eighteen, the legal age for a woman to be able to exercise consent and contract a valid marriage.

If the marriage is polygamous, i.e., between a high caste girl and a low caste boy, it will almost certainly be contested and criminalised; the whole weight of the police and even of the legal system works to uphold the cultural codes of marriage. There is widespread “consent,” in the sense in which Gramsci outlined it, within civil society to regard choice, particularly when articulated by a woman, “as disruptive of the whole social order.” This creates a major anomaly. While the weight of new social forces celebrates, at least notionally, freedom of choice in buying, selling, and in the political system of freely elected parliaments, freely elected heads of state and so on, “whenever an innovation has to do with free choice of partners, the whole social fabric seems to suffer a terrible tear.” The criminalisation of love is to be seen as a response to such disruptive actions on the part of women.

The process of criminalising love is apparent in the cases summarised here.

**In Pursuit of Love**

This is the story of a love affair between Chetna, a young Patel woman in Ahmadabad, and Roshan Prajapati, a young scheduled caste man who lived in the same neighbourhood. Chetna was only seventeen and, therefore, legally a minor when her brother chanced upon a letter written by Chetna to Roshan which made her feelings for him explicit. Earlier, Chetna’s parents had tried to break up the relationship between them. Angry at her daughter’s “recalcitrance,” the mother threw Chetna out of the house and Chetna promptly went to Roshan’s house. Even before Roshan could persuade her to return, Chetna’s mother filed a complaint accusing her of stealing jewellery. Her *mama* (maternal uncle), accompanied by his sons and a number of young men, arrived at Roshan’s house, beat him up and demanded that Chetna should return. They also threatened to abduct Roshan’s younger sister, who hid herself, in retaliation for abducting their sister. Chetna stood her ground and refused to go. The mama and his troop left but soon afterwards the police arrived, acting on the complaint of the mother, who charged Roshan with abduction with the motive of having illicit sex with Chetna; Chetna was charged with decamping with the valuables from the house. Both Roshan and Chetna were taken into custody and beaten at the police station; they were also sent for a medical examination and bodily samples were sent for a forensic examination, which “established” that Chetna was still a “virgin.” Roshan was arrested and secured bail a week later. Chetna was also arrested and sent to the Central Jail and then to a remand home till she was eighteen. She sat for her twelfth class exams from the remand home. Nine months later the police moved the court to drop charges against her. After she turned 18 and the charges against her were dropped she married Roshan. By the time the case came up for hearing on the compliant against Roshan a couple of years later, they had a small baby. Her mother then charged her stance and agreed to a “compromise” by not pressing the charges of abduction and rape against Roshan and suitably amended her story in court. At least in this case the story turned out to have a “happy” ending but in the meanwhile both Roshan and Chetna – who was only seventeen – had been arrested, beaten and subjected to an invasive

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22 Section 4 (e) of the Special Marriage Act, 1954.
25 This account is part of the field material Pratiksha Baxi collected for her thesis on rape (see n. 19). I am deeply grateful to her for so generously letting me use the story of Chetna and Roshan in this section on caste and gender in contemporary India.
medical examination to rule out rape. All because the relationship was across caste – in fact it was transgressive because it was a patrilineal relationship, as the girl was from a higher caste, and the girl’s parents were opposed to it. It was regarded as a criminal connection according to caste norms though perfectly legal according to the 1956 amendments in Hindu law. Since it could not be criminalised according to the extant marriage law other criminal clauses were used to criminalise the relationship. The residue of what the young couple suffered haunts their narrative. Death executed by caste panchayats (council of tribal elders) may be the worst articulation of violence related to inter-caste marriages but there are others and deeply scarring dimensions of violence in the manner in which inter-caste marriages are punished which go unnoticed by us.

Love Denied

A not so happy ending to a similar romance between a Jat girl and a Dalit boy of Narela occurred when their legal marriage was aborted some months later. The couple had eloped and were untraceable for a few months while the girl’s father, who had connections in the police, filed a case of abduction charging the Dalit boy and his family of abducting the girl, who he claimed was under eighteen. The police picked up the boy’s brother and beat him up. The brother then tried to mobilise women’s groups, civil liberties groups and the press to stop the harassment and make it possible for the couple to return to Narela. The boy’s family circulated evidence of the girl’s age by attaching her tenth class certificate – widely regarded as an authentic proof of age for purposes of official records such as a passport or admission into college. A marriage certificate from an Arya Samaj temple and a statement by the girl of having chosen to marry the boy of her own free will, and that she had not taken anything from her father’s house when she left to get married, were also appended to petitions for help. The way the documents were assembled suggests that the couple were seeking to pre-empt the standard charges against runaway couples who are pursued by their families.

It was at this point that I got involved in the case, another democratic rights activist, and I went to the Police Commissioner’s office in New Delhi. After a long wait, we finally got to meet the officer that we had been asked to see in this case. The response of the police official was to bark at me – I was the older of the two of us and could have had a daughter who was of the age to elope: “Why are you pursuing this case? If your daughter had done such a thing as this girl, you too would have pressed the same charges.” He was talking about a shared set of “norms” that regarded such a marriage as ipso facto criminal. When we pointed out that the girl was legally a major he dismissed the tenth class certificate as worthless: everyone knew how easy it was to forge anything in this country. The only foolproof evidence he was willing to accept was a bone density test for the girl to undergo in order to establish her real age.

We then went to the Scheduled Caste and Scheduled Tribes Commission. We got a more sympathetic reaction there but there was really nothing that they thought they could do – there were hundreds of cases of violations of all kinds that they were confronted with. In the meanwhile, the father’s influence worked; the couple was located and by the time the girl was presented in court she had been coerced into conforming to parental pressures, as in hundreds of such abortive “love marriages.” The endogamous marriage is still the norm, the father still decides for the girl (and for the boy too), even as the edifice of such marriages is occasionally interrogated by young men and women in pursuit of self-choice.

While police and the courts may not overtly strike down the “choices” made by women in the context of marriage, they subvert the legal provisions governing marriage through the “great universals” in the unwritten codes to which they subscribe: “morality,” “family,” “filial obedience,” as seen in the context of religion-based traditions and notions of “cultural identity.” Occasionally, the honourable judges may also indicate that consent in India was never meant to apply in reality to the partners contracting marriage: A judge of the Madhya Pradesh High Court observed even as late as 1992 – and this sentiment would be widely shared even today – that consent in the context of a Hindu marriage included the consent “to marriage given by a spouse through his/her parents, elders

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26 This is a reference to the Hindu Marriage Act, 1956, which is an amendment not technically but in actual practice to the uncodified Hindu law practices and the erstwhile basis of endogamous marriages.
27 A dominant caste in Western Uttar Pradesh in India; also a caste in Pakistan.
28 A person outside of the four castes in the Hindu caste system and considered below them.
29 Hindu reform movement in India founded by Swami Dayananda in 1875.
30 A statutory body set up to protect the rights of the scheduled castes and scheduled tribes who face widespread discrimination in India.
in the family, and other friends and relatives."31 Although this judgement suggests the validity of consent on behalf of the partners by parents as one of the acceptable ways of locating consent, in reality this is the only notion of consent that operates in the minds of most people. A valid marriage in the India that practices caste remains one that is negotiated and contacted by the parents on behalf of the actual partners in it.

The above discussion outlines the violence and uncertainty experienced by some young couples for forging socially transgressive alliances in urban areas. However, in the examples cited above, the violence, though reprehensible, falls short of actual killing, although these do occur even in cities. Both in cities and rural areas, social transgressions are also perceived as tempered by caste and class hierarchies such that when an upper caste/class man desires a lower caste woman, and rapes or seduces her, the act is regarded as violative of the caste norms of permitted sexual relationships, but is accepted or even naturalised. Feminist research has shown that Dalit women's bodies are seen as collectively mute and capable of bearing penetration and other modes of marking by upper caste/class hegemony without the intervening discourse of desire because of the over-determination of this violence as "caste privilege."32 While in recent years mobilisation by Dalit and Naxalite groups has focused attention and created the basis of resistance on the issue of rape, or the abuse of the lower caste woman's sexuality, i.e. on the naturalness of this "privilege," there is no vocabulary as yet by which the lower caste man who desires an upper caste woman, and who in turn desires him, can express this publicly. Certain modes of desire are prohibited and have been regarded thus from the time that caste itself is referred to in the Brahminical textual traditions.33 The very mention of such a possibility can lead to violence: thus the statement made during a speech after the murder of a Dalit woman, that Dalit men should seek brides from the upper castes, let loose a wave of repressive violence in Tamilnadu in which thirty people were killed.34 There is thus, a close connection between caste, desire and patriarchy, which under-girds the possibility or impossibility of love and marriage in caste society. The nature of caste related violence also points to this connection.

Given these structures of love and desire, when the lower caste man dares to fall in love or enter into a relationship, or to elope with and marry a higher caste woman, he is still subject to the collective power of the upper castes, which will stop at nothing to punish the transgression. The last few years have witnessed a spate of brutal killings of such couples. Since a woman's sexuality is still under patriarchal and caste control, and still requires formal transfer from father to husband, these killings have the explicit consent of the community, especially that to which the woman belongs. Thus, while the lower caste man is killed, even the "errant" daughter (who loses her status as daughter through her transgressive relationship) of an upper caste household is regarded as someone who must die for her sin of violating the patricidal codes of marriage. Both men and women of the upper castes uphold this gruesome ideology of "private" justice, or rather retribution, to deal with "errant" couples who violate the norms of endogamy — no matter what the law says about the legality of such relationships. This brutal and informal application of the death penalty is yet to receive the serious attention of human rights activists in India although it has been the basis of a campaign in Pakistan.35

What is now routinely called "honour killings" (both in South Asia and among South Asian feminist groups in the United Kingdom) first hit the headlines in a big way in India with the Mehrana killings in 1991. Roshni, a Jat girl of the village, eloped with Brijendra, a Jat boy, regarded as low caste in the region, assisted by his friend. All three were caught. The Jat panchayat sat all night and passed a judgement on the "errant" couple and their friend. Under this decree they were tortured all night, hanged in the morning, and then set on fire. The entire village is said to have witnessed this brutal murder. When the story broke and the press came to investigate, the villagers, both men and women, including family members of the girl, defended the action on the ground that it was necessary to restore the "violated" honour of the family and community. Even Jat peasant leaders regarded the "punishment" as justified. Needless to say, no male political leader of the country publicly condemned the killings — or scores of other similar cases. It is as if a woman who is regarded as violating sexual norms of her caste is not a citizen of the country, entitled to the right to life that the Constitution of India gives to all its citizens.36

In other cases too, the punishment meted out extends to those who may lend support to the "transgressing" couple. For example, a Dalit woman was stripped, beaten and paraded through the streets for aiding a runaway

33 See, for instance, O' Flaherty and Smith (1991) for The Laws of Manu.
35 Recent efforts on the part of Non Government Organisations and human rights activists in Pakistan have resulted in attracting the government's attention towards this issue (eds.).
couple. In another case in North India, in a village named Ali Nagar near Muzzafarnagar, a Jat girl, Sonu, was seen with a Brahmin boy, Vishal, under a neem tree; they were both killed in August 2001. They were in their teens, had been to the same school and were believed to be in love with each other. Sonu was killed by her father, Bhopal Singh, for “wrongdoing” and for bringing shame upon him; he thrashed her, put a rope around her neck and killed her. Once Sonu was killed, Vishal’s brother was called upon to do the same to Vishal and he readily complied. The judge sentenced four people to life terms, including Sonu’s father and Vishal’s brother. Sonu’s mother and Vishal’s sister-in-law were said to be present when the killings took place. But while no one in the village claims to know anything about what happened – no one from the village is usually willing to give testimony in such incidents – many defended the need to punish “errant” couples as Bhopal Singh had done in this case. His statement gives a clue to the way people think:

People in this village live within their caste. Big people like Indira Gandhi can afford to marry whom they please, but we do not. If something happens to my daughter, I will have to do something about it.37

The judge recognised the deep-rooted prejudices of caste and said,

Villagers here consider such incidents as a blot on the social standing of their village.38

He upheld the charges against four of the men named, let off eight others and particularly let the women go on the ground that since women’s opinion carries no weight in panchayat decisions, they could not be held to be complicit in the crime. As Pamela Phillipose, who visited the village after the judgement wrote:

While the local cinemas celebrate Bollywood’s latest essay on young love, under the neem trees of Ali Nagar, deeply entrenched and horrifically cruel caste hierarchies script another story. There, only the pregnant words of Bhopal Singh hold sway: “If something happens to my daughter, I will have to do something.”39

Brutal killing then, is the communitarian response to the “oppositional agency” of women who may attempt to renegotiate the traditional boundaries of their lives. Such women are given the “death penalty” with no qualms by their own families and communities. It appears that as the norms of the caste system and its marriage patterns are increasingly disturbed through social changes – upward mobility, caste assertions, changes in the land and occupational structures and political transformations – the virulence with which the control over female sexuality is asserted increases, as these cases show.

Two further points may be made before I conclude this paper; I have been struck by a comparison of men and women in relation to taking recourse to the bone density test. In the case of girls, it is almost invariably used as a way of establishing the age of discretion or majority to ascertain her capacity to exercise consent when she is asserting her choice in marriage or a sexual relationship and her age is contested by her parents. In a recent case, a bone density test was ordered by the court to establish the age of a boy charged with rape, where the defence was arguing that he was a minor.40 Thus, in the case of men, it may be used to establish criminal liability in the law, while in the case of women, it is implicitly being used to establish incapacity to act independently and to establish the criminal liability of her partner. Similarly, when one compares the habeas corpus41 petitions of men and women, it is striking to note that men are in danger of arbitrary actions by the state; the conflict of interest is perceived to be between the family and the victim and state authorities. In contrast, women in habeas corpus petitions, are the subjects of disputed control between the natal family and her husband/partner, to establish who is entitled to “control” over her — even as legally she is meant to be an individual who is an independent entity and can act as she pleases. Arbitrary actions here emanate from or are perceived to emanate from two sets of men. What is ironical is that a democratic legal provision such as the habeas corpus is actually often used to subvert a woman’s capacity to act for herself. The question then is, when and how this situation can change and women can take control of their own lives and actually claim their rights as citizens as enshrined in the Constitution of India, 1949. More than fifty years after independence, the question that women are still faced with is: when will women be accepted as rights-bearing individuals and not merely as culture-bearing icons?

38 Ibid.
39 Ibid.
40 Express News Service, “MAMC Rape Case: Court Orders Bone Formation Test of the Accused.” Indian Express, 6 December 2002. p. 3.
41 A petition issued to request the court to order the production of a party before it.
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WOMEN'S RIGHT TO EXERCISE CHOICE IN MARRIAGE:
REFLECTIONS ON ITS RECOGNITION IN BANGLADESH AND BRITAIN

This paper outlines the right to choice in marriage, and the major forms of violation of this right that are of concern in Bangladesh and Britain, respectively. Taking into account the relevant international standards, it discusses the extent to which legal reforms in Bangladesh have provided a measure of recognition of the right of women to choice in marriage. It also reviews the range of reforms that have been put in place in Britain to address the practice of forced marriage. Through comparison of these two experiences, the author seeks to raise queries and concerns regarding the responses undertaken.

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WOMEN'S RIGHT TO EXERCISE CHOICE IN MARriage

HEREDITARY GS OF RECOGNITION-FOCUSED AND RELIGIOUS

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INTRODUCTION

International human rights law protects "the right to choose freely when, if and whom to marry." Cases of child marriage, early marriage, and forced marriage have long been recognised as human rights abuses. In addition, laws and practices which prevent marriage across barriers of community, religion, class, caste and gender are increasingly being interrogated as violations of human rights.

In Bangladesh, interference with choice in marriage — in the context of inter-religious marriages in particular — has been the subject of judicial consideration since the colonial period, but by contrast has evoked little response from women's rights organisations or from the state. In Britain, the question of forced marriage has been a prominent part of recent policy and procedural reforms, which have themselves been catalysed largely by the activities of women's organisations.

This paper will first outline the right to choice in marriage, and the major forms of violation of this right that are of concern in Bangladesh and Britain respectively. Second, it will then briefly outline the relevant international standards. Third, it will discuss the legal framework in Bangladesh, and analyse judicial responses and the extent to which they have provided a measure of recognition of the right of women to choice in marriage. Fourth, it will then review the range of reforms that have been put in place in Britain to address the practice of forced marriage. In conclusion, through comparison of these two experiences, it will seek to raise queries and concerns regarding whether the responses undertaken serve to further women's rights, or whether, despite good intentions, they result in part in heightening perceptions and entrenching practices which further discrimination against women of certain communities.

DEFINING THE RIGHT TO CHOICE IN MARRIAGE

The notions of "consent" and "choice" are key to the discussion of the right to choice in marriage. It is important first to distinguish arranged marriage and forced marriage. In many arranged marriages, the parties may freely agree to the choice made on their behalf. However, in others they may only acquiesce in the face of intense family and social pressure. It is a moot point when such pressure is sufficient to vitiate consent and amount to coercion and render an arranged marriage into a forced marriage.

1 United Nations Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee), General Recommendation No. 21.
Within Bangladesh, and its diaspora, the common practice of arranged marriage means that in most cases, the choice of when and whom to marry is one that is usually made for an individual by her immediate family members, and the woman or girl concerned consents or acquiesces to this choice.

In some cases, a woman's consent may be obtained through duress or fraud. In others, she may refuse to consent and exercise her own choice regarding whom to marry. If this decision is not accepted by either her family or her community, they may respond in several ways: they may accept the situation or if they do not, they may pressurise the woman emotionally, through fear of or actual social sanction (for example ostracism from the community, cutting of family ties), or in more extreme cases, threats of or actual violence. Where marriages cross boundaries of community, class or caste, or gender, or simply do not meet with the approval of the immediate families, the risk of violent repercussions is greatly exacerbated. Typically, family members opposed to the marriage will invoke criminal law alleging that the woman concerned is a minor and that her “husband” has raped/kidnapped/abducted her; the police will then arrest the man and place the woman in so-called “safe custody” where she may remain incarcerated for prolonged periods.

In the past few years, forced marriage among young people within the South Asian diasporic Bangladeshi and other (primarily Indian and Pakistani) communities has elicited concern at the governmental level in Britain and other European countries. While many forced marriages occur within the country, others involve an international element, with some one thousand women (from the Indian, Pakistani and Bangladeshi diasporas) reportedly being abducted overseas for purposes of forced marriage. In a typical case, a woman or young girl, often a teenager, is induced or forced by her family to travel to her parents’ country of origin, and on arrival held in effective detention by her family, subjected to threats or violence until she is married off.

Those who perpetrate violations of the right to marry do so for a complex web of reasons. Poverty and the threat of physical insecurity may dictate a parent’s decision to agree to a child marriage or an early marriage, or even a forced marriage. The need to maintain family ties and develop kinship networks point to similar considerations motivating parents to choose a spouse for a partner. Many of the cases we will consider demonstrate a linkage between questions of honour and the attempt by the community and, generally, male family members, to control women’s behaviour, in particular sexual behaviour, through restrictions on her right of choice of marriage, her liberty and movement, and in some cases violations of her right to life. Crucially, they appear to be about male, and familial, control over women’s autonomy.

**International Human Rights Standards**

The right to choose whether, if and whom to marry is clearly established under international human rights law. In addition to child marriage and early marriage, long condemned as implicating human rights concerns, forced marriage, that is any marriage conducted without the free and full consent of both parties, has also now been explicitly recognised as a human rights abuse.

Cases concerning the right to marry may implicate the right to personal liberty and security, including freedom from arbitrary detention. The more extreme cases may also implicate the right to life; the right to bodily integrity, including freedom from gender-based violence; the prohibitions on slavery or practices similar to slavery; the right to access to justice; the right to equality before the law and equal protection of the law; the right to an effective remedy and the right to freedom from gender-based discrimination.

Both Bangladesh and Britain are bound to respect these rights by virtue of their treaty obligations under several major international human rights instruments, including the Supplementary Convention on Slavery, the Slave Trade and Institutions and Practices Similar to Slavery Convention, 1956, the International Covenant on Civil and Political Rights, 1966, the International Covenant on Economic, Social and Cultural Rights, 1966, the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 and the Convention on the Rights of the Child, 1990. Britain is of course also a party to the European Convention on Human Rights, 1950.

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2 The choice not to marry rarely exists in practice and is not discussed here.

which secures the right to marry in explicit terms.

Bangladesh’s specific obligations to prevent interference with the right to choice in marriage include, among others: providing an effective legal framework for redress (including penal sanctions, civil remedies, compensatory provisions), requiring free and full consent of both parties for marriage; fixing suitable minimum ages of marriage, prohibiting child marriage and requiring marriage registration. In addition to the overhaul of the laws, such obligations also include putting in place policies and programmes which provide women with access to justice, including information about their rights, free legal advice and representation; and necessary social support, including counselling, health services and emergency shelter. The state is further under an obligation to make legal and judicial procedures victim-sensitive, and to exercise due diligence to prevent, investigate and punish acts of interference with choice in marriage.

THE RIGHT TO CHOICE REGARDING MARRIAGE IN BANGLADESH

Within Bangladesh, child marriage and early marriage are common, and cases of interference with choice in marriage, forced marriage and denial of the option of marriage (widows, sexual minorities) are also widespread. Such cases are so much the norm that they rarely receive individual consideration or scrutiny. The one exception concerns women who actively choose whom to marry, only to have their choices frustrated by their families invoking the law against them. These cases result in a level of judicial scrutiny and observation. Many of these cases occur due to conservative social values, and the failure to focus on the importance of the question of women’s consent to marriage, or to recognise women’s right to make their own decisions regarding marriage. In some cases, abuse of the law – resulting in young women who have done nothing more than exercise their right to marry of their own choice ending up in so-called safe custody in our jails – by parents, in collusion with corrupt police officers, results in serious human rights violations of the women concerned.

LEGAL FRAMEWORK

While the Constitution of Bangladesh, 1972 (the Constitution), does not recognise the right to marry explicitly, it does guarantee a number of fundamental rights which underpin it, including the right to life, the right to personal liberty, the right to equality and the equal protection of the law, the prohibition on gender discrimination, the right to be treated in accordance with law, and the right to freedom of movement.

In addition, existing laws address the issue of child marriage by establishing minimum ages of marriage at twenty-one for men and eighteen for women, and penalising the contracting of marriages between persons under these ages. They also provide some scope – though limited – of exit from marriages which have been contracted by force or under duress, or during minority.

Cases concerning the right to marry – for example cases of child marriage, early marriage, forced marriage, or interference with the right to marry – may result in the violation of a number of fundamental rights guaranteed by the Constitution. The right to enforce such rights by application to the High Court is unequivocally secured, and is itself a fundamental right. Various legal remedies are available in order to redress this right, such as writs of habeas corpus (a petition issued to request the court to order the production of a party before it), or criminal prosecution (e.g. for abduction for the purpose of forced marriage or false imprisonment) and civil law remedies (such as divorce or annulment).

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4 For further discussion, see Submission by Ain-o-Saizah Kendra, Shikat Gah and Interights to United Kingdom Home Office’s Working Group on Forced Marriage, 1999.
5 See Part III of the Constitution in particular Article 27 (equality), Article 28 (prohibition of discrimination), Article 28(a) (special measures for women and children), Article 31 (treatment in accordance with law), Article 32 (life and personal liberty), Article 33 (safeguards on arrest and detention), Article 35 (speedy trial), Article 35(A) (prohibition on torture and ill-treatment) and Article 36 (movement).
6 Section 5, Child Marriage Restraint Act, 1929 (as amended).
7 Section 2, Dissolution of Muslim Marriages Act, 1939.
8 Article 44 of the Constitution.
10 See Section 2, Dissolution of Muslim Marriages Act, 1939 and Sections 7-8, Muslim Family Laws Ordinance, 1961.
However, the continued application of personal laws to govern rights within the family, including in relation to marriage, not only diminishes the impact of laws criminalising child marriage and forced marriage, but also contributes to their abuse and to the violation of rights. For instance, the recognition of the validity of child marriages under personal laws, ensures their continuation, despite laws criminalising their solemnisation. Further, the right of women to marry non-Muslims is not recognised.

The gender biases pervading the legal system results in the abuse of laws intended to protect women’s rights and secure their choices. Thus, reported cases indicate that if women marry of their own choice, their parents may bring false charges of kidnapping or rape against the husband, resulting in his facing arrest and criminal prosecution, and her being institutionalised in an official shelter home in the name of “safe” custody. In these cases, the writ of habeas corpus, though often used to secure women’s liberty, has also been invoked successfully by families staking their claim to control over them. The state’s responses have often further exacerbated the difficulties faced by women in such situations, by placing and retaining them in state-run shelter homes and delaying the trial process, thus prolonging the period of their incarceration.

**Judicial Responses**

While the term “right to choose in marriage” remains relatively unknown in Bangladesh, the law, as noted above, recognises and explicitly criminalises acts of abduction for the purpose of forced marriage, and courts have for more than a century been addressing — in the context of securing the right to liberty — the rights of women and girls who have chosen to exercise their right to marry of their own choice.

Most reported judgements, which broach issues regarding interference with choice of marriage, relate to habeas corpus proceedings (under Article 102 of the Constitution or Section 491 of the Code of Criminal Procedure, 1898) for the recovery of custody of a woman/girl from “safe” custody, either at her own initiative, or that of her alleged husband or father. Many such cases also involve allegations of the offence of abduction for forced marriage or of rape.11 Usually the main question for determination by the Court is the age of the victim.

Judicial responses have not been uniform. There is no discussion of the case in terms of fundamental rights, except that invariably where a woman is found to be over eighteen, she is “set at liberty,” thus implicitly recognising her right to exercise choice regarding marriage.12

In contrast, in cases where a woman is not found to be a major by the Court, the discussion shifts from consideration of her liberty or autonomous choice to marry, to that of her welfare and custody. In the absence of incontrovertible proof of age (in the form of reliable and available birth certificates), the Courts rely on a range of materials to evidence age, including school certificates, horoscopes, medical certificates and statements on oath by parents, doctors or teachers. Courts have also directed invasive medical examinations to be held (involving “examination of private parts” or ossification tests), usually without seeking the prior consent of the victim, even where she is obviously a major. Overwhelmingly, the Courts have preferred the evidence of the parents to expert medical evidence.

If a woman is found to be aged over sixteen and therefore having the capacity to marry, and further to have married of her own volition, she may be set at liberty by the Court, or allowed to go with whomever she pleases.13

However, in a number of cases, the Court rode roughshod over the woman’s will, not only finding her to be a minor but also requiring the care and protection of parents, on the basis that parents are invariably the “best well-wishers of their children.”14 Where a woman/girl is adamant about her refusal to return to her parents, she may nevertheless

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11 See Section 366, Bangladesh Penal Code, 1860, for abduction for forced marriage, or Section 397, Bangladesh Penal Code, 1860, and more recently, Section 9, Suppression of Violence against Women and Children Act, 2000 (as amended) for rape.
14 See Khairunnessa v. Ily Begum 48 DLR (AD) (1996) 67; Sukhendra Chandra Das v. Secretary, Ministry of Home Affairs 42 DLR (1990) 297 (where the woman claimed to be 22 years old, but the Court found her to be 17 and nevertheless sent her to her father’s custody) and Protulla Kamal Bhattacharya v. Ministry of Home Affairs 28 DLR 123.
be sent by court order to “safe” custody in a shelter home (to a jail prior to 2000) in order to give the minor a chance to develop his or her own independent opinion free from external pressure regarding her future course of action, rather than permitting her to be set at liberty.\textsuperscript{15}

\section*{Addressing Forced Marriage in Britain}

\subsection*{Legal Framework}

In Britain, the Human Rights Act, 1998 (the Act), explicitly recognises the right of all men and women of marriageable age to the “right to marry and found a family” according to national laws governing the exercise of this right.\textsuperscript{16} This Act also guarantees a number of related human rights, including the rights to life, personal liberty, equality and the equal protection of the law, the prohibition on gender discrimination and the right to freedom of movement.

There is no specific law which addresses forced marriage, but any threat of or actual forced marriage may implicate a number of offences, including abduction, kidnap, false imprisonment, assault, child cruelty, sexual offences and even murder, depending on the facts involved, and of course the new offence of domestic violence (which includes domestic violence by family members as well as intimate partners). In addition, the legal requirements of a valid marriage include the free and full consent of both parties.\textsuperscript{17} The minimum age of marriage is sixteen; a person under eighteen may not marry without parental consent.

Cases concerning the right to marry may result in the violation of a number of human rights, which may be remedied by judicial redress. Various legal remedies are available in order to redress this right, including through actions under the Act, or criminal prosecution and civil law remedies.

\section*{Policy and Administrative Responses}

In Britain, the past few years have seen an increasing concern with the practice of forced marriage, focusing in particular on the South Asian diaspora communities. In mid 1999, the Home Office (HO) set up a Working Group, including representatives from women’s and community-based organisations, to inquire into the extent of forced marriages and to make appropriate recommendations in this connection.\textsuperscript{18}

The Working Group’s Recommendations, contained in the influential Choice by Right Report, 2000, were followed by the adoption of a Joint Action Plan, which set out specific activities to be undertaken by various departments of government including the Foreign and Commonwealth Office (FCO) and the HO. Interestingly, the FCO then led the way regarding initiatives to tackle forced marriage. It established a special unit, which is now a joint FCO and HO initiative: the Forced Marriage Unit, which was tasked, among others, with providing advice, support and legal referrals to British nationals threatened by or subjected to forced marriage and also to undertake policy and projects to address the problem. Early attempts to consider mediation as an effective response to forced marriage threats met with widespread criticism from women’s organisations and activists. The focus of state initiatives was initially to support British citizens taken abroad for the purpose of forced marriage, and gradually has developed to providing increased protection to those living within Britain (including non-nationals) against such a risk. This more holistic approach has been accompanied by development of sets of guidelines through public consultation and the participation of women’s groups, for the functioning of the police, social services and educational professionals dealing with the issue of forced marriage (with further guidelines for health professionals currently planned).

\textsuperscript{15} Jahanara Begum v. State 15 DLR (1963) 148.
\textsuperscript{16} Section 12.
\textsuperscript{17} Marriage Act, 1949 (amended) and the Matrimonial Causes Act, 1973.
\textsuperscript{18} See www.homeoffice.gov.uk and www.tco.gov.uk for further information. Women’s organisations working within the South Asian diaspora communities had consistently raised demands for state intervention with regard to more effective investigations of allegations of forced marriage, together with more effective social and economic support (from social services and educational authorities) for individuals under-threat of forced marriage. In the view of many of those concerned, this pressure, together with a change of administration, the location of key individuals committed to bringing about change within the relevant government departments, and a High Court judgement on the abduction for forced marriage of a minor, catalysed a focused and specific policy response to forced marriage.
A range of policy and administrative measures, together with public education initiatives, have thus been adopted to address the practice. Measures currently in the pipeline include possible legislative initiatives to criminalise forced marriage.

More controversially, and less transparently, immigration rules have also been revised. The minimum age for marriage entry clearance has been raised from sixteen to eighteen, meaning that if a person in Britain marries anyone overseas, that person may not enter Britain until both parties are over eighteen (although the age of consent for marriage for persons within Britain remains sixteen years). This measure is ostensibly intended to "give those who faced forced marriage extra time in which to mature and resist familial pressure to enter a marriage that they do not want." Practitioners have raised serious concerns over whether this "reform" genuinely serves to protect individuals at risk of forced marriage, or merely further immigration control. They have also noted the heightened risk of this change resulting in the "dumping" of women and girls – and their being excluded from accessing effective remedies within Britain because of their national origin, and their choice of a partner of a particular national origin. Many have also pointed out, that in contrast to other policy measures undertaken, the immigration rule revisions were not preceded by any prior discussions on the issue and do not appear to be based on any empirical evidence indicating a need for them to have been put in place.

**Judicial Responses**

Side by side with the above initiatives, significant judicial interventions have complemented the range of effective remedies available for survivors of such violence.

A forced marriage may be rendered void by a declaration of nullity which may be given if either party is found not to have validly consented to the marriage "whether in consequence of duress, unsoundness of mind or otherwise." The Courts have defined the test for duress as being "whether the mind of [the victim] has in fact been overborne by, howsoever that was caused." In *Re KR (A Minor)*, wardship proceedings were initiated in the High Court of Justice (Family Division) in England regarding a minor girl (British national) abducted to Punjab, India, by her parents for the purpose of contracting a forced marriage. Following directions from the Court, British consular officials intervened to locate the girl, interview her and repatriate her to Britain.

More recently, in *Re SK* the High Court of Justice (Family Division) gave orders extending its inherent jurisdiction to adults and giving directions aimed to prevent the forced marriage of an adult British national who had been taken overseas for the purpose (requiring that she be seen by an appropriate official at a British High Commission, and in addition granting an injunction against named parties to prevent them from threatening, intimidating or harassing the victim or holding a marriage ceremony). In this case, the Court also noted that other orders could be passed to ensure the attendance of persons in Court who have knowledge of the whereabouts of a person threatened with forced marriage. The judicial reasoning in this case was clearly based on human rights, and articulated notions of choice and consent as being part of a fundamental human right to choice regarding marriage.

**Concluding Comments**

In Bangladesh, despite longstanding legislative and judicial recognition of the practice of interference with choice in marriage, there appears to be little current concern with understanding the nature of the problem, with measuring its extent, or putting in place systems of prevention and protection for survivors. This disinterest

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10 www.homeoffice.gov.uk/comrace/race/forced_marriage
22 (1999) 2 FLR 542.
23 2004 EWHC 3003.
appears to be shared by both governmental agencies and many non-governmental organisations; the latter having until recently been more concerned with acts of violence against women by the state or community, with attempts to address domestic violence more systematically only just beginning to emerge.

As a consequence, while violence against women, including forced sex outside the confines of marriage, invokes widespread public outrage, similar acts occurring within marriage rarely merit any response, let alone legal remedy. And in a peculiarly inverted logic, non-violent, consensual sexual relations within a marriage contracted by a woman without family approval may result in her being, at best, left without any source of sympathy or support, and, at worst, confined or imprisoned against her will, beaten and humiliated.

The state’s response in these situations may be, as demonstrated above, to act in collusion with family members by placing such women in “safe” custody for prolonged periods. In some cases, the superior courts’ interventions and observations in the course of hearing habeas corpus proceedings for the release of women and girls from safe custody, amount to an implicit recognition of women’s right to choice in marriage. More disturbingly, their observations in other cases, and tendency to exercise discretion in favour of parents claiming the custody of their "wayward minor” daughters — even in the face of those daughters’ clear assertion of having exercised their own will to marry and further refusal to return to their father/parent — demonstrate the highly patriarchal assumptions under which the Courts operate, and manifest an approach which underscores and entrenches paternalistic control over women’s lives.

Given this scenario, a closer examination of experiences in other jurisdictions, in particular in relation to Bangladeshi diaspora communities within Britain, may well open up the possibility of expanding the discourse on women’s rights, and indeed on violence against women, to incorporate an understanding of issues relating to choice and consent in marriage. It may also enable linkages to be made between the denial of consent and choice in marriage with emerging discourses on domestic violence and established strategies of response to violence against women in general. Finally, it may point the way to developing effective policy and practical measures, shifting the focus of resolving such cases concerning choice in marriage from the narrower and more limited forum of the courts, while at the same time developing a critique of existing judicial interventions and their failure to systematically ensure women’s safety and security.

In Britain, by contrast, while major policies and processes have been put in place to address the practice of forced marriage, and a recognition of the centrality of the issues of consent and choice has become more widespread as a result of the campaigns against forced marriage, concerns remain regarding the extent to which such reforms have been made wholly within a human rights framework. The recent change in the immigration rules, and the manner in which these have been made, together with public statements by high officials, appear to identify forced marriage as the outcome of a clash of cultures, and thus to see a remedy against forced marriage by restricting marriage between British nationals and others. Such an approach, which curtails choice, is clearly wholly contradictory to any notion of facilitating the right to choice in marriage. Similarly, earlier approaches to addressing the problem in Britain — including attempts to foster mediation as a possible strategy of response and to involve religious community leaders in undertaking public education on the issue — and continuing efforts to develop free-standing responses to the problem, appear to be motivated by a somewhat problematic understanding of forced marriage as a cultural practice, rather than a manifestation of wider structures and processes of violence against women and denial of women’s rights, in particular the right to sexuality and decision-making.

The challenge in both cases is to find means — through legal, social and cultural interventions — to recognise and realise the right to choose freely "if, when and whom to marry,” for women across all communities, classes and castes. And to do so in ways which continue to expand women’s choices and rights, rather than to curtail them.
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This paper argues that legal reform efforts to combat the ill effects of denied consent must look beyond the strategy of petition and redress. A more holistic appraisal of the structure of laws currently operative in Pakistan, which is cognisant of the originary importance of Islamic forms of legality, can serve to illustrate potential points of engagement that bridge the divide between transformative politics and individualised justice. The author also queries the extent to which the important gains made by Western feminism cover the possibilities of defining social spaces that do not privilege the state and its enforcement mechanisms.

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In writing this paper, I recall a somewhat embarrassing incident: Some friends of my parents were grappling with the issue of their son having declared, while studying in London, that he wanted to marry a class-mate from Iran rather than resign himself to his parent’s choice, a cousin for whom he could rouse no amorous feelings. During one such debate on the topic, all the adults assembled sensed that I was taking a determined interest in the subject and so I was given the opportunity to declare my opinion. I quickly recited that it was an express provision of the United Nations Declaration of Human Rights that every person has the inalienable right to freely choose their marriage partner. I was perhaps thirteen or fourteen years old and had just learnt this at school. The actual words had seemed to me to establish an unequivocal standard, one that the adults should not have wavered from for a moment longer. Although it had surprised me at the outset that something so essentially private, so wedded to the family should be articulated at all in a legal code, I had chosen not to query the syncretism of legal sources in favour of using this bit of information as an advocacy tool. My parents and their friends reacted with forced acknowledgment and then continued seamlessly with their own conversation. I felt more than a little humiliated at the time. In retrospect, however, I too marvel at the “ontological minimalism” that I was willing to abide by in thursting forth my bit of inherited advice.¹

Of course, rights statements are not simply the resort of the naive and my recollection of the previous incident should not be read to imply this. Rather, the point of the incident was that there are multiple and fundamental unresolvable issues impacting upon the realm of family relations, and that “the law” as a system, with its denatured and somewhat arbitrary units of analysis, is thought to be rather remote from the everyday management of the family. Agreement with the former statement does not however negate the possibility that, as with other realms of the law, family law can be perceived to be upholding organisational and associational norms reflective of an ossification of certain social values. Particularly, the ecclesiastical and moral principles that are embodied within the marital relation have been reiterated through the employment of civil and criminal forms of legal commitment and sanction; the concept of marriage as sacramental rite, as it exists in Christian and other religious traditions, has enjoyed profane patronage through the organs of the state. As a seemingly contradictory acknowledgement of this patronage, evidence of shifting patterns of intimate and family relations, particularly those outside marital bonds, enable commentators and theorists to expostulate about evolving gender roles and a politicisation of private space to explain the orientation of laws away from the enforcement of norms considered “outdated and inappropriate.”² Such accounts are however predicated upon certain presumptions about legality, ones that are

¹ The phrase “ontological minimalism” is used by Costas Douzinas (2001) in reference to human rights norms which “links man philosophically with all of humanity.” pp. 183-206.
wedded in essence to a notion of the progressive secularisation of laws. In fact, such accounts assume the victory of law over culture and religion and suggest implicitly that the categories of nation and citizen are reforming family laws in a manner that is functionally related to the secularisation of society and its constituent units.

Enlightenment ideals have been thought to be actualised within legality to the extent that through the organisational structures of the state, public life and personal destiny have been rationalised. However, it has been recognised that law’s transition from religion did not excise religion “from Western lives but rather, it simply excised religion from law.” As a corollary, the role of religion was transformed from that of religious ideology to that of “personal belief.” However, this does not represent the prevalent situation in much of the Muslim world. The body of laws governing marriages amongst Muslims in Pakistan can be situated within the broad area of Muslim Family Laws (MFL). From the outset, it must be acknowledged that there are very few exceptions to the Pakistani situation, as almost all predominantly Islamic countries apply some variant of these shari‘at (Islamic law) derived laws in their regulation of marriages, inheritance and guardianship and custody. Pakistan has, however, been the site of some exceptionally sensational cases in recent years in which the notion of women’s right to consent and enter into a valid marriage has been challenged through the invocation of Islamic precepts that are purported to vest consent in male kin or relatives; these cases have questioned the validity of marriage between persons of different social classes or tribes; they have undermined age and capacity requirements so as to legitimise child marriage; and also, have either rendered null or upheld marriages performed without procedural regularity where Hudood cases (cases relating to violations of the Hudood Ordinances of 1979) are pending.5

The socio-cultural reasons why consent in marriage for women remains an area of bitter contestation are obvious to anyone remotely familiar with the Pakistani social structure and the degree and extent to which patriarchal norms here determine the personal space ascribed within western regulatory regimes to autonomous subjects as being within their ambit of decision making. In considering judgements that most glaringly reflect this difference, a considerable amount of energy is devoted to illustrating the inter-relations of law and society in the attempt to discover the reasons why informal networks of oppression become politically salient through their iteration in legal opinions and verdicts. Such studies tend to yield conclusions suggesting that the law is in a fully dependent and functional relationship with society and, in a notionally realist sense, it is further suggested that unfavourable outcomes for women are yielded because “judges, after all, are a part of the same social system within which this violence takes place.”6 Scholarship on the subject often also proceeds to the insight that Islamic law presupposes a social structure which mandates rather than challenges women’s subjection to a heavily patriarchal social structure. As corrective and resistant, struggles are advocated along two axes: firstly, that Western forms of codified laws should be adopted alongside a more rigorous adherence to equality-spousing human rights norms; secondly, that judges should become social activists by taking a woman-centred approach, by incorporating contextual analysis and international customary and treaty law into the domestic legal landscape. I believe that such forced diagnostic-prognostic couplings overlay a fundamental disconnect, in that the intervening system of legality has systematically been occluded by a narrow focus on the content of laws and on the procedural encumbrances encountered by women who now have to transpose their social struggles into legal battles. Before approaching legal strategies, it is important to interrogate the basis on which law functions in different societries. For a preliminary analysis, this paper presumes to be able to coalesce the varying interpretations, the multiple histories of law across the tenuous and somewhat fictitious divide of Western and post-colonial Islamic systems, so as to query the efficacy of pronouncing the former as the corrective for the ills of the latter. Points of fixity have been assumed from shared understandings sufficient to make these systems both socially effective and internally coherent.

Particularly in North America and Europe, legal apparatuses and systems have, alongside capitalist development, undergone both intensive and extensive growth in the twentieth century. A great deal has been written about law

6 Ibid. p. 1417.
7 In Bibi Khatoon v. Faiz Mohammad and Mohammad Rafique (PLD 1976 Lah. 670). It was held that “Muslim Law, not the Majority Act was determinative of the question of majority for the purposes of marriage,” and that majority for the purposes of marriage is presumed to be achieved at fifteen years of age. The issue of the guardian’s or wife’s consent in marriage was brought most forcibly to public attention in the case of Hafiz Abdul Wahed v. Asma Jehangir and another, (PLD 1997 Lah. 301). In reliance upon earlier Federal Shariat Court decisions the right of a sui juba woman to contract her own marriage even in the absence of her wife’s consent was upheld. In Qaiser Mahmood v. Mohammad Shafi (PLD 1986 Lah. 72), a high degree of scrutiny and diligence was employed in the authentication of a nikahnama produced by the accused as defence to a Hudood charge. In contrast, in non-Hudood cases, it has been held that even in the absence of a nikahnama, subject to other facts of the case, an admission by the couple that they were married of free consent would constitute proof of valid marriage, (PLD 1982 FSC 42, PLD 1984 FSC 93).
having outgrown its reliance upon the nation-state to colonise life forms on a global scale. Without denying the rhetorical and even moral pull of international law, this paper adheres to the view that legal regimes are interlinked with forums of legitimation, deliberation and mutual understanding, which act concurrently within the parameters of the nation-state to implant legalised forms of gender oppression. The formation of national legal structures relied upon a theory of legal positivism in which laws were bound to a principle of rationality through their inscription in a systematic body of law. Subservience to the law could thus be assumed through the application of principles of territoriality and citizenship and allegiance to the complex of governance structures that constituted the nation-state. A marked historical trajectory which culminated at the beginning of the twentieth century in the advanced industrial states, was the appropriation by the nation-state of legislative primacy over rule-making regimes, even those that may have had autonomous origins in the interactions between constituent or even territorially dispersed social groups previously. Over the latter half of the twentieth century and continuing into the current one, oppositional movements have had to navigate through multiple layers of legality and yet, have had to position their struggles strictly within the ambit of national legal systems where goals have been formed with reference to the complex of rights guarantees, which is subject nevertheless to discursively demarcated zones of the public and the private. In Western democracies, the rule of law as an overarching social good purveyed by the state has justified both the expansiveness of its reach as well as its unwillingness to disrupt the social terrain which it occupies. As a consequence, distributions of wealth and power have managed to maintain prestige within the borders of such polities.

Given the equivocal and marginal rights guarantees that women in Pakistan hold and knowing the intertwined history of authoritarianism and a patriarchal resurgence disguised under the rubric of Islamisation in this country, it is neither far-fetched nor completely occlusive to suggest that it is the form and function of the latter to induce and/or exacerbate the former. However, I am suggesting that a scheme that simply highlights points of conjuncture and relationality is insufficient for explanatory purposes. While it cannot be presumed that a wholly sufficient alternate framework of understanding can be proposed, it would be a fruitful exercise to engage in both a comparative and an ontological exposition of forms of Islamic legality for at least provisional insight into the possibilities of kindling a constructivist project which not only accepts Islam’s political intransigence in Pakistan but also advances strategies that are culled from within its communicative interplay with difference, variability and the particular.

I

Evolutionist accounts of legal systems are often derivative of a Weberian typology which situates the formal structure of Western capitalist legality at the apex and counts Islamic legality as a body of scriptural law missing in certain attributes which would ensure the true implantation of rule by law in social structures subject to its oversight. A formal rationality is said to be embedded within systems of Western legality which derive from the principles of generalisation and systematisation: generalisation ensures that within the judicial sphere there is a reduction of reasons relevant to the issue being considered through the application of a relevance standard to legal propositions; systematisation proceeds from the ordering of legal propositions so that they form a logically coherent and consistent system of rules. This, however, forms the basis of procedural rationalisation of the legal system and there is in addition the requirement of substantive rationalisation. Substantive rationalisation in turn requires reflexivity within the legal system so that principles are self-generated within the voluntary organisation of society. These norms are “positively enacted and hence changeable.” A further point, and one which throws up various levels of contestation amongst sociologists of the law, is that the legitimacy of the state is necessarily mediated by the abstraction of legal principles so as to provide effectiveness of rule and bind individuals within a social sphere following a severance from higher order divine principles. The degree to which law is simply the conduit or the progenitor of such legitimacy reflects larger epistemological issues of whether social differentiation is under the lens or whether it is diffuse networks of power and/or expectations that are being studied. Nonetheless, the preceding analytical tools should sufficiently anchor the comparative discussion of Islamic law that follows.

7 Jurgen Habermas (1998), p. 72
In the categorisation of Islamic law as amongst a body of sacred laws, the following attributes are imputed to its functioning: outcomes are sought on the basis of ethical, political, sentimental or utilitarian considerations in the absence of general norms.\textsuperscript{6} Further, in the words of another Orientalist, “the Fiq\textit{h} [Islamic jurisprudence] is not a legal system but a deontological because it mingles religion, ethics and politics in an unsystematic way in order to construe the image of an ideal society.”\textsuperscript{7} The laws thus promulgated and enforced are not open to rational analysis and codification but are about duties and not rights; in the absence of self-generative norm enunciation, the relation to government and power remains ephemeral and thus, the notion of oriental despotism as necessitated by the social/political disconnect, unmediated by rational law, subsists as the latent and consequent form of political rule in societies which adhere to Islamic forms of legality.\textsuperscript{10}

I should state from the outset that the reconstructive project I propose is not premised on a complete disavowal of the distinctions drawn between Western and Islamic legality. However, as historical and genealogical accounts show, the rationalisation which stands in for secularisation in the ideal type rendering of the former is never completely severed from its ecclesiastical groundings: The English common law canon is not free of derivations from ecclesiastical codes. Nonetheless, this is not to suggest that secularism itself is simply whitewash; as a historical movement it is essential in transforming duty-bound subjects into rights-bearing citizens. This shift is laden with implications for the nature of state, society and the private political subject. In other words, in the secular modern state “the people, who are endowed with rights, exert them by electing their leaders to a government that guarantees to protect the public good.”\textsuperscript{11} This reflects a prior development wherein rights as liberties were transformed into rights implying the demand by the people for fulfillment by the government of certain tasks and responsibilities. The judicial role is not distinct from the larger governmental role in this respect. Although rarely are political principles the groundwork from which judicial reasoning proceeds, the concepts of purposive, contextual or historical reasoning alongside the propensity to read rights guarantees in their entirety will, in pivotal cases, define, affirm and reinscribe originary myths of social formation. This propensity to historicise is itself an implantation of secular presuppositions and aspirations this historicity, rewritten through successive judgements, works to augment and inclusively transform the realm of citizenship as democratic principles are themselves elaborated. Duty, as the other end of this spectrum, situates the law outside of the particularity of social forms. However, duty simultaneously avows the pre-eminence of the social totality in that a jigsaw-like cohesion of individual subjects is aimed at while maintaining status and hierarchies not as constructs to be levelled through formal reasoning but as integral to the proper functioning of the social structure. It is, thus, important firstly, to understand whether, in this presumed opposition, Islamic legality can be simply aiming at an affirmation of duties, or is this substantially mediated by the form of government implanted, by political conditions and historical forces.

The distinction between procedural and substantive rationalisation proceeds on the basis of an underlying assumption regarding the relation between ethical and legal ends, which furthermore entrenches particular normative suppositions regarding the forms of judicial reasoning and the presumed origins of law. Strictly command-based notions of legality are rarely invoked now to defend a positivist conception of law. It is more common to find either a concept of minimal natural origin of laws or a propagation of democratic decision-making as the necessary corollary of achieving just laws.\textsuperscript{12} In fact, the nature of the two expositions is not unrelated and serves to explain both social acceptability for laws in Western societies, as well as to illustrate the possibilities of advancing and making law more reflective of social aspirations. Legal validity is thus related to both its procedural filtration of rule-formation, as well as the substantive import of ethical considerations.

A crude conception of natural law posits that that which is observable in nature (human or other), forms patterns of regularity against which social norms can be measured and adequate laws formulated. Such certainties can only be built by the employment of an objectifying gaze, which is wedded to an external logic that separates the significant from the trivial; as the subjects of knowledge, we are shackled by valuations embedded in binary codes based on the initial division between the self and the other. Legal self-reference is thus always at a remove from

\begin{footnotes}
\item Barber Johansen (1986), p. 49.
\item Ibid. p. 43. Deontological (from the greek word deon, or duty) theories are ethical theories which take duty or obligation to be foundational (eds).
\item Amina Soton (2003), pp. 226-227.
\item Mahmoud Sadr and Ahmed Sadr (2000), p. 68.
\end{footnotes}
the particularity of individual experience, and is in fact a relegation of particularity to a lower order than the generality that can be derived from scientific and “certain” generalisation. The science of laws is concerned with the creation of equivalences. The category of the human species is subject to its own rationalisation in that, on a revolving scale, motives and passions are made subject to a singular accounting, whether the measure is utility, morality, ethics or passions. The “law of laws” is thus constantly operationalised to limit the diversity and sources of laws on the basis which best reflects human values and aspirations. \(^{13}\)

Furthermore, processes for individuation in line with conceptions of justice, such as to treat like cases alike, create the conditions which pass for justice in this scheme.

In fact, it is rarely outside “the parliamentary conception of legislation” that law is ever theorised from the point wherein the king is displaced as the particular embodiment of sovereignty in favour of the generality of reason as embodied in some form of constitutionalism. \(^{14}\)

Further, within the bounds of parliamentary rule “neither state power nor any kind of metaphysical conviction is allowed to appear ... everything must be negotiated in a deliberately complicated process of balancing” wherein “relative truth is achieved through discourse.” \(^{15}\)

However, the preceding discussion of natural law and ethics alerts us to the possibility that this process of deliberation, tied as it is to the conceptual and value-laden history of the development of the Western liberal state, in which the ideas of formal equality and popular sovereignty are both co-original and co-extensive, is formally dependent upon procedures for the implantation of deliberative spheres, wherein people are accorded equal rights for voicing their concerns. However, critique levelled squarely at these visions of complex democracy highlight the contradiction that “in order to have agreement in opinions ... there must first be agreement in forms of life” so that procedures should be envisaged as a complex ensemble of practices that are inscribed in shared forms of life. Agreements in judgement about which “procedures can be accepted and followed” reflects a conflation between the procedural and substantial, as well as the moral and ethical. \(^{16}\)

This is an important cautionary call against assuming the efficacy of a normativity which does not acknowledge its own blind spots in the rush towards implanting universality. Whilst these critiques are not limited to the functioning of legal systems only within the complex democracies that they are addressing, they do illustrate the propensity to elide the variegated interests of constituents in favour of aggregative goals, which can presume to reflect ethical and moral considerations, but which are purveyed now as generalisable norms.

In the study of Islamic legality and jurisprudence, is it fair to suggest that there exist no systematic means of distilling and/or separating legally valid rules from ethical standards? One answer can be inferred from the writings of Abul Ala Maudoodi who suggests that those who claim to be acting in the name of the state in the promulgation of laws and commands, are clearly contravening the precept that Allah alone is Sovereign and the Law Giver. \(^{17}\)

Thus, the possible sources of legislation in an Islamic state are, firstly, the interpretations of the written sources, the Quran and Sunnah, secondly, reasoning by analogy, and finally, juristic interpretation or reasoning so as to come up with new rules within areas left unmentioned. Maudoodi’s is a seamless scheme and he advocates the centrality of the Islamic state for the implantation of an ideal sharia. He further specifies a list of certain prohibited acts from which he derives the basis for a moral order which is the essential unchanging content of Islamic order and legality. Where the prohibited, as a list of enumerated acts divinely revealed, pre-exists a social order, the limits of rule-formation will be circumscribed not only by the need to formalise these as prohibited acts but also to situate on either side of a binary divide the licit and illicit, legal and illegal, through reasoned inference by analogy and derivation, amongst social situations unforeseen by the Quran and Sunnah. A similar but slightly more complex answer is suggested by Haim Gerber with the observation that the imputed capacity to choose between options and “to give one’s voluntary consent to the act and its legal consequences are formal conditions of the validity of a legal act...however, in certain cases this consent itself is subject to the ethical scale of allowed and forbidden.” \(^{18}\)

While Islam presupposes free agents, the validity of their actions is premised upon a predetermined moral valuation of the outcome. Understanding such schematics necessitates at least a partial orientation away from the units of

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\(^{13}\) Peter Goodrich (1999), p. 197.


\(^{15}\) Ibid, p. 48.


analysis that are reflexively employed in the understanding of Western legality. The inchoateness which is inferred through the merging of facts and norms in such statements of the legally valid, reflects at least partially the absence of an overarching state structure. While the inner cohesiveness of the legal system is pivoted along a singular point (religious authority), just as in Western Legality (which thus situates its own body of authorities such as constitutions, statutes and common law), in the latter case this body of laws is itself the progenitor of state legitimacy. By refracting time and again the proceduralism underlying their genesis, the state claims itself as the embodiment of a general will and sovereignty is reinscribed. An Islamic legal structure does not presuppose a political realm of rule formation. In fact, the primacy of Islamic laws’ textual origins circumvents a social distribution of that sort. While alternate jurisprudence suggests tolerance of variable outcomes proceeding from identified textual sources, the reference to society at large is often limited to statements which were incorporated in the development of fiqh and the particularities of given social and customary practices which existed at that time. However, the issue fundamentally at variance is whether policy, governability, and other presumed goods of the nation-state can be incorporated to regulate political subjects in a manner wherein their ambit of action is not arbitrarily constrained in line with an assumed vision of moral order that is unreflective of desire, autonomy and sense of personhood.

The statelessness of Islamic law does not, however, imply a complete absence of precepts for the development of particular institutions for cohering social action. The pre-eminence of the Quranic text and the Sunnah as sources for the derivation of such norms ontologically pre-disposes societies towards a belief in human reason as the probable but fallible means of appreciating these unfallible sources.\textsuperscript{19} The plurality of madhabs (Islamic schools of thought) betrays the belief in human reason in that it allows for diverging opinions (ikhilah), and suggests inherently that limits to human reason will be reflected in the divergent opinions of jurists. It also upholds the validity of the decisions arrived at, if rendered through a means wherein ethical, religious norms were distinguished systematically from legal norms, although legal norms might be determined by the religious imperative.\textsuperscript{20}

The assertion that Islamic systems conflate religious ethics and legality receives affirmation in the fact that Islamic codes refer to subject-matters which have often been demarcated on the side of the private within Western systems. Where Western systems for centuries marked the bounds of the public so as to situate the family and its internal functioning outside its regulatory ambit, within the Islamic world the family has been the site of controlled and consistent juristic experience as reflected in the body of Islamic Family Laws. However, the heteronomy of sources and the multiplicity of legal formations which operate to enunciate judgements often functions to vitiate the pronouncement of operational legal standards. Western legality avows singularity in its adhesion to the principles of generalisation, systematisation and, ultimately, rationalisation.\textsuperscript{21} Ethical considerations are themselves processed through the tropes of science and nature and the agglomeration of individuated behavioural criteria in the category of politics and policy, so that reasonable subjects of law and reasonable adherents of the law are established. Such law presumes a subject who consents not only to obedience to the law but furthermore to the originary justification which underlies the law. In contrast, in Islam, the delimitation of ends of consenting action need not be related to the singular vision which impregnates the reasoning capacity of the Western subject from the outset.\textsuperscript{22} While I am not arguing that Islamic texts and legal sources are impervious to analysis about human nature and an ideal vision of the individual in a larger social totality, there is no such singular vision, which coheres in an autonomous self-reproduction. To illustrate these contentions in a historical manner, I will be undertaking a brief but hopefully illustrative analysis of the laws relating to the issue of female consent in marriage. Alternate legalities inform these judgements and pronouncements about the validity of marriage as allegedly contracted. However, more interestingly, the interplay of Western and Islamic forms of legality, as operative within the courts,

\textsuperscript{19} Op. cit., Johanson, p. 36. Also see Abu-Odeh (2004), p. 1051, where he argues that, historically, the major madhabs owe their solidification to developments within the era of usual (principle); during the ninth century, inspired directly by the works of the famous jurist Al Shafi, through the work of "engaging in the legal activity of innovating rules inspired directly by the sources of the religion," various schools "came to be identified in their jurisprudence along the spectrum of text on the one side and discretion on the other."
\textsuperscript{20} The actual work of consolidation was the era of Taqlid (in Muslim jurisprudence, taqlid denotes unceremonial adoption and imitation of traditional legal decisions), in which the individual doctrines of Hanafi, the Shafi, the Maliki, and the Hanbali, the four major madhabs, came to be implanted as the law within moral or territorial units.
\textsuperscript{22} Reason is the transmission line of a teleology which situates social order as the outcome of the operationalisation of either instrumental or Kantian imperatives for action. In either case, reason is about demarcating the bounds of the self so as to limit alienity through its incorporation of desire into itself. Acknowledging the descriptive inadequacies of the analytical tradition within law and the resurgence of natural law and virtue ethics theories to describe Western systems, opens these systems themselves to the "critique" of being "deontological."
suggests particular spaces for political manoeuvrering and struggle amongst parties who seek to redress the injustice of denied and/or limited consent. At this stage of the discussion, it becomes important to distinguish that in the preceding discussion of ideal-types, the substantive component of law that is aversely can only refer to the normative element of a system that is procedurally also Islamic. The implication is that the closed system that is postulated therein is not one of spontaneous mutual infiltration of Western and other forms of legality. The situation in Pakistan demands a study which is more nuanced, one wherein procedure and substance have to be conflated because petition and redress are things of substantive importance in that their channelling reflects a choice, made historically at various stages, wherein these forms of legality have converged so as to render them rights of universal or bounded application. The principal propulsion for the Islamisation of laws has been a divestiture into the judicial sphere of jurisdiction over interpretation and even enforcement. This delegation either represents faith in the possibilities of coherent and generalisable derivation of legal propositions or alternately it is an indication that the post-colonial state is maintaining the primarily extractive character that it inherited from developments during the British Raj. As it is far beyond the purview of this paper to attempt an extrapolation of the organisational prerogatives of the state in its totality, I will foreground the historical development of Pakistan’s mixed legality in the next section. Following that, a brief analysis of some case law touching upon the issue of consent in marriage will form the backdrop for identifying further areas for political practice.

II

The Mughal rulers of the Indian sub-continent did not attempt a singular enunciation of the law or attempt to establish a centralised judicial system that would serve all the various communities of the land. There were several organisational forms that judicial institutional structures reflected. Amongst them were the Qazi Courts which administer Islamic law in both civil and criminal cases. These Courts were organised in a hierarchical fashion with the Chief Qazi holding court in Delhi and his appointees spread throughout the provinces. While the Qazi was theoretically representative of the centralising tendency of Mughal rule, it has been noted that he was considered an autonomous agent in the dispensation of justice because of his presumed mastery over religious knowledge cultivated in line with what were thought to be precepts of a global Muslim order.

British legality in India came to be implanted by way of Royal Charters governing the East India Company’s activities here. In the earlier incarnations, the Company was delegated power to preside over European residents, but with the Diwani (provincial revenue administrative system under the Mughals) and later the Raj, the ambit of activities and governability increased broadly. Actual reforms undertaken were ultimately dictated by a need to implant their absolute rule and flowed more naturally from the enforcement of land-revenue collection concerns than of a need to systematise norms. There was a dual move towards incorporating custom and local usage, particularly within private, non-land disputes. Beginning with the Bombay Regulation of 1827, successive enactments of regional application explicitly made “succession, special property of females, betrothal and marriage, divorce, dower, adoption…” subject firstly to the customs that the parties were deemed to be governed by, and in their absence, to the religious personal law of the same.23

The myth that “Oriental Despotism” has been the natural governing regime in the East since time immemorial in the sub-continent, helped to consolidate the colonialists impetus towards centralisation. Against those who argue that the Company and Colonial regimes were insufficiently concerned about social and cultural transformation through the transplantation of normative legal devices, Upendra Baxi counters:

... as is well known, the constant reorganisation of the “hegemonic judicature” was almost all the time moved by explicit considerations of promotion of revenue exactions, of that minimal degree of law and order which would make colonisation safe for the colonisers, and of abundant provision of the illegitimates of rights for the Indian elites which supported colonial governance. It was the declared policy of the colonial state (in both its company and its Raj incarnations) not to disturb the people’s law formations.24

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For the colonial state, this accommodation represented what is functionally also an anti-insurrectionary move on its part; by maintaining local hierarchies, they could maintain and foster dependency networks in other spheres, as noted by Baxi above. Such explanations also partially explain the fact that at the instigation of the *ulema* (Muslim clerics), as well as Muslims women’s groups, the Shariat Application Act of 1937 was promulgated, specifying uniform practices for regulating spheres within family and private law.23 In this way, religious code superseded customary law in the sub-continent. This had various consequences for the forms of post-independence legality that would emerge. Proposed enactments debated by the colonial Legislative Council were ostensibly also responding to the requirement of representing the “secular” realm of law-making, even when dealing with communal and not universally applicable statutes. Thus, reason and not religious doctrine should have been the guiding principle in their formulation.24 The corollary has been both the generalisation of religious guidance and authority as well as some element of reform within the civil law field. Other governing statutes constituting the extent of codified family law reform that would be inherited by the post-colonial state also include the Child Marriage Restraint Act of 1929 and the Dissolution of Muslim Marriages Act of 1939.

In the newly created Pakistan, the Commission on Marriage and Family Laws was established in 1955 to consider the kinds of laws which would govern this area in the infant state. The Commission’s report was mildly reformist and yet only some of its recommendations were incorporated into the Muslim Family Laws Ordinance of 1961 (MFLO) by the government of General Ayub Khan. The more notable provisions included the appointment of *Nikah* (Muslim marriage ceremony/civil marriage contract) Registrars through a Local Union Council, placing limitations on a husband’s right to polygamy, granting right of *khula*27 to women, and raising of the age of majority for the purposes of marriage to sixteen for girls and eighteen for boys. While the West Pakistan Family Courts Act of 1964 continues to be in force, the courts which are its creation have exclusive jurisdiction over a large swath of issues governed by the MFLO, but not over all the areas implicated in the issue of valid consent. While the MFLO confers the right to grant licenses to Nikah Registrars on Local Union Councils, for the purposes of performing and keeping a record of marriages solemnised under Muslim law, as well as providing for penal sanction for non-registration, it does not provide further conditions as regards persons who can validly enter into a marriage. The issue of age is certainly crucial: cases have arisen from the outset which negate the absolute scale established by the Child Marriages Restraint Act of 1929 on the basis of high jurisprudence and a varying scale to be determined factually by evidence of puberty as a measure of mental and emotional capacity. Thus, the only absolute measure in this regard is that in the absence of material evidence, fifteen is the age at which persons are presumed to have attained puberty. Whereas the role of the guardian of a minor can legally include the power to contract a nikah on behalf of such child, the necessity of guardian or *wali* consent for a *suri juris* female is an issue that resounds repeatedly and often in questioning the validity of marriages within the legal system.28

From the outset, the possibility of statutory review on the basis of repugnancy to Islamic principles was incorporated into the Pakistani constitutional structure. However, the more blatant show of Islamisation of law occurred during General Zia-ul-Haque’s reign; the variety of ordinances curtailing sexual freedoms, the status of women witnesses,29 etc. have been detailed extensively and this project can broadly be situated as being guided by and extrapolating the means and mechanisms of women’s formal subjugation within the Pakistani state and nation. The constitutional alterations that proceeded during this time were firstly the creation through addendum of the Federal Shariat Court under Chapter 3-A of the Constitution of Pakistan, 1973, whereby a dual role of examining law against Quran and Sunnah, as well as acting as an appellate Court in Hudood cases is highlighted. Another alteration to the Constitution of 1973 was the 1985 incorporation of the Objectives Resolution, 1949, as a substantive component of the Constitution. At the earliest stages, this formed the basis for the higher judiciary striking down certain legislations and even provisions of the Constitution as repugnant to Islam. However, in decisions dating from the early 1990s onwards, it is held that the Objectives Resolution cannot be the basis for testing either Constitutional provisions or ordinary legislation for Islamic validity.30 However, its promulgation has enabled an incorporation of Islamic principles

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25 Dissolution of marriage obtained by the wife in lieu of compensation paid by her to her husband.
26 In *Hafeez Abdul Wahed v. Asma Jehangi* (PLD 2004 FSC 210), the Federal Shariat Court upheld previous decisions on the wali issue and thus set aside the motion that the High Courts and Courts subordinate to the High Court were not bound by its decisions in this regards. *Mst. Hajira Khatoon v. SCO Fatih Jang* (PLD 2005 Lah. 316) is a recent case dealing with the same issue.
27 For instance, the Qanun-e-Shahadat Order of 1984.
into the legislative framework, which expressly include an evaluation of executive acts, and in a country ruled repeatedly by military dictators and executive fiat, this forms a significant terrain of review powers. On the level of normative understanding and reflection, the larger issue of incorporation of the Objectives Resolution is the suggestion that “the power to be exercised by the people of Pakistan is not an unlimited one” but can only be exercised within the limits “prescribed by the Holy Quran and the Sunnah of the Prophet,” and that even within those limits Pakistanis are not free to exercise power purely in accordance with their desires because the power conferred on them is in the nature of a sacred trust which “cannot be used to further objects alien to Islamic teachings.”

III

As shown above, there is a legislative lacuna in the realm of Muslim Family Law within Pakistan. Because of the issue of mixed legality, the interstitial points at the juncture of formal codified law in this area are in actuality capacious openings which have been filled with norms of Islamic derivation. As noted above, this delegation into the judicial sphere of the Islamisation of Pakistani laws is reflective of the perception that Islamic law is juristic law. More importantly though, it can also be read as affirmation that the Pakistani state is engaged in a process of defining itself against the teleology of advanced western states and managing, hence, the tensions of what is contained within a legal system and the points of intersection and transformation that occur in dealing with the residuum. In tracing this tension, it is instructive to look briefly at the selection of works of some theorists who deal with the foundational moments of legality in Western societies and the logic that inheres as a defining line through the mutual development of law, society and the individual subject. Hannah Arendt traces the legitimating force of law historically to discover how, at various revolutionary moments, it was either the people, God, or historical situations themselves that became the embodiment of the necessary transcendent to authorise government and bind not only its current but also its future citizens to the laws it would enact. The transcendent condition is outside the law and answers the question of what gives rise to law. In speaking particularly of America, she impresses upon the reader the fact that its revolutionary origins and the possibility of augmentation gave to the American constitution itself the characteristics of the transcendent. Lastly, and most interestingly for our analysis, Giorgio Agamben has convincingly argued in *Homo Sacer* (1995) that it is the play between life and order which formed the context of politics in the development of the modern Western state. Relying upon the Foucaultian idea that natural life comes to be incorporated into the life of the state, he further argues that politics of the time must be investigated through the points of inclusion, exclusion and occlusion of an individual life through law and judicial discourse. It is a combination of all of these insights which can provide contextualisation for the development of family laws in Pakistan, and which can inform a larger politics of re-negotiation.

In this section, then, I part ways from the initial comparative exercise of highlighting the points of similarity and difference between Islamic and Western legality. That previous discussion is important to what follows because it highlights implicitly the range of preformed options that the Pakistani state negotiated in an attempt to consolidate its rule since coming into being. The forms of legality that have been employed to govern at various stages are related to certain desired or imperative ends. Thus, while recognising that such choices are neither naive nor only representative of the whims and fancies of individuals or even legislatures, the issue of historical intractability for such decisions is too messy to deal with thoroughly here. Nonetheless, while the modern state cannot be said to have a singular logic, the question of origins is never far from juridical reasoning and casting of roles and logics within the state.

While the movements for independence and partition cannot be severed from each other in the revolutionary impetus, an indigenous colonial nationalism with an ostensibly modernist lineage, that gave rise to both, the achievement of Pakistan as an independent state reflects the dual tendencies that were being harbouried by the elite Muslim movements most forcefully articulating the demand for a Muslim homeland. As Partha Chatterjee has argued in reference to the independence movement broadly, the modernising imperative as it was imbibed amongst

23 Tanik Jan, et al. (1968), p. 163.
24 Hannah Arendt (1990), p. 204.
25 Partha Chatterjee (1993), Chapter 1.
these elites functioned along both an inner and outer path. The inner path was one which defined itself in reference to cultural and historical difference and distance from the colonial rulers. Thus, patriarchal forms, familial structures and even, in some instances, structures of land-holding and resource use were upheld as exemplars of sufficient difference to assert national culture or certainly, at the least, its nebulous foundations. The outer path was marked by the imbrication of liberal, enlightenment-derived notions of self-governance as an ideal. The contradictory space between European adherence to such values domestically and the continuance of the colonial project, which relied upon racialised hierarchies, was that within which self-government demands were entrenched. In the case of Pakistan, the derivative demand was a self-governing state for Muslims and thus, the inner path is what justified a movement that was essentially insurrectionary, maintaining the logic of the outer path, but with a core sentiment of difference that justified the partitioning of territorial space. The separation into a national community was defined by adherence to a religious moral order, and this body was then the putty that became a newly defined and controlled population. While it might be contentious, from within other modes of theorising social structures and change, to assert that Islam monopolised the whole of the moral order within the new Pakistani state, there are further claims which bolster this notion of origins. Although the inner path of difference, as noted above, was already incorporated into the colonial legal regime through an acknowledgment of the heterodoxy of religious legal sources, as in the Shariat Application Act, 1937, and earlier colonial statutes, this did not fully meet aspirations for official representation. While the claim for fiqh gained momentum in later years, the inclusion of divided legality on the colonial model suggests that in the initial years the realm of family law was maintained as a place for this difference to continue to justify the nation.

The 1961 MFLO came onto the national agenda as a restorative against the persistence of practices clearly derogating from the basic rights of women in their familial relations. While ostensibly a positive law, in the sense of being binding and supreme in its pronouncement, it never achieved this status because of its porosity and hence, permeability to Islamic laws. The very fact of its coming into being reflects the modernisation being undertaken by the Ayub regime in other spheres. This legal modernisation aids such a project through the enforcement of requirements such as that of nikah registration: the technology of governance is expanded in that the creation of registers aids in the processes of information gathering, of enforcement of collateral legal issues and contracts, particularly those pertaining to property and offspring. However, while the ideal of governance powered this new intervention, its effects were limited. In the courts, particularly during the Zia era, the ratio was formulated that if a man and woman proclaimed themselves to be legally wedded even in the absence of a nikahnama (certificate of marriage), and without evidence to the contrary emerging, the validity of such a union would be upheld. This deference to informality reflects both a failure of conventional legality and the formation of social institutions wherein the prior has affectivity. Although the contractual nature of the marriage is affirmed and thus a notion of individual sovereign will acknowledged, there is no obvious allusion to “rights” within such judgements. Rather, traditional fiqh is relied upon to regularise the procedural requirements for validity. Considerations of social policy as dictated backwards from fiqh are themselves incorporated into the process of determining whether marriages are regular, irregular or voidable from the outset. Thus, while consent is one requirement of marriage, other considerations displace its importance for determining whether a marriage, even one of long standing, is to have the social standing that was mutually agreed between the parties. Where the issue of validity arises within Hudoordinance, it is primarily an outcome of the defendant pleading valid marriage as a defence to the charge of rape or, in the case of fornication/adultery, of both the co-accused pleading the same. In such cases, judges tend to establish a more stringent standard of proof for valid marriage, one which requires greater conformity with MFLO prescribed procedure: the requirement for witnesses at the nikah, as well as registration of the nikahnama is necessitated. While assessing evidence against the shifting onuses and burdens of proof might account for this difference, it is also indicative of the sway between legalities that is endemic to this form of criminality.

As third world feminists often critique western feminists for rhetorically consigning them to a historical stage that the west has already traversed, it is instructive for women here in the third world to look at the history of second

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35 Marital rape is not criminalised in Pakistan, as can be clearly inferred from Sections 5(1) and 6(1) of the Offence of Zina (Enforcement of Hudoordinance, 1979.
wave feminism within the rubric of larger political processes, to underscore the possibilities of charting alternate trajectories ourselves. To begin with, the slogan "the personal is political" creates a hierarchy in which the previous is divested of the particularity of its own political content in favour of creating or at least militating for a national consensus about the forms and content of private and intimate association. It also reflects both the socialist, feminist and liberal feminist view wherein women need to break free from the private sphere of family and enter the public one of the workplace with men so as to ensure their emancipation. To make public is ostensibly a strategy for ensuring that private subjects are protected by the law while the ambit of choice in the forms of allowable private relations is expanded in reference to guarantees of liberty and equality. The protective cover of the law has been secured primarily through vigilance in the promulgation of criminal statutes to ensure that the household disciplining of women into subservient roles does not escape penal sanction. Although the gains made by western feminism are not to be discounted, it is worthwhile querying the extent to which these techniques cover elemental possibilities of defining social spaces that do not privilege the state and its enforcement mechanisms. On a larger level, the public-private divide is a casting of morality outside of the law through the positivist enterprise: the personal sphere is structured by morals whereas the public is governed by reason. One can readily agree with Nivedita Menon when she writes that "the dilemma that faces radical politics is what I term the 'paradox of constitutionalism,'" wherein lies the "tension in which the need to assert various and differing moral visions comes up against the universalising drive of constitutionality and the language of universal rights." The heterodoxy of sources, where Islamic law meets Western codified law, opens up a space for a critical hermeneutics that could initiate the political processes of casting suspicion upon written sources and tradition, so as to illustrate living relations to that tradition; it would also allow for an understanding that would excavate through the interests that are given preeminence in its formation. The relations of visible norms and interpretations to the metaphysical grounding presupposed by those norms and their replication in practice and social interaction can be charted thus. The dualisms of sovereign/subject, male/female can also be unhinged and made replete with alternate understandings. A project to break the foundedness of the private/public divide, thus involves a presumption that norms have not been settled in a political sphere that purportedly informs the judicial sphere. It involves politics that negotiates an expansion of the heterodoxy of legal language and considerations and which should militate actively for that. Because customary practice is very often the locus of offending norms, particularly in the area of forced marriages in Pakistan, the implantation of Islamic legality in this sphere is a greater bulwark against such practices in that an alternate social order is proposed wherein these dualisms can be maintained provisionally, subject to the reinterpretations proposed above.39

One particular means of seeing such possibilities is to look at the cases emerging from the exercise of the "option of puberty." Since child marriages continue to be recognised as valid if entered into through a valid and recognised wall or guardian, this option enables a person between the ages of fifteen and eighteen to repudiate such a nikah. One recent and illustrative case proceeds from a Fundamental Rights Petition under Article 199 of the Constitution of Pakistan, 1973. The petition was to quash a Hudood case arising from a First Information Report (FIR) lodged by a person claiming to be validly married to the petitioner, the marriage having been contracted while the female was still of minority age. No rukhasti (departure of bride with the groom after nikah) had taken place between these two and, after achieving the age of majority, the girl had a second nikah performed of her own free will with another person. The Lahore High Court held that the first nikah stood repudiated by her in exercise of her option of puberty. The Court delivered the verdict that "the issue is symptomatic of a culture where the Nikah of a girl is performed in minority on account of a variety of compulsions. It is either on account of watta satta or family pressures. Since a minor is not a free agent and mature enough to express her consent i.e. an essential element of Nikah, the woman has been granted a right in Islam to exercise her option when she attains the age of puberty." The judgement goes on to suggest that it is a "settled proposition of law" in reliance upon cases dating from 1950 and 1953.41 It also reiterates that a second nikah after attaining majority would be a valid repudiation of the earlier

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38 Ibid. Chapter 1.
39 The project is similar to what is proposed by a variety of theorists in reference to enlightenment-derived universal categories such as human rights or the category of woman itself. See particularly, Etienne Balibar (1995), p. 48.
40 Where a girl from one family is married to a boy from another family in exchange for the marriage of a male from her family to a female relative of her husband.
41 Mrs. Irlana Tasneem v. Station House Officer and others (PLD 1990 Lah. 479), pp. 483-484.
nikah performed during her minority. In a slightly earlier case, there is even the suggestion that the option of puberty is essentially the right of the wife and "approval of the Qazi was only to authenticate it, mere exercise of this right by the wife was a perfect repudiation of first marriage and there was no need to get it confirmed by the Qazi."\textsuperscript{42}

The doctrine of the option of puberty illustrates the regulative tensions between legalities as transcribed into the realm of social practice. As a legal principle, it presumes a biologically determined subject; capacity is presumed at puberty and this becomes the point wherein individual decisions over conjugal society acquire official status. As a legal doctrine, it is simultaneously an avowal of a right as well as a corrective against social practice which militates against an assumption of full individual subjectivity. Its status as right is one that is accorded in the realm of civil relations but which is not reliant upon the state extending its coercive reach into society. As the state will recognise even the occurrence of child marriages, this remedy provides a manner of correcting any decisions made without due vigilance in ensuring valid and informed consent. This option implicitly also guards against the argument that the consent or permission of a guardian is a necessary condition for the valid marriage of a Muslim woman. As case law illustrates, there is an individuated ethic embedded within certain Islamic principles which safeguards a conception of "bare life" within the legal structure; this is a guard against codified visions which inevitably come to be weighed down with particular normative assumptions about the subjects they address. The unchangeability of these in reference to equality assumptions would militate against aggressive fact-finding regarding the particular social context in which claims arise. By enabling women deprived of consent to seek redress through an act, such as the contracting of a subsequent marriage or a verbal repudiation, rather than through petition, the option of puberty in this example enables a political reappropriation which is at least marginally appropriate to the dilemma.

**Conclusion**

This paper has purposely steered an eclectic course; it is neither structured by the need to answer a single question nor by the imperative of choosing amongst the various methodological and expository frameworks that have been provisionally deployed. Beyond the limitations of space and personal knowledge, it is also the very limited intention of arguing for a movement beyond mere surmises about the affectiveness of legal codes to which it owes its many foreclosures and against which the reader may claim disaffection. Nonetheless, in proposing alternate sites for a politics to be waged in which women might be the beneficiaries, it is necessary to highlight the limitations of the parameters within which legal advocacy efforts function; in the framework of rights and state-led legal change, a constellation of social relations is already presumed. Civil society, as a place wherein rights are subsisting and which functions as an oppositional ground from within which enforcement efforts might be culled, is a somewhat vacuous formation, even in the Western constitutional states where rhetorically its naturalism is presumed. In Pakistan, our conception of origins, of state and social formations is one of constant interplay between religious identities and secular movements towards centralisation. Without claiming sufficient evidence through this paper alone, I do propose that these processes need to be excavated thoroughly and a politics of decentralisation, of "taking back," needs to unfold before holistic social transformations are attempted through the law.

\textsuperscript{42} Said Mahmood and another v. The State (PLD 1995 FSC 1).
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The legal provision of "grave and sudden provocation" was repealed some years ago. However, the provisions of the law of Qisas and Diyal, enshrined in the Pakistan Penal Code, 1860, effectively convert murder, a crime against the state, into one against the individual through its provision of retribution or recompense. This change has done little to bring a modicum of safety to women's lives, especially as in most cases, the murder is either committed or incited by close kin. This excerpt from Shahla Zia's Violence against Women and Their Quest for Justice (Simorgh Publications, 1998) is included in this issue to illustrate not only the misogyny that undergirds our laws and judicial practice, but to also reveal a shared perspective vis-à-vis women's autonomy between those who interpret the law and those who violate it. Seen from this perspective, clearly there is much to be done before women are able to exercise their claim to a full humanity through the exercise of their very fundamental right to autonomous choice and decision-making.

SHAHLA ZIA

Background

One of the founding members of Women's Action Forum Aurat Foundation and the AGHS women's law firm and legal aid centre, Shahla Zia made immense contributions to law reform and research on legal, political and development issues of concern to women. She was one of the main authors of the 1997 Report of the Commission of Inquiry on Women and an author and co-editor of the National Report-1995 for the Women's Conference in Beijing. She resigned from the various government committees and the Beijing Core Group when the 15th Constitutional Amendment was introduced in Parliament in 1998. She passed away in 2005.
The Pakistan Penal Code, 1860 (PPC), in its original form, contained provisions whereby causing the death of a person due to grave and sudden provocation was defined as culpable homicide not amounting to murder. The relevant provision, contained in Exception 1 to Section 300 PPC, stated:

Culpable homicide is not murder if the offender, while deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The law thus empowered the courts to liberally interpret the provisions of these sections in terms of offences relating to women. However, in 1991, the Criminal Law (Fourth Amendment) (Qisas and Diyat) Ordinance, declared as being based on Islamic law, did away with the provisions relating to “grave and sudden provocation.” The amendment provided for murder (qatl-i-Amd) to be punished with death as retaliation (qisas), with death or life imprisonment (taazir; that is, punishment other than hadd where hadd means punishment ordained by the Holy Quran or Sunnah) where the evidentiary requirements of qisas were not met, and imprisonment for up to twenty-five years where the punishment of qisas was not applicable. This change caused great concern and palpable concern amongst the superior judiciary, which then directed its energies into re-creating the law of grave and sudden provocation within the new provisions.

In Ghulam Yaseen and others v. The State,¹ the three accused were charged with the murder of a man they suspected of having illicit relations with Bakho, sister and niece of the accused. The trial court convicted all three accused under Section 302 (b)(c) PPC, and sentenced them to twenty-five years rigorous imprisonment each. The High Court felt that the question that emerged for resolution was the determination of the offence that had been committed by the appellants. Referring to the newly added section in the PPC, the court noted that the provisions did not make any allowance for qatl committed under ghairat (honour). However, holding that the courts were to be guided by the injunctions of Islam in the interpretation of the application of the provisions of the chapter and referring to various ahadeeth (sayings of the Holy Prophet), the court stated that qatl committed on account of ghairat was obviously not the same thing as qatl-e-Amd (murder) pure and simple, and people deserved concession. The least that could be done was to convict such persons under clause (c) of Section 302 PPC. The conviction was accordingly converted, and – holding that under the old law such culpable homicides were termed as homicides committed under grave and sudden provocation and no such convict was ever punished with twenty-five years – the sentence of the accused was reduced to five years each.

¹ PLD 1994 Lah. 392.
In **Abdul Haque v. The State and another**, the Supreme Court felt that the plea of diminished responsibility under grave and sudden provocation had been well-recognised in the sub-continent for more than a hundred years and there was good reason that a person who committed culpable homicide out of compulsion, ethical or otherwise, was brought about by himself, could not placed on the same footing as a cold-blooded murderer or hired assassin. With similar observations in other cases, the law of grave and sudden provocation remained.

The mitigation allowed in cases of grave and sudden provocation has been criticised by women’s rights activists as a provision that condones violence against women; allows murderers to get off with light sentences, and sanctifies the criminal as “honourable.” Its existence in a patriarchal society is particularly dangerous for women, allowing for gender biases that have serious implications for women and their right to life and security.

**JUDICIAL VIEW OF “GRAVE AND SUDDEN PROVOCATION” IN THE CONTEXT OF WOMEN**

Ordinarily, the plea of grave and sudden provocation is considered applicable to very close family members upon catching a person in the actual act of illicit sex. However, this has undergone wide expansion over the years. In the case of **Ghulam Mustafa and another v. The State**, Javed, who killed his mother’s husband, had his sentence of life imprisonment reduced to five years because the High Court felt it was quite natural for him to be furious, lose control and kill his mother’s “lover.”

In **Mohd. Yaqub alias Ayyub v. The State**, the sentence of a brother who stated that he had killed a man and also tried to kill his sister because he saw them coming out on different sides from a sugarcane field was reduced to five years because the High Court felt the circumstances were sufficient to raise a genuine suspicion in his mind and it was a case of grave and sudden provocation. It also stated that no hard and fast rules could be laid down, and that the age, environment, occupation and individual character had to be kept in mind while determining the matter.

In the case of **Mohd. Rafiq and others v. The State**, the High Court extended the application of the plea of grave and sudden provocation to everyone, stating:

> Consequently, when a man who is otherwise stranger to a woman, sees her in the arms of another and loses control over the situation would be entitled to get benefit of this exception in a particular society where social norms are observed strictly everywhere with no exception.

In **Riaz v. The State**, the High Court held sexual intercourse was not the only cause to provoke a brother to cause culpable homicide in our society and that in a rural society family honour was of prime importance.

In **Akbar v. The State**, the court observed that there was no way to measure the degree of provocation and how long it continued, since people’s minds react in different ways. According to the court, illicit relationships in a Muslim society were not acceptable and the actions of a “ghairatmand” (honourable) father/brother were but natural and needed proper realisation by the courts. And in **Mohd. Ayub v. The State**, the High Court reduced the sentence of a husband to five years for killing his wife out of “ghairat,” it observed that the accused was an uneducated young man belonging to a tribe and an area where no loose conduct of a female was tolerated and family honour was jealously guarded; that he was also of an age group (nineteen to twenty) where tolerance was nonexistent and rashness was the order of the day irrespective of ensuing consequences, and that if he remained in jail a long time he was likely to come out as a hardened criminal, which was not desirable.

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2 1996 SCMR 1566.
3 1989 PClJ 1712 Lah.
4 PLD 1984 Lah. 338.
5 PLD 1993 Lah. 848.
6 1997 PCrLJ 22 Lah.
7 1997 PCrLJ 1897 Lah.
8 1997 PCrLJ 2058 Lah.
The messages emerging out of these decisions are very clear. A man can get away with minimal punishment on the plea of grave and sudden provocation:

- even where the relationship of the persons involved is licit, if he gets furious enough with it;
- even when they have done nothing suspicious, or have done something which he subjectively considers suspicious;
- if his age, environment, occupation and individual character so impel him;
- even if the woman is a total stranger;
- even if the murder occurs long after the provocation, because there is no way of measuring the degree of provocation or knowing how long it continues;
- if he is ghairatmand;
- if he is uneducated;
- if he belongs to a tribe or an area where a woman's loose conduct is not tolerated;
- if he is intolerant and rash, and does not worry about consequences; and,
- if he is likely to come out of jail a hardened criminal if he stays there too long.

The alacrity of the courts in accepting any justification in cases of grave and sudden provocation is a clear indication of their own gender biases. For example, where a son killed his step-father, the use of the words "mother's lover" instead of "husband" is indicative of the court's own bias about women who marry for a second time of their own choice, and provided the justification to her son for losing control. And where a husband brutally murdered his wife, there was concern about his youth, although the wife he killed must have been even younger than him. Killing of women for 'honour' is clearly viewed as a natural reaction for good Muslim men, calling not just for leniency, but also for respect. Basically, then, the courts have given men a license to murder women within and outside their families whenever they so wish, according to social norms or personal character and circumstances.

"SHROUDED IN MYSTERY"

In cases where the prosecution gives suspicion of illicit relations as the motive, courts often tend to immediately accept the defence version entirely if claims are made about catching the couple in the act of sexual intercourse. In the case of *Mohd. Shariq v. The State*, where a husband killed his wife in their own house in the early hours of the morning, the appellant denied guilt and in his statement under Section 342 Criminal Procedure Code, 1898, stated that he had gone out to ease himself and when he returned, he saw his wife and one Anwar Fauji embracing each other inside the room. Anwar Fauji scaled the wall and left. The appellant admonished his wife, whereupon she abused him and threatened to carry on her illicit relations, upon which he lost his self-control and throttled her to death. The appellate court fully accepted the defence version, further observing,

The appellant's admonishing his wife on her paramour's departure did not minimise the gravity of the situation and the provocation offered. In such a situation even if the wife begs her husband for a pardon and asks for mercy, yet if he kills her, his conduct would still be mitigated and he would not be guilty of murder, because it is the gravity of the provocation which is the criterion to determine the conduct of the
accused who loses self-control and not the immediate subsequent conduct of the person who offered the provocation. But in this case, the wife's conduct immediately after the departure of her paramour added fuel to the fire, because on reprimand, she shamelessly threatened to carry on with her lover and also abused her husband, as if he was an intruder. This was the greatest provocation offered to the appellant who lost self-control and killed her.

The High Court, therefore, altered the conviction to one under Section 304 PPC and reduced the sentence to one already undergone by the appellant.

The judgement is one of the most blatant examples of judicial gender bias. The court had no hesitation in totally believing the statement of the accused; a statement that was not even subjected to cross-examination. The absurdity of the defence version – that the wife was entertaining another man in the house in the very short period that her husband had gone to ease himself – did not seem to strike the court at all in its eagerness to condemn the murdered woman. The readiness to condone the criminal conduct of a husband and drastically mitigate his sentence merely on the allegation of immorality or bad character of a woman is apparent.

Sometimes, even when it is denied by the prosecution and there has been nothing brought on record to even indirectly support it, a mere claim is sufficient to make the defence version acceptable. In Mohd. Abdullah v. Rashid Shah and another,\(^2\) where a man had been sentenced to life imprisonment for murdering his wife, the High Court converted its sentence to five years under Section 304 PPC. The prosecution story was that Rashid had recently got married and was living as khana damad (resident son-in-law). He wanted his wife to go to his village with him and on her refusal he murdered her. Rashid's statement was that his wife would not have sexual intercourse with him as they got married and he therefore had a suspicion that she was a bad character and had illicit relations with one Shah Nawaz. When he told her she had to leave with him, she told him she would rather go with Shah Nawaz, upon which he lost his self control and killed her with hatchet blows. The Supreme Court did not find it a fit case for intervention.

Courts can even reinvent the whole story to justify a plea of grave and sudden provocation. In Mohd. Jamil and others v. The State,\(^3\) three accused persons had been charged with the double murder of Shahid and Nargis. The defence version was that they had caught both of them making love next to the kitchen in Nargis's house, and had picked up kitchen knives and killed them there under grave and sudden provocation. The proven reality was that they had been killed separately in their own houses, which was also the prosecution's story. The High Court, therefore, partly accepted the defence story. It stated that it was reasonably possible that when the accused caught them, Shahid tried to run away and was chased and killed in his own baithak (sitting room). He raised an alarm upon which the witnesses came. The accused then rushed back to Nargis's house. The latter was still there, thinking they might not come back. However, they did return and caused injuries resulting in murder. Through this totally concocted story, the life sentence of the accused was reduced to five years under Section 304 PPC.

Yet another way of mitigating sentences is by finding that the motive or events were "shrouded in mystery." This is quite a favourite expression with the courts. In the case of Mohd. Nawaz vs. The State,\(^4\) Nawaz had been accused of brutally murdering his sister and niece with knife blows. It was a daylight murder with a single accused and eyewitnesses, in which the accused had been almost caught red-handed. Nawaz had totally denied the charge, but stated that after her husband's death, his sister and niece started leading an immoral life. The trial court sentenced him to death, which was confirmed by the High Court. The Supreme Court came to the conclusion that keeping in view the close relationship, the motive alleged was not strong enough to commit two murders. Noting that the appellant had raised the plea of immoral conduct and protested his innocence, and also noting that there were innumerable injuries on the dead bodies, the court stated that it appeared that the appellant for whatever motive, committed the murders at a time when he was highly charged with the emotion of anger. The fact that no cuts were found on the shalwar (loose trousers) of the niece although she had injuries on her legs, according to the court, "could only lead to an argument that she was not wearing this or any shalwar at the time of occurrence." The fact that the results of vaginal swabs were not produced "would at least raise a serious suspicion with

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\(^2\) 1987 SCMR 2045.
\(^3\) 1989 FC(L) 1365 Lah.
\(^4\) 1989 SCMR 124.
regard to clean conduct of the prosecution case.” And one independent witness admitted that they had the notoriety of immorality. The Supreme Court held that while it was unable to give a definite finding that the appellant saw something “which provoked him suddenly and gravely, but it would be possible to reach the reasonable conclusion that his suspicion about the immoral conduct of the deceased lurking in the mind of the appellant was not unfounded. However, as the reputation of an unmarried girl is involved, after death, we would in such a case refrain from making any further comment regarding her character.”

Another hypothesis, according to the Supreme Court, was that the prosecution motive was too weak for the murder of two such close relatives. Thus the alleged motive, having not stood the test of scrutiny, was treated as a case where the motive remained “shrouded in mystery.” In either case, the accused was entitled to a reduction of sentence, and the death sentence was changed to life imprisonment.

On occasion, in their willingness to believe the worst where women are concerned and eagerness to allow the accused the benefit of the plea of grave and sudden provocation, courts do not even make the effort to explain their decision in accordance with the facts. In Mohd. Sharif v. The State,\(^{13}\) Sharif killed Nasim Akhtar with a knife and when Siddiq tried to save her, he gave him two knife blows also. The prosecution story was that he killed Nasim, his former wife, out of annoyance because she was about to get married again. The accused claimed that she was still his wife and he killed her when he saw her coming out of a haveli (ancestral home) with a stranger. The High Court rejected the prosecution story and felt that the accused had seen something unusual resulting in his losing self-control and attacking his wife, which fitted in with the defence inference. The sentence was reduced to three years. However, the Court did not give any explanation for the injuries to Siddiq, who supported the prosecution version, though it allowed him compensation.

Courts appear to bend over backwards to allow men the plea of grave and sudden provocation. If the accused sees the couple in the act of sexual intercourse, he is treated leniently because of the grave and sudden provocation he suffers; if he sees something which he considers suspicious, the circumstances are considered sufficient to give him the benefit; and if he comes up with nothing to justify the murder in the eyes of the court, then it becomes a case “shrouded in mystery” and he becomes entitled to reduction in sentence.

Courts also tend to see a large number of injuries on the dead bodies as corroboration of the defence version of grave and sudden provocation, since they suggest a loss of control. In Fazal Din v. The State,\(^{14}\) where the accused claimed that he had found the deceased in a compromising position with his sister and killed him, the High Court held that the number of injuries showed that the same were caused in a fit of frenzy and had it been merely suspicion, he would have avenged the family honour with just a few blows. The conviction was converted to one under Section 304 PPC, and the accused sentenced to five years. In Mohd. Yaqub\(^{15}\) the court felt that eleven stab wounds indicated the state of mind of the accused and showed that it was a case of grave and sudden provocation. On the other hand, single injuries are seen as showing lack of premeditation or no intention to kill.

Even with the change of law, the sentences usually given for cases of grave and sudden provocation are insultingly light. In Niamat Ali v. Mohd. Yaqub and another,\(^{16}\) the accused who had killed his wife, received a sentence of two years, and the Supreme Court held that no case was made out for interference. In Mohd. Amin and others v. The State,\(^{17}\) where sixteen year old Raj Bibi and seventeen year old Shaukat were done to death cruelly, the accused received seven years. In Zulfiqar v. The State,\(^{18}\) where Zulfiqar murdered his sister and her “paramour,” the High Court held that the ends of justice would be met if the appellant was sentenced to the period of imprisonment already undergone by him. In Waliyat v. The State,\(^{19}\) where the accused had killed his sister-in-law, he was sentenced to seven years. In Mohd. Ishaque v. The State,\(^{20}\) where the accused was alleged to have killed a man on suspicion of illicit relations with his sister, and of killing his sister the next day, the High Court reduced his sentence to five years despite his total denial, convinced that he acted in ghairat and stating that a sentence of a few months should generally meet the ends of justice in most cases, even though he totally denied the killing.

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\(^{13}\) 1983 PChL 1617 Lah.
\(^{14}\) 1983 PChL 92 Lah.
\(^{16}\) 1988 SCMR 62.
\(^{17}\) 1988 SCMR 249.
\(^{18}\) PLD 1997 Lah. 213
\(^{19}\) 1998 PChL 111 Lah.
\(^{20}\) 1998 PChL 1110 Lah.
However, there are occasionally some exceptions to the rule. In *Abdul Shakoor v. The State*, Abdul Shakoor killed his wife Nargis with a knife and made a murderous assault on Abdul Rehman, his father-in-law. Nargis had been living with her parents for two years because of strained relations; Abdul Shakoor wanted to take her back but she was not willing to go with him, because of which he killed her. The appellant pleaded grave and sudden provocation, claiming that on the day of the occurrence, Nargis had gone to the field to meet her paramour Ali Asghar and when he saw them in an objectionable position, he got provoked and assaulted them. Once his death sentence was confirmed, Abdul Shakoor came in appeal to the Supreme Court. His counsel contended that the appellant was entitled to the company of his wife, which had been denied to him for two years. He stated that the appellant went to the house of his father-in-law a few days before the occurrence, but his request was refused. This was followed by an exchange of hot words. It was urged that it was against this background that the appellant, a young man of around twenty-seven, became desperate and took recourse in attacking his father-in-law and wife, which unfortunately proved fatal in her case. These were the extenuating circumstances that mitigated the gravity of the offence and would justify the lesser sentence. The Supreme Court found itself unable to accept this contention. It observed that there was nothing on record to indicate that the appellant had made any serious effort over the two years to bring her back through seeking intervention or any other means. He only went to his father-in-law’s once and that too not in a very conciliatory mood, since it ended in an exchange of hot words. Thereafter he made a murderous assault causing six injuries to his father-in-law and killing his wife in cold blood. Not only that, he also tried to malign the deceased by attacking her moral character at the trial stage. For all these reasons, the Supreme Court did not feel he was entitled to any leniency and held that he had been rightly awarded the death sentence. The appeal was dismissed. The judgement clearly exposed the tactics usually employed by the defence in cases of such nature, and usually accepted by courts at some stage.

Courts sometimes make biased presumptions about women’s character, even when there is nothing on the record to prove it. In *Mohd. Rafique v. The State*, a murder case where the accused claimed that he had stabbed the deceased because he trespassed in his house at midnight to rape his wife, the trial court rejected the prosecution’s story holding that “it was likely that the deceased had an affair with Zarina and had visited the house on an invitation from her.”

Courts also sometimes make presumptions about men. In *Murid Hussain v. The State*, it was alleged that the appellant had killed one Zafar Iqbal on his refusal to submit to sodomy, and afterwards dragged his own wife, Jindan Mai, out of the house and murdered her to give the murder the colour of *karo kari* (honour killing). The appellant pleaded grave and sudden provocation, saying that he killed Zafar Iqbal and his wife because he found them in a compromising position. The appellate court rejected the motive alleged, holding that there was nothing on record showing that the appellant had a “bad eye on the deceased” or that he had “a flair for boys.” It noted, on the contrary, that the appellant was recently married and, therefore, the story appeared to be improbable. Thus, the court chose to deny the possibility of homosexual urges in a man recently married, but had no qualms in finding a recently married woman capable of extra-marital sex, even when dead and unable to defend herself. The fact that Zafar Iqbal was naked at the time of the post-mortem examination was held to be supportive of the defence version, although it was more consistent with the prosecution version of attempted sodomy and, in fact, belied the defence version since Jindan’s body was not naked.

**“Honourable” Treatment Reserved for Women**

The provision of grave and sudden provocation, whether written or read into the law, allows for the free expression of gender biases particularly prevalent in tribal and feudal societies, and has led to a practice where women themselves are murdered, and men are murdered on the declared or proven suspicion of “illicit” relations with...
women, and these murders are increasingly viewed by courts as “honour” killings. Case law in Pakistan is replete with examples where dead women have been condemned as immoral merely on the raising of a defence plea to that effect, where courts have extolled the virtue of ghairatmand men who avenge family honour, where every leeway has been extended to condone these murders and exonerate the men who have committed them, where customary practices of men taking the law into their own hand have been actively encouraged, where the definition of “grave and sudden provocation” has been extended to cover the most inexcusable offences, and where sentences have often been light enough to be laughable.

A common argument raised is that the concept of grave and sudden provocation has neither been limited to Pakistan, nor does it apply to women in particular. Firstly, the existence of bad law in other parts of the world is no justification for its continuance in Pakistan. Secondly, the reality is that in a patriarchal society, where women are largely regarded as property and their bodies as the repository of family honour, the use of the law and its interpretation would inevitably be heavily tilted against women. Nowhere do you hear of men or women killing men of their own family because of family honour or because their immoral conduct led to loss of control over the passions. This “honourable” treatment is only reserved for wives, mothers, sisters, daughters and other female relatives, and sometimes even unrelated females. The lenient view taken by courts not only makes murder respectable and allows mitigation of sentences, it encourages people to give in to base instincts and take the law into their own hands – an attitude laws are intended to discourage, not corroborate. By doing so, the system condones customary practices like karori kari, encourages violence against women, holds women guilty without their being heard, and allows murder to go insufficiently punished. It has also led to an increase in the practice of accused persons using this as an excuse for murder, and often getting away with it. A crucial question is whether a woman’s conduct, however immoral or opposed to social norms, justifies or mitigates what is, at the end of the day, murder.

In any event, the practice of condoning crimes of this nature is the acceptance of the base instinct of retribution and revenge, which the justice system should aim to discourage, not approve. And in patriarchal societies like ours, where women are considered both the property of the family and expendable, it is they who will inevitably bear the brunt of these cultural practices.

**MITIGATING CIRCUMSTANCES**

Mitigation of sentences takes place in other cases of violence against women also. This normatively occurs in instances where the court feels that the wife has not been sufficiently “docile” or “obedient,” or when the slightest suspicion is raised about her moral character. In *Abdul Ghafoor v. The State*, 24 the accused murdered his wife who had been living separately from him with their children for four years, because she did not consent to her daughter marrying her husband’s nephew. The High Court felt that the fact that her husband had deprived him of the expression of the paternal emotion of love and attachment to his children, and the murder was a result of annoyance, was a mitigating circumstance. The death penalty was reduced to life imprisonment.

In *Riasat Ali v. The State*, 25 where the accused had killed his wife with two danda (big stick) blows in front of her relatives because she complained to them about his cruel treatment, the High Court altered his conviction from Sections 302-304 PPC and reduced his sentence from life imprisonment to seven years rigorous imprisonment, on the grounds that the occurrence happened all of a sudden and the appellant had no intention to cause the death of the woman. According to the judgement:

It appears that the appellant got infuriated when the deceased in his very presence told Muhammad Rafi that he was instrumental in getting her married to an undesirable person. There was no pre-planning on the part of the appellant. Unfortunately, the danda was lying nearby and he suddenly picked it and gave two blows to her... In the circumstances, the intention to kill cannot be presumed.

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24 PLD 1982 Baghdadul-Jadid 44.
The gender bias of the court was reflected in the presumptions made on behalf of the accused and an unconscious underlying disapproval of the inappropriateness of the wife’s behaviour. The words in the judgement that the appellant “got infuriated when the deceased in his very presence told . . .” seem to sanction the appellant’s anger in view of his wife’s temerity in complaining about him in his presence. They also reflect the stereotyped attitude that it is natural for a husband to maltreat his wife, but not acceptable if she tries to speak about it in front of even her closest relations. The words “… unfortunately, the danda was lying nearby…” further serve to absolve the appellant, placing the burden both on the danda for being there and on the wife for her socially inappropriate behaviour. The court condoning the murder of a woman is reflective both of the low value attached to women’s lives, as well as of the social norms which deny women even the basic right to protest the violence being committed against them. It also reflects the distinction courts make between violence against women in the public or private sphere. A similar offence committed by another person in another place would not have been treated in the same way.

In Sabir Ali v. The State, the accused murdered his eighteen year old wife, Salma. She had come back to her father’s house a few months earlier and given birth to a son. On the day of the incident, Sabir Ali came and declared that he had come to take Salma away. Her father told him that it was not possible to send her straight away because he had not yet prepared the customary gifts for the occasion and asked him to wait a few days. At this refusal, Sabir attack Salma with a knife, giving her seven injuries. Her sister, Anwari, tried to intervene and also received knife blows. At the trial, Sabir Ali denied guilt and denied that there were any witnesses. He stated that Anwari, who was also his brother’s wife, stage-managed her presence through self-inflicted injuries. He claimed he had turned Salma out of his house because she was an immoral woman, and his brother had similarly turned out Anwari, for which she blamed Sabir. The trial court sentenced Sabir Ali to death for murder. In the High Court, the appellant’s counsel contended that “all was not well with the informant’s family.” He pointed out that it had been suggested that Salma’s mother was living in adultery with someone, and also that Salma was a woman of easy virtue. On the basis of these circumstances, he contended that the prosecution concealed the fact that Salma was living in adultery and when the appellant came to fetch her, there was no one in the house except his wife and her paramour; thus he reacted violently. He, therefore, pleaded “grave and sudden provocation.” The High Court stated that there were no circumstances in support of the argument for grave and sudden provocation. However, it held that the weakness of the prosecution case lay in the fact that Salma’s father’s refusal to send his daughter back straight away was not sufficient enough to enrage Sabir:

In all probability, the refusal may have been provocative and something may have also happened between the appellant and his wife which appears to have been concealed.

In view of this, the court was not inclined to confirm the death sentence and converted it to one of life imprisonment. Thus, even if there is nothing on the record which can be brought within the very extended parameters of what constitutes provocation, courts presume such provocation to justify the lesser sentence, particularly so in the case where only a wife has been murdered.

In Muhammad Habib v. The State, the accused had allegedly turned his pregnant wife, Salma, out of the house five to six days earlier after a beating. On the day of the incident, Habib came to the house of his father-in-law, Mohd. Shabir, and wanted his wife to accompany him home. His father-in-law told him that he should bring his father with him so that he could negotiate the conditions of his daughter’s safe return. The appellant refused to comply with this request and insisted on taking his wife back with him. His father-in-law flatly refused to let his daughter go under the given circumstances. There was a verbal altercation, and Habib raised a lalkara (challenge) and, taking out a knife, stabbed him in the chest and ran away. Mohd. Shabir died. The trial court sentenced him to death and the sentence was confirmed by the High Court. However, the Supreme Court observed that the appellant and his wife had been living happily and only a few days before he had turned her out. The deceased refused to send his daughter with her husband and asked him to bring his father for negotiation. According to the Supreme Court, “It was thereafter that the appellant flared up and stabbed the deceased.” It added,
The situation perhaps could have been averted had not the deceased betrayed an attitude of marked refusal to send the wife of the appellant with him. It is discernible from the record that the appellant was then a young lad of less than 22 years and on the denial of the company of his wife must have been provoked. He inflicted a single blow on the deceased and did not repeat the same.

Considering this as a mitigating circumstance, the death sentence was converted to life imprisonment.

In *Faqir Hussain v. The State*, the accused killed his wife's brother and attempted to kill his wife, Bhirawan. The reason was that her brother wanted to take her to her sister's house for condolence on the latter's mother-in-law's death, but Faqir stopped her. When she insisted, Faqir started to beat her. Her brother stepped forward to rescue her, whereupon Faqir rushed into his hut, brought out a hatchet and attacked him. When Bhirawan tried to save him, he gave a hatchet blow to her head also. Faqir Hussain was sentenced to death. In appeal, the High Court, while believing the prosecution version, went on to add that it was due to the insistence of Bhirawan to go to the condolence that a dispute had arisen and when her brother intervened, Faqir flared up and in the heat of passion went to his hut and brought out a hatchet and inflicted one injury on each of them. He had not repeated the hatchet blows and there was no premeditation. It was a sudden flare up in which the appellant could not control his passions. The death sentence was converted to life imprisonment.

Inevitably, gender biased judicial thinking condones a husband's loss of control, shifting the blame onto the wife for inciting it, and since domestic violence is considered a routine matter or a husband's prerogative, the intervention of even her brother to save her is considered provocation enough to mitigate his sentence.

In *Samson Mashi alias Pappu v. The State*, Nasreen's husband had been working in Saudi Arabia for four to five years. In his absence, his real sister's son, Samson Mashi alias Pappu had been living with her and her children. He had allegedly been trying to persuade Nasreen to commit zina (adultery), with him and, on her refusal, had threatened to kill her. On the night of the incident, Samson Mashi went to her and wanted to commit zina, but she refused. He then sprinkled kerosene oil on her and set her on fire with a match, thereafter running away. In hospital, she made her statement, praying for action against the great cruelty that was done to her. About two weeks later she died. Samson claimed he had been wrongly involved in the case. He stated that Nasreen had asked him to have illicit intercourse with her, but he refused in view of his relations with her, on which she threatened to commit suicide. He further stated that at the time she set herself on fire, no one else was present and he had taken her to the hospital. The trial court found him guilty and sentenced him to death. In appeal, the High Court held that the appellant had been rightly convicted and sentenced. Nevertheless, it went on to discuss that although the investigating officer had stated that no one from the locality had told him anything about the character of Nasreen, he had nevertheless concluded that Samson was having illicit relations with Nasreen Bibi deceased and the same fact had come to his knowledge during investigation. The High Court altered the sentence to life imprisonment and went on to add,

It is surprising that the appellant used to live with the deceased in the absence of her husband as well as used to sleep in the same room. The genesis of the case is shrouded in mystery and it has not been brought on record that what happened immediately before the alleged occurrence.

In *Salahoon v. Abdullah and another*, Abdullah had asked Salahoon, Kalsoom Bibi's father, for her hand in marriage, but had been refused because he was jobless and a vagabond. On the day of the incident, the accused came to Salahoon's house with a hatchet, and gave a hatchet blow to Kalsoom Bibi, as well as to Sukhan. The Sessions Court sentenced Abdullah to death. The High Court maintained the conviction but reduced the death sentence to life imprisonment, holding that

... it appears to be an unpremeditated attack, the origin of which remains shrouded in mystery due to the presence of blood-stained kassi [agricultural implement] at the place of occurrence... We are, therefore, of the view that something appears to have occurred at the spur of the moment when the appellant came there which caused the occurrence... It can, therefore, safely be said that it was an unpremeditated attack and the appellant might have picked up the kassi from the spot and caused the injuries to the accused.
Leave to appeal against the judgement of the High Court was granted by the Supreme Court.

Clearly, much needs to be done to reverse the injustice that women are subjected to; from changing women's own perceptions, to enhancing their awareness, setting up and strengthening support structures, changing social attitudes, reforming the law and sensitising the enforcement agencies. All of these are critical needs. But this will be a long process, and none of it will ever be totally effective unless those charged with the ultimate responsibility of dispensing justice begin to understand what justice really means in the context of women.
the panchayat dilemma
Sardar Mureed Abass Khan Jatoi
(translated by eds.)

Fifty-two percent of the female population of southern Punjab is a victim of severe problems due to outdated customs and rejection of fundamental rights. In certain areas of this region, even today, women are not allowed to wear shoes to ensure that they are not able to meet men's eyes as equals and, perchance, demand their rights.

The existence of panchayats (councils of tribal elders) — whose many sarpanch (heads of panchayat) often retain a prominent status in their respective localities despite ripping justice to shreds — and of privately pronounced and enforced sentences is no novelty. In Miranwala, a Jatoi area, Mukhtar Mai was made the target of the panchayat's cruelty; in Jalalpur Pirwala, Sughran Bibi was raped and photographed in the nude during the heinous act. A student of class seven in Alipur was raped, and yet another student was similarly victimised in Sialkot. In Makhdoom Shaheed, a particularly hair-raising episode was recorded: two and a half years old Nisha was raped, and the culprits not brought to justice despite the testimony of the professors of Nishat Hospital in the post-mortem report. One Majeed's mother was forced to lie naked on the bonnet of a car as she was driven over an area of five kilometres because Majeed allegedly had relations with the daughter of a sardar (head of tribe). In Lodharan, the panchayat forced divorce upon seven women and thus separated twenty-five children from their mothers' care. In this manner, many households have been destroyed rather than reconciled because of a panchayat's decision.

Jagirdars (landowners) are like kings in Jatoi. They can obtain sentences in favour of those whom they patronise in self-created panchayats — of course, the importance of the client increases with the number of votes he can guarantee. The poor, helpless man is invariably the victim. If he goes to the dera (seat of the landlord) with his complaint, he is punished for his presumption in doing so. A case may be registered against him for stealing a goat, cow or buffalo, or the local doctor bribed to make an illegal allegation. Often, such cases are withdrawn when the accused agrees to give his daughter in marriage in compensation. Recently, when a complaint about the theft of a donkey worth Rupees two thousand (Rs. 2000) was made to the landlord, he imposed the decision that the accused would give his daughter Shamsi in marriage to the complainant.° The poor accused had no choice but to agree. In Korai, in Thana Shehr Sultan's jurisdiction, Razia Bibi was assaulted after she and her six children were intoxicated. The panchayat ruled that the accused should give Razia's husband one acre of land and a woman in marriage, thus adding insult to injury.

In Basti Nichrani, when Shakeel and Rukhsana were seen in conversation, Master Faiz Bakhsh (Rukhsana's father) demanded in the panchayat that night that Shakeel's father, Ghulam Farid Nichrani, give a girl of his family in marriage in lieu of the damage done to his family's name by Shakeel's liaison with Rukhsana. When Shakeel's parents refused to comply, the entire biradiri (kin group) entered their house and tortured the whole household. Nichrani argued that all his daughters were already married, therefore it was impossible for him to give one of them in marriage. He told Faiz Bakhsh to get Rukhsana examined by the lady doctor in the government hospital, and to have him arrested or otherwise punish his son if evidence of violation was discovered. Faiz Bakhsh told him that the mere suggestion that he have an unmarried girl examined was a matter of shame, as his clan never took women to the hospital. The decision to give one bigha (four canals) of land and two girls in marriage was imposed upon Nichrani: his granddaughter, aged two, and his brother-in-law Ata Muhammad's daughter, aged seven, were given in marriage to relatives of Shakeel. The latter girl married a student of class five, whose age according to the school records was nine at the time of the nikah (Muslim marriage contract). The nikahkhwan (cleric who reads the nikah) was told that the bride was eighteen and the groom was twenty years of age. Nichrani was made to
understand that if his granddaughter were not given in marriage upon coming of age, he would have to forfeit four canals of land, which would otherwise be his upon the solemnisation of the marriage. An undertaking between the parties was recorded on stamp paper, under oath.

When Nichrani and Ata Muhammed came to our organisation (People’s Social Welfare Society), we assured them of our full support. We met with the then Chief Minister of Punjab, who directed an official to visit Jatoi and make full inquiries. The official visited the town and summoned the nikahkhwan. He looked up the entry of the nikah in the register; then, taking the register with him, made a visit of the school. The school entrance register gave the dates of birth of the children involved. The official signed on the register of the primary school, photographed and photocopied it. Armed with these, as well as photocopies of the nikah forms, he went to the police station and made the in-charge, Latif Khan Chand, responsible for acting against all those who had been present at this decision, and those whose testimony had been used to reach it. Master Faiz Bhuksh then went to the local landlords, who were his patrons. They took action against Nichrani and also instigated the local police to do so, for informing us about the issue. Although we helped Nichrani, both in freeing him from jail and in repossessing his land, a month later, the local landlords once again succeeded in evicting him from his landing and making him a homeless vagrant.

Another such incident took place in the jurisdiction of Thana Bait Meer Hazar of Jatoi Tehsil. Ghulam Haider and Mai Jeevan had two sons. One of their sons decided to run for a seat in the elections. When his group lost the elections, the victorious party filed a false case against him for theft. He was tortured so hard at the behest of the local politician-landlords that he died in custody. The other son, Ayaz, protested against his brother’s murder. He was accused of a liaison with a woman, whose father and brothers were called to the dera and informed that the woman had illicit relations with Ayaz Ahmed and, therefore, they should kill him. On the landlord’s insistence, the brothers went to Ayaz’s village and were about to carry off Ayaz on his cot when he woke up. All the assailants hit Ayaz repeatedly with axes, and also injured his mother, Jeevan Mai, when she tried to intervene. Ayaz died on the spot because of his wounds. Thana Bait Meer Hazar, after registering FIR 75/04, began investigating the case. Jeevan Mai and Ghulam Haider are extremely poor, and were able to attend court summons only with the help of a donation. Two lawyers from our organisation represented them. Finally, the local landlords started engaging in propaganda against our organisation, and registered a false case against me in Thana Jatoi. A delegation of ours met the then S.P. Muzaffargarh and D.S.P. Jatoi, whose advice was: How long will you fight against the feudal system? The case against you will be discharged on condition that you disband your organisation. Let them make decisions as they do in the deras, it is their business to do so.

Our young members were incensed, and told the police officers that they would not desist, even if cases were registered against all of them. Thankfully, in the meantime, the D.S.P. was transferred. The officer who replaced him as D.S.P. Jatoi, Malik Laqat Ali, was very vigilant in his duty. We requested that an inquiry be made; he summoned all the parties. The landlords did try to use their clout, but the D.S.P. gave a just decision, and the case against me was finally discharged. However, D.S.P. Malik Laqat Ali was transferred when the clash between the landlords and him worsened. Thus, the state of affairs in our hometown continues as always, as does our struggle against it.

If we look at Southern Punjab, the incidents of violence against women present a grim situation:

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<th>Nature of Violence</th>
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<td>Women killed on the pretext of honour</td>
<td>85</td>
<td>115</td>
<td>200</td>
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<td>Women killed because of household disputes</td>
<td>109</td>
<td>167</td>
<td>276</td>
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<tr>
<td>Women who became victims of sexual violence</td>
<td>573</td>
<td>540</td>
<td>1113</td>
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<td>Kidnapping</td>
<td>667</td>
<td>634</td>
<td>1301</td>
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<td>Acid-burning</td>
<td>15</td>
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<td>39</td>
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The statistics for the last two years show the violence to which Eve's daughter is subject; it proves that her rights as a human being are being trampled upon time and again. Will this scenario of violence continue in the coming days? We should all think about this. Our aim is to end this kind of violence. If we are able to save even one woman from murder on the pretext of honour, from acid-burning, from rape, or from becoming the victim of a wrong custom, we shall consider ourselves successful in this aim.
an inhuman heritage

Eds.

On his recent visit to the United States of America, President Pervez Musharraf delivered a statement before the Western media which clearly exposed the male bias against women in Pakistan, even if the male in question is no less a person than a President. President Musharraf made a blanket statement against Non Government Organisations (NGOs), claiming that they encourage women to rely on rape claims to obtain foreign visas. President Musharraf has always walked a political tightrope as far as his actual stance vis-à-vis discrimination against women is concerned. And although not much has been achieved towards improving the status of women in our country during his tenure, it is only now that he has so blatantly exposed his anti-woman stance. President Musharraf has denied making the statement and, interestingly, the news of his discriminatory comments was initially unavailable in the local press. This lent credence to the popular belief that this news was being deliberately suppressed locally and that the comments were made purely for foreign consumption to maintain the government’s supposed international image as a pallbearer of women’s rights in Pakistan. Unfortunately, this incident merely reiterates the basic fact that women in Pakistan are severely disadvantaged and discriminated against.

Nowhere is this more apparent than in the marital practices of the society. One rarely witnesses cruelty to the extent suffered by honour killing victims, but certainly there are many other local marital practices that call for investigation.

It is accepted that marital customs such as dowry, bride-price, watta satta, marriage to the Quran, etc., are not merely peculiar to our region; however, in our culture, ridden with a variety of nuances of bias against women, these only tend further to undermine the position of women in our country. This paper attempts to outline the various customary practices which affect marital law in Pakistan, to trace their various origins, to reflect on the consequences of these questionable customs, to examine the government’s efforts and to suggest possible solutions.

DOWRY

Dowry, or jahez, is the gift bestowed on a girl by her parent, at the time of marriage. This gift may be in cash or kind, but should, of necessity, meet the demand of the boy’s family.

An important attribute of status, dowry is popularly considered a Hindu custom, yet widely practised among different communities in Pakistan. In ancient times, dowry was prevalent amongst the Brahmans and Kshatriyas, who had only priestly and martial duties. The bride’s entry into the family meant an additional monetary burden without any contribution to the income, so the dowry was given to compensate this burden.

Dowry as a cultural institution is merely adding to female plight in Pakistan. A multi-faceted gender issue, dowry has a deep social and economic impact. Often used as bait by the girl’s family, a heavy dowry merely attracts greedy unseemly individuals. The girl’s family also usually use dowry as a tool to deny the girl her right of inheritance, although it is hardly ever used or enjoyed by the girl herself. Some advocates of dowry justify it as a
support mechanism to help the new couple begin their practical life, but realistically speaking one knows the futility of this suggestion.

Clearly dowry has a different impact on women hailing from different strata of society. As always, it is the poorest who suffer the most. As a result, many girls remain unmarried for want of an “appropriate” dowry, and families have been known to starve to prepare an adequate one. Dowry-deaths due to stove burnings are now commonplace, while many a parent has been known to beg, borrow or steal to give his or her daughter a chance of marriage.

The government has not made any real efforts to eradicate this deplorable practice. It has been reported that the Commission of Law and Justice has drafted a new law against dowry, although it is anybody’s guess as to when and in what shape it will be enforced and implemented.

Dowry has also never been a core issue for the NGO sector, although this deep-rooted marital custom is a major cause of violence against women. In fact, some mainstream NGOs still provide dowries to girls to facilitate their marriages.

**B R I D E - P R I C E**

Any discussion of dowry must touch upon the less prevalent practice of bride-price, which is nothing more than a reversal of dowry. Bride-price is the gift, in cash or kind, offered to the bride’s family in return for the bride. In essence it is an exchange.

Again a marital custom associated with the Hindus, it was prevalent among the Vaishya and Shudra castes, in times past. The Vaishyas and Shudras worked as menials and physical labourers. The bride-price was thus paid in lieu of the income of which the bride’s family would be deprived by the marriage, and which would be generated by the bride’s entry into the family as another earning member. Also an old Beloch and Pashtun tribal custom, *vulvar or taka*, as bride-price is referred to locally, is raised on the basis of the beauty and youth of the bride, a repeated proposal of marriage, the wealth of the proposer, or the bride’s becoming a second wife.

High levels of economic hardship reduce some families to selling their daughters into marriage. However, for others, it is merely another custom to be followed. Girls are thus treated as mere cattle to be bought at a whim, who do not benefit from the payment of this amount, but are in fact treated as slaves.

If dowry has been denied the limelight as a major element of practices against women in our society, the issue of bride-price has fared even worse. Meanwhile, neither the government nor the NGO sector has ever concentrated on removing this evil from society.

**S L A V E R Y**

Although slavery is illegal in Pakistan under the Constitution of 1973 (Article 11), girls and women continue to be traded, either to settle debts or conflicts, or merely as a commercial incentive. Pakistan is both a country of origin and a transit country for the trafficking of women for forced marriage. This form of slavery is organised by crime networks that span South Asia.

In certain underdeveloped rural areas, the open sale of girls and women in markets has been reported. Parts of Balochistan in particular have been identified in this regard. The Tharparkar area of Sindh has also been reported to be one of the main hubs of women’s trafficking in Pakistan. As usual, the consent of the woman is irrelevant. Separated from her friends and family, she is left to fend for herself.

Women’s trafficking is linked to children and drug trafficking, and political exigencies result in the government’s
“see no evil, hear no evil” policy on this issue, even though the Constitution of Pakistan, 1973, clearly bars it. Thus slavery continues to be a prosperous albeit unlawful trade in Pakistan.

HAREMS

Harems can be traced back to antiquity. Since time immemorial, kings, emperors, nobles and nawabs have all maintained harems. Denied the financial ability to maintain a family, men refrained from marriage and the resulting number of unmarried women paved the way for the establishment of harems as a means of preserving the virtue and chastity of women.

Then, too, harems played an important political role: various wives and concubines, belonging to influential families, assured the political security of the master of the harem. Insecurity in harems provoked unrest amongst its inhabitants. Whether vying for their master’s attention, or shying away from it, the women of the harem were caught up in a political web of intrigue. These women were totally at the mercy of the eunuchs who reigned supreme as their sole connection to the outside world.

Harems are still maintained in rural Sindh and Punjab, where women’s lives are held cheap. The poor ones suffer not only the humiliation of being a part of the harem but also the wrath of the more powerful women there.

Although certain NGOs in Sindh have made substantial efforts in drawing attention to this issue, there has been no governmental interest whatsoever.

MUT’AH

*Mut’ah* or fixed-term marriage is one of the distinctive features of Shi’ite jurisprudence. No other school of Islamic jurisprudence allows it. It is believed that the concept of *mut’ah* was permitted at a time when the Muslim men were away from their wives and passing their time in great discomfort.

In Pakistan, *mut’ah* enjoys no legal status. Women may be coerced into performing *mut’ah* and thus used and discarded without hope of any legal redress.

MARRIAGE WITH INANIMATE AND HOLY OBJECTS

It is a common practice in Sindh to marry one’s daughter to inanimate and holy objects such as trees, or the Holy Quran. In Southern Punjab and Sindh, especially in Syed (those who claim direct descent from the Holy Prophet Muhammad, pbh) families, the marriage ceremony of a girl may be arranged with the Holy Quran. Forced to “wed” the Quran and withdraw from the right to marry, the girl is then expected to spend the rest of her life reading the Quran. The “bride” of Quran is honoured as a religious saint: she lives her life as a virgin and is considered free of worldly desires. Deprived of a normal life as ordained in the very book to which she is “married,” she is coerced into remaining single all her life.

There is no religious sanction of such a marriage; indeed it is totally un-Islamic. However, local marriage registrars are also often invited to witness the ceremony and record the event in their official books. Originating in the greed of man, this cruel tradition practised by feudals and landed families, has been established to deprive women of their rightful inheritance and to ensure that landed property remains in the hands of the male members of the family.
Haque Bakhish (withdrawal from the right to marry), as Quran marriages are popularly known, is at once atrocious and barbaric, but what is truly shocking is the fact that reports in newspapers reveal prominent Sindhi politicians holding public office to have forced their kinswomen to submit to this custom.

The status of Quran marriages was recently reviewed by a special sub-committee of the Council of Islamic Ideology. The Council has recommended life imprisonment under Section 295 (b) of Pakistan Penal Code, 1860 (PPC), for marrying girls to the Quran.

CHILD MARRIAGE

Child marriage originates form mediaeval times. Today, childhood marriages are common in the rural areas of the Pakistan. In some cases, parents arrange these marriages even before the time of the birth of the child. Often the children never meet until the wedding ceremony, when they are both of an acceptable marriageable age, which differs based upon custom. In some cultures, the age is at or even before the onset of puberty.

Common among the nobility of some countries, child marriage secured political and financial alliances. Today, the same considerations remain along with considerations about similar social standing, not giving children the opportunity to indulge in loose moral practices, etc. Another rationale behind this practice is that a child’s parents can secure her or his future by arranging a suitable match.

Globally this pitiless marital custom has gone out of vogue, yet we in Pakistan still remain adherents of this custom. Forced marriages of young girls continue to be reported despite a legal minimal age of sixteen. There have been several reported cases of marriages between infants and young children, but a more dangerous variation of child marriage is when a marriage between a young girl and an old man or a young woman with an infant is arranged. Saddled with the burden of her gender, the consent of the woman does not feature at all in such a transaction.

Under the Muslim Family Laws Ordinance, 1961, a girl must attain the age of sixteen and a boy the age of eighteen, and both must consent before a marriage can take place. Also, in 1990, Pakistan ratified the United Nations Convention on the Rights of Child, 1989, which prohibits child marriages.

WATTA SATTÁ

Practised amongst the feudals and particularly in the lower and middle class of society, watta satta is an exchange marriage. In the majority of the cases under the system, a girl is married to a man in exchange for a bride for her brother. However, watta satta is best explained as an arrangement where a girl from one family is married to a boy from another family in exchange for the marriage of a male from her family to a female relative of her husband.

These barter or exchange marriages facilitate marriages at lesser expense and are therefore, preferred by the lower classes. Another justification for such arrangements is the guarantee of the safety and honour of one’s daughter. Watta satta is sometimes part of a package deal which includes the giving of pieces of land, cattle and cash.

Unfortunately, under this system, not only is there often the issue of age disparity, but also the unhappy relationship of one couple can affect the marriage of the other couple. A girl’s husband and his family may retaliate against her in case the husband’s sister/relative is not happy with the bride’s brother/relative. Thus, a precarious balance must be maintained to safeguard the happiness of both couples, which is fairly impossible in most cases. Resultantly, many women suffer due to the misfortune of being part of a watta satta arrangement.
INCEST

Incest is sexual intercourse with a namehram, a person within the prohibited degrees of marriage. Despite its illegal status, incest exists in all societies and is also condemned in most. In a country where intense poverty requires whole families to reside in a single room and carry out their marital obligations in that same room, it is not surprising that incest is so widespread here. However, it remains widely undocumented. This is not due to the lack of occurrence of incest but, in fact, due to the pressure on the victims to remain silent. After all, incest is an allegation against one's own relative and in an environment where women are hesitant to acknowledge rape by strangers it is not surprising that incest remains mostly unreported.

Women are either refuted when making claims of incest or asked to remain silent even by their female relatives. Many have suffered the same fate and are either indifferent or unwilling to take a stand to encourage reporting such a case. Also, these claims are mostly against the bread-earning members of the family. Thus, monetary considerations together with that of avoiding rifts in the family motivate people to cover such cases. Also, in this male-dominated society, women are hardly in a social position to support each other. Thus, incest continues to be practiced without any qualms about its legal redress.

There are many reports of women being forced to marry their father-in-law in case of the death of the husband or his disappearance. Illegal and without any religious sanction, incestuous marriages have no status in law and, therefore, women who have been forced into such a marriage cannot claim any rights under the marriage in a court of law. In fact she may be tried for adultery in such a case.

In the Bijnor district of Uttar Pradesh in India, her father-in-law raped a woman and the local panchayat (council of tribal elders) asked her to marry him and treat her husband as her "son." This shocking ruling reflects what is happening in our own country although no one is ready even to accept that incest exists in Pakistan.

VANI

Also referred to as swara, sakh, and sharam, in various parts of the country, this tradition has become a great evil of society. The inhuman tradition of vani hails back to almost 400 years ago, when two Pathan tribes of Mianwali fought a bloody war against each other. At that time, a jirga (council of tribal elders) recommended that the dispute be resolved by giving girls as compensation for the murdered people. Later on this decision became a custom.

When compromise is sought between two belligerent tribes, this tradition is followed to avoid further bloodshed. Usually vani is affected in the case of murder and kidnapping of womenfolk. The nearest virgin kinswoman of the offender is given over to the aggrieved family. Considerations for vani include the number of murders, length of dispute, as well as the power balance between the two opposing parties.

Since the marriage is a forced one between enemies, there is no wedding. The woman is usually made to ride a donkey, pony or horse, and taken to the opposing family by a third party. The receiving family takes the girl as a punishment to their enemy, but the most severely punished is the vani herself. Handed over to a family one or more of whose members have been killed by her kinsmen, her future holds no hope of happiness.

Although the government claims to be mulling over a law for the eradication of this marital custom, no legislative movement has been made in this regard.
HONOUR KILLINGS

A misnomer, this term signifies nothing honourable. The religious and cultural origins of this practice must be studied to find a way to effectively eradicate it from society. Although honour killings have been associated with Islam as an Arab-Islamic practice, it actually occurs in all regions of the world, including western countries. Reports submitted to the United Nations Commission on Human Rights show that honour killings are also committed in Bangladesh, Great Britain, Brazil, Ecuador, Egypt, India, Israel, Italy, Jordan, Pakistan, Morocco, Sweden, Turkey, and Uganda. Even though Iraq, Iran, and Afghanistan have not submitted reports to the UN in the past, the practice of honour killings has been reported in all three countries.

In our region, honour vests in the body of the woman, and consequently many women are murdered in the name of honour or izzat by their own kinsmen. The origin of honour killing in Pakistan lies in the Baloch and Pashtoon tribal customs of karo-kari killings, a more ritualistic form of honour killings. This custom is widely practised all over Pakistan, in particular, our rural areas. Women become pawns to settle old scores: they are killed in the name of honour in order to involve enemies in charges of adultery. They are often accused on the basis of hearsay and thus become victims of a male-dominated society. Murder on the pretext of honour is also used by men to rid themselves of burdensome wives.

Honour killings are particularly relevant to this paper in that women who make marriages of choice without the consent of their kin are promptly declared kari (literally, black female) and condemned to death in the name of honour. The existence of cultural excuses for murder for the perpetrators of honour killings presents a major predicament with reference to human rights. Culture and customs which violate human rights must be condemned and abandoned in order to uphold universal notions of justice.

The recent Honour Killings Bill of 2005 has been more of an effort on the part of NGOs as opposed to the government and, in fact, parliament has introduced only a diluted version of the draft bill proposed by NGOs (see s/o, Volume 3, pp. 120-126). The latter are still struggling for the repeal of the law of Qisas and Diyat enshrined in PPC, 1860, as well as the Hudood Ordinances, 1979, since the Honour Killing Bill can do nothing towards protecting women till the repeal of these laws. Certainly, no effort must be spared in directing the agenda of state governments and the international community towards the abolition of the custom of honour killing from society.

CONCLUSION

Despite many setbacks, over a period of time women's rights have improved worldwide. The Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW), has gone a long way in bringing international attention to women's rights. Realistically speaking though, international laws cannot enter the private sphere to assure protection of women in the home. They can, however, make states responsible to achieve this through their respective national legal systems. Movements against human rights abuses like honour killings, which are gender specific to women, are gaining momentum and women's issues are in the limelight globally.

Pakistan has ratified CEDAW and is as such responsible to ensure elimination of all acts of discrimination against women by persons, organisations or enterprises. While formal laws in Pakistan do not condone the marital customs and practices discussed above, Pakistani courts have not done much to condemn or address them. As a result, parallel judicial systems such as jirgas or panchayats have chosen to implement their own laws. Most of these firmly entrenched traditions may be considered a part of our cultural heritage, but a heritage that provokes injustice and cruelty and results in the violation of basic human rights, must be rejected if Pakistan is to undertake the journey towards recognition of women's rights and the establishment of a non-discriminatory and democratic judicial system.

Legal measures must be undertaken that ensure the security of women in general and give them the space to contract marriages of their own free will. The government must undertake review and revision of criminal laws to
guarantee equal protection of law for women, and declare both the sale of women for marriage and the giving away of women in marriage for any consideration to be offences.
In the United States of America, lesbian and gay rights advocates have long sought recognition of homosexual unions in the eyes of the law. In the recent Presidential elections, this issue was one of major if not critical importance. Acceptance has been slow and only recently has the movement for recognition of gay marriages gained any momentum.

State legislatures and judicatures have responded in different ways to this issue. The resultant lawsuits and amendments try to define the future of homosexual marriages. Although no focused picture has come forth, certain amendments and decisions outline the direction this future may take.

In this regard, the landmark decision by the Massachusetts Supreme Judicial Court in November 2003 has gone further than any court yet towards legalizing gay marriage in the United States of America. Although the tribunal did not order the state to start issuing marriage licenses, it ruled the state’s denial of gay marriage unconstitutional and gave the legislature 180 days to resolve the issue. This marked the first time a high court has ruled that civil marriage between same-sex couples is a state constitutional right.

In early September 2005, the California Legislature became the nation’s first to approve a gay-marriage bill. The Legislature’s Assembly narrowly approved gay marriage after twice defeating identical bills. The Senate had approved it a week earlier. However, Governor Arnold Schwarzenegger says he will veto it.

Eighteen states have adopted state constitutional amendments against same-sex marriages. A federal judge struck down Nebraska’s amendment earlier this month by saying it went far beyond merely defining marriage as between a man and a woman. In 2006, voters in Alabama, South Dakota and Tennessee will decide whether to ban same-sex marriages. Legislatures in at least thirteen other states are weighing similar amendments.

Court decisions have varied in their stance towards gay marriages. Judges in California, New York state and Washington state have recently ruled that prohibiting same-sex marriage violates their state constitutions. On the contrary, in April 2005, the Oregon Supreme Court ruled that 3,000 same-sex marriages performed last year were illegal.

Two states have opted to legalise civil unions. Civil unions give same-sex couples the same benefits as married couples, without marriage. Connecticut passed a civil-unions law in April 2005 that goes into effect in October 2005. Vermont has permitted civil unions since 2000 following a state Supreme Court ruling.

No consistent pattern has been seen in the various lawsuits and amendments regarding this issue. Even so, it is clear that the hub of this debate remains Massachusetts. The state is moving forward on a constitutional amendment that would ban same-sex marriage but allow civil unions. The Legislature approved the amendment last year and
will take it up again in late August. The state Constitution provides that the Legislature must pass it a second time before the measure would go to the voters in November 2006. The outcome remains uncertain, as does the future of the homosexual marriage movement.
Peace Work: Women, Armed Conflict and Negotiation

Radhika Coomaraswamy and Dilrukshi Fonseka (eds.)
2004
New Delhi: Women Unlimited, Colombo: International Center for Ethnic Studies
278 pages

the labours of peace: feminist peace activism and agendas for the future

Neloufer de Mel

Peace Work: Women, Armed Conflict and Negotiation. I like the title of this collection of essays. Peace work because there is now a growing acceptance within scholarship that theorises on issues of war and peace, militarisation and memory, truth and reconciliation, that these are processes that require labour. The labour of many actors as they construct the conditions for war or peace; the day to day work that forwards these processes; the struggles, disputes and conflicts that arise over them, and how these are negotiated, settled, compromised with – all of these entail work. But most importantly, as Argentinian social scientist Elizabeth Jelin, whose own book is entitled State Repression and the Labors of Memory (2003), notes, calling attention to work is about acknowledging the people who remember or make peace happen, those who, at times against tremendous odds and danger, work to transform their societies, those who are not passive consumers but people who make peace an activity, and labour on despite grave setbacks.

Those people, in Peace Work, are women. The essays incorporated in this volume, which were first presented at a conference on Women, Peace building and Constitution Making held in Colombo in May 2002, as well as the editors’ introduction to the collection, provide an excellent summation of the issues and debates that currently preoccupy feminist scholars and human rights activists about the gendered nature of both war and peace, and the contribution women have made to peace building. In their introduction, Radhika Coomaraswamy and Dilrukshi Fonseka nudge some of the terms and concepts such as agency and victimhood, widely used in the 1990s, to where the language is at today: to understand women not merely as victims of war, or agents of peace – both essentialisations which deny and obfuscate the full range of how women interact with war and peace – but to look at how the structures and instruments of war, and of peace, are themselves gendered, thus having a different impact, as they do, on men and women.

On first reading, this book may well have been titled “Feminist Responses to 9/11.” The first two essays - Rubina Saigol’s “Ter-Reign of Terror: 11 September and its Aftermath” and Charlotte Bunch’s essay “Peace, Human Rights and Women’s Peace Activism: Feminist Readings” mark, either in their titles and/or main arguments, the impact of 9/11 on our contemporaneity. Charlotte Bunch unambiguously marks 9/11 and George Bush’s “war on terror” as a wake up call, a moment of great urgency for feminists around the world to be alert to how militarised governments work, and how terrorism is instrumentally used to jettison even rhetorical commitments to human rights in the name of national and public security. Bunch states that “The need for articulating an approach to global security that ensures human rights and human security for women and men is more urgent than ever in the post 11th September world ... ” particularly so because whatever gains secured by feminists and human rights activists so far are in danger of being drowned by the jingoism of a post 9/11 militaristic, nationalist discourse. For Rubina Saigol however, the talk of 9/11 as a watershed masks the fact that what got legitimised in the name of national security was already well under way in many countries around the world. The rush to call 9/11 a defining moment, or as CNN put it “the biggest terrorist attack in history,” stems, for Saigol, from the fact that it was an attack on the so called “inviolable values” of global economic and military domination which the Twin Towers and the Pentagon spatially symbolise(d).

1 p. 37.
But it is the case that post 9/11, the global discourse on “terror” shifted to open up a space for many governments to talk with ease about, or rush through, new legislations that buttress repressive security apparatuses of the State. It is also the case that the “either you are with us or against us” slogan placed women in a bind because either way, as Saigol states, “the choice is for favouring terror, murder, genocide and war ... neither one is a choice for peace.”

In this dialogue over the precise impact of 9/11, the next essay in Peace Work by Ritu Menon entitled “Doing Peace: Women Resist Daily Battle in South Asia,” offers a compelling argument. For Menon, the violence women experience in highly militarised conditions of armed conflict is within a continuum of violence they experience in their daily lives as victims of domestic violence, sexual harassment, dowry abuse, trafficking, rape and so on. Here, Menon echoes Cynthia Cockburn who wrote in her book The Space Between Us that “Feminist work tends to represent war as a continuum of violence from the bedroom to the battlefield, traversing our bodies and our sense of self.” This is a violence that is sanctioned as part of a consensus under patriarchy. The logic of this argument permits us, therefore, to realign our understanding of dates such as 14 and 15 August 1947, or 9/11/2001, not as foundational moments but signposts that lead us to look around and beyond them: at “the less obvious” linkages between routine gendered violence and that experienced by women at times of heightened conflict. For Menon, it is precisely because women understand violence to be a part of their daily existence, because they have “first hand knowledge of the connected form of domestic, communal and political violence that stretches from the home to the street and into the battlefield” that they are committed to labouring for peace. And it is in the multivalent discussions of feminist peace activism that Peace Work comes into its own. All of the essays included in the volume discuss pertinent and urgent issues for feminists involved in peace work today. In an epoch which, to its discredit, has witnessed the greatest bloodshed, and the destruction and displacement of civilian life, what are the feminist agendas for peace? How do they build coalitions for peace? What should be their relationship to the State, and to militant groups in pushing for peace? What are the mechanisms whereby gender concerns can be mainstreamed into peace processes? Where are the successes and failures of this peace work?

These questions are answered in every essay in this book through a close look at the particularities of women labouring for peace. The essays highlight three main sites in which this labour takes place: Transnational feminist politics, Women’s participation in constitution building and transitional justice mechanisms, and Women’s entry into post-conflict governance. Both Charlotte Bunch and Wenona Giles (for her essay Giles draws on the conferences that brought together feminists from Sri Lanka and former Yugoslavia and the Women in Conflict Zones Network) argue strongly for a transnational feminist practice which takes cognisance of the particular as it engages in a praxis of universal human rights. This balance is a difficult one but both Bunch and Giles recognise that international feminist solidarity is extremely important in sustaining feminist peace activists who labour often in militarised societies, under conditions of hyper nationalisms, censorship and repression. At the same time, gains such as UN Resolution 1325 on Women, Peace and Security, could not have taken place without feminist solidarity on a global level. This is not to forward a sentimentalised global sisterhood, but to acknowledge in Bunch’s words, that a dynamic tension exists between “the universality and the specificity of this work.” This is a tension, as we in Sri Lanka well know, which often informs the discourse on the role of international peace mediators and NGOs in Sri Lanka’s internal, national politics. For Bunch, these tensions about sovereignty, cultures and international standards must, however, be grappled with continuously in a consultative process that has integrity if peace is to succeed.

While Bunch and Giles map their vision of transnational feminist politics onto practices of lobbying, constant dialogue and exchange of information and strategy, Carmel Roulston whose essay is on “Women, Peace Processes and Constitution-Building” that draws on the Northern Ireland experience, posits that women’s participation in peace negotiations is made easier when the “balance is right for international intervention and domestic involvement in the negotiations.” While it is the case that almost all negotiations today have some element of international

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facilitation, this, in and of itself, does not necessarily ensure women’s participation in them. The point is that, as Patricia Jefferey noted in a book she edited with Amrita Basu entitled Appropriating Gender, “male dominated organisations such as trade unions and political parties (and we may add the State) are often unreliable champions of women’s interests and are reluctant to concede that women have special interests and concerns in the domestic sphere and beyond.” This is why there is an imperative for women to apply pressure on their governments, including those mediating peace, to formulate a gender sensitive post-conflict process.

What, then, should be the relationship between women peace builders and the State? Christine Bell, in her contribution entitled “Women Address the Problems of Peace Agreements” points to a liminal space that women must occupy as both insiders and outsiders to peace processes: insiders who inform and ensure gender equity in the new dispensations that are forming, and outsiders who are able to critique their inadequacies and re-draw linear definitions and uncreative solutions focused on mere divisions of power and territory. Just as in grappling with a transnational feminist politics, being inside and outside requires a difficult balancing act that women must continually tread, negotiating with the State; so that even as the essays insist on the value of women’s insights on peace, there is an aporia in the book marked by a certain tentativeness, a tone of compromise that shows just how much women have to work just to be heard, to be accepted as an integral part of post-conflict settlements. Their participation needs to be sought not merely as gender experts as Christine Bell points out, but also for drafting legislation, as experts on constitutions and criminal justice, and we may add, as members of Equity Commissions and transitional justice mechanisms that meet the needs of recording the “truths” of past injustices, reparation and reconciliation. Amongst the creative solutions that Christine Bell calls for, is to push beyond the current format of “hot house”, “back room deals” of peace negotiations which are family un-friendly to modalities that encourage women’s participation in talks. Bell is aware that fighting over such issues may be low priority, but insists that to be creative about all aspects of peace negotiations is only to reiterate the need for gender equality and equity at each stage.

Another approach to ensuring women’s participation in official peace work is to secure enough women in the process of governance itself. Radhika Coomaraswamy, in her essay entitled “Engendering the Constitution-Making Process,” discusses the gamut of issues around women’s access to government, from quotas in legislative bodies to the establishment of Women’s Commissions. Coomaraswamy points out that there are several reasons as to why women’s entry into government is crucial. Apart from the fact that women, demographically, make up half the population in South Asian countries but are woefully under-represented in their Parliaments, an ICES led study on women and governance in South Asia, (published as Women and Governance in South Asia: Re-imagining the State edited by Yasmin Tambiah) point to women’s heavy reliance on the State for distribution of welfare, education, health care, and personal security as an overarching fact. How this relationship is being re-drawn under the neo-liberal economic policies that are gradually dismantling the welfare State is not pursued in Coomaraswamy’s essay. But as of now, given that women still predominantly look to the State for essential services, Coomaraswamy argues that the only way to ensure a gender equitable distribution of them, to ensure a gender sensitised police force and judiciary, is to be strategically placed within government, in parliament, or on bodies like constitutional assemblies. In this way, women can ensure that core gender principles and provisions in governance are in place and that all provisions in the constitution for instance reflect this fact.

Peace Work is a testimony to the rich texture of feminist peace praxis that draws on specific case studies from Sri Lanka, South Africa, Northern Ireland, Former Yugoslavia, the tribunal on the Comfort Women held in Tokyo, international instruments for gender rights and UN mechanisms for training women in aspects of peace work. It keeps faith with, and thereby values, the entire range of women’s peace work, which includes feminist dialogues, conferences, data bases, research, publications, coalition building, lobbying, expert advise and recommendations to legislative bodies, participation at tribunals and truth and reconciliation commissions. In doing so it does not belittle or necessarily prioritise and thereby hierarchise one modality over the other. For me this is a strength of the book.

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10 p. 113.
11 p. 121.
12 pp. 121-122.
13 p. 197.
14 ICES, 2002.
15 p. 203.
However, the book itself is not entirely innocent of a hierarchy. As its emphasis is primarily on women’s peace work vis-à-vis the State, Constitutions and peace settlements, it pays little attention to the details of grassroots women’s groups and their challenges, failures and successes in peace work; or the transitional challenges faced by women combatants during ceasefires and peace negotiations. This is not to say that women who have the capacity and opportunity to work at the topmost national and international levels are the only ones who represent the women’s movement. To say so would be to fall into another essentialising trap. But it is to say that the absence in this volume, for instance, of a full-length case study of a grassroots women’s organisation that has patiently continued its work of peace building, has sustained, and more importantly, perhaps re-defined peace at the local community level, remains unmarked, not because this has not taken place, but because our own recognition of peace work looks for results only at the apex.

Every essay in this volume articulates the need for a broad consensus amongst women’s groups on peace agendas, for a broad consensus in general, if a sustainable peace is to be achieved. This is often difficult given the disparate interests of multiple groups, including women’s organisations that have their own priorities depending on locality, class, political history and organisational mandate. However, even as the need for consultative processes are stressed, there is little detail in the volume of coalition-building within women’s groups themselves: between, for instance, urban and rural women or women of various ethnicities. To be sure, there are plenty of references to women’s coalitions and consultations with civil society, but Carmel Roulston’s discussion on the Bill of Rights for Northern Ireland is a case in point. Even as she writes of how a consensus was achieved on the Bill, she leaves tantalisingly bare the consultative process of this particular event and the dynamics by which, for instance, abortion, a contentious issue for a Catholic community, got discussed in the first place, then compromised with, and finally dropped.17

We need to learn how and why specific issues get picked up and dropped – such issues reflect moments of political exigency, cultural hegemony or transformation and have their historical specificities that can be instructive for us. They also teach us about reductive approaches and women’s own internalisation of nationalist and religious paradigms that have a bearing on the outcomes. At the same time, we know that women’s recommendations have often been appropriated by various States and turned into something else. The evidence from this volume of how patriarchal norms in conjunction with the State are overwhelming. In South Africa, while the Truth and Reconciliation Commissions accepted women’s recommendations that separate hearings should be conducted for women, only three such hearings were held and that too in the regions of Natal, The Western Cape and Gauteng, which resulted in an urban bias.18 Tokenism – something feminists working for gender rights are very aware of – is alive and well. In Northern Ireland, the Equal Opportunities Commission for Women has now merged into an Equalities Commission.19 There is a tension here between democratic mechanisms seemingly set up to look after everybody, and the need for specific affirmative action for particularly marginalised groups like women. Turning an equal opportunities commission for women into a general equalities commission can take away from the very specific concerns and needs of women, and thus veer away from women-friendly forms of redress and appeal. At this moment of time, it is not enough to say this happens, or has happened. Research needs to be done and empirical data collected on the impact of such appropriation, so that feminist strategies can be drawn up accordingly.

As a collection that provides insights into women’s peace work at State and international levels, from the 1990s up to today, Peace Work is an excellent book for scholars and general readers who want to know about peace and conflict studies, women’s movements, and the gendered aspects of constitution-drafting and transitional justice. The book amply illustrates why women need to bring their own concerns into peace talks and find mechanisms for doing so. It thereby sets the agenda for the next few years. The wish list of women that form a leitmotif in this book is about nothing less than re-visioning a society that is free of violence and discrimination. Yet, even as the authors of these essays write of the peace work that has been achieved, their acknowledgement of women’s failures, their indignation at patriarchal appropriation of their causes, and their reflections on women inequity point to the many labours yet ahead.

17 p. 146.
18 p. 266.
19 p. 146.
The Nation FRIDAY, SEPTEMBER 2, 2005

Sonia's travails

WHAT happened to Sonia Naz in police custody has shaken many. Her travails started when her husband, who was wanted by the Jaranwala police, allegedly went into hiding. Pestered by police who in such cases routinely detain the relatives of the accused, Sonia went to Islamabad to seek justice and not knowing the legal implications of her act reached the floor of the National Assembly while it was in session. When pointed out as a 'stranger in the House', she was arrested and sent to jail without seeking an explanation or for the intrusion. This, she says, emboldened the police who picked her up after she was released from jail and kept her in illegal custody for 15 days. She alleges that as a punishment for publicizing the case of her husband, who she fears might be killed by the police, she was raped by a police officer on the instructions of the SP investigations Faisalabad. A helpless woman of 23 and a mother of two, Sonia is so scared of police after her trauma that she is reluctant to join an enquiry by the police department and has asked for a judicial probe.

Sonia's case assumed a high profile due to nationwide publicity. The intervention from the highest quarters may provide a modicum of relief to the hapless victim. Several such cases involving police excesses generally go unreported because the victims fail to muster the courage to speak out. Unless radical steps are taken to change the thana culture, which are promised by every government but never implemented, incidents of this sort will continue to occur. For this an initiative is required from the highest quarters.

Derogatory remarks against Punjabis

Indian lawyer, WPC to move SC

Indian lawyer Sonia Rai Sood has arrived here for filing a joint petition along with the World Punjabi Congress in the Lahore branch registry of the Supreme Court for expunging irresponsible and defamatory verdict given by two British judges against the Punjabis in a judgment in 1925.

Disclosing this at a press conference along with the Indian lawyer here on Friday, WPC chairman Fakhir Zaman said British judges Scott Smith and Mcintyre had remarked in their joint verdict in the murder case titled Babu Khan, citing that the dying declaration of the deceased was not dependable because the Punjabis were prone to speak lies.

He said that Sonia Rai had filed a petition for expunging derogatory remarks in the Lahore High Court, the Supreme Court of which disposed of it with the observation that remarks of the British judges could not be described as a considered opinion against a particular community.

Sonia Rai later started a signature campaign and sent a petition to the Indian President for exerting diplomatic pressure on British government for an apology on the defamatory remarks given by its judges against the people of Punjab. Prominent cricketer Kapil Dev and journalist Kuldip Nayar were among the signatories of the petition.

He said that Sonia Sood would not only file a petition for expunging of objectionable remarks of the British judges in the Supreme Court but also submit a petition signed by scores of people from all walks of life before President Pervez Musharraf to demand an apology from the British government for the remarks given by its judges.

Hasba bill infringes personal freedom: SC

By Nasir Iqbal

ISLAMABAD, August 31: The Supreme Court on Wednesday ruled that the state cannot enforce any religious obligation stipulated by an Islamic, except Salat (prayer) and Zakat.

The Court agreed that private life, personal thoughts and individual beliefs of citizens could not be allowed to be interfered with and held that under the Hasba Bill, the NWFP Assembly had conferred judicial powers on “Moharim” (ombudsman) not only to inquire into cases of maladministration of government agencies but also religious and personal affairs of individuals and blocking powers of judicial review by civil and criminal courts.

On August 4, a nine-member Supreme Court bench had declared several clauses of the Hasba bill relating to powers of the moharim as contrary to the constitution and had advised the NWFP governor not to give his assent to the controversial law.

The unanimous short-order was announced after four-day hearing on a reference filed by President General Musharraf against the bill under the advisory jurisdiction of the court.
Ulema reject registration law

ISLAMABAD, Aug 30: The
Tanzim Hamshar Abli Shura
(Barelvi) on Tuesday rejected
registration of seminaries under
the amended law and said it
would not cooperate in the
process unless their reservations
about changes made in the
law were removed.

The national body, which
includes members from Balochi,
Punjab, Sind, KP and Swat,
also said that they would not
accede by the government's
dictates on the question of syllabus
nor would they stop teaching
the concept of Jihad as it was in
the Holy Quran and Hadith.

They rejected allegations
that some religious schools were
giving military training to stu-
dents.

A large number of scholars,
including the Tanzim's chief,
Mufti Munirur Rahman, and Dr
Sarwar Ahmad and Mufti
for Religious Affairs Jamil
addressed the convention.

MMA president Qazi Hassan
Ahmed also attended the con-
vention but made no speech.

Mufti Munir said that reli-
gious leaders wanted a dialogue
with the government on all
issues concerning seminaries,
but would not compromise on
the independence of their
institutions.

Muslims to decide
if they want
Islamic law. Delhi

NEW DELHI: The law min-
ister and Wednesday it was up to
the country's 150 million Mus-
lims to decide whether they
want to follow edicts or "far-
wa" issued by Islamic family
courts. The comment by Law
Minister H L Shah was made
after a lawyer, Yashwant Lochan
Mohanty, filed a petition demand-
ing that the Supreme Court
order the disbanding of all Is-
lamic courts and ban new ones.

A Supreme Court lawyer,
in a declaration that religious
decisions "made right there was
"made" by the courts on
personal matters, habe no legal
force. —AFP

Experts urge law on
organ donation

The long
pending brain death law in the
country is largely hampering life
expectancy as well as quality sur-
vival of numerous local patients
suffering from renal and/or liver
failure besides those suffering
from relevant malignancies.

Prof Adibul Hassan Rizvi,
Director, Sindh Institute
of Urology and Transplantation
(SIUT) talking to journalists on
Saturday reminded that
"Cadaver Organ Donation" was
also very much needed in the
country to prevent illegal organ
sales.

There was no only a need
to combat exploitation of the
resourceless, compelled to sell
their organs, but introduction of
cadaver donation would also
streamline the process of organ
transplantation in the country.

Women stopped
from voting in
over a dozen
Peshawar UCs

By Sadia Qasim Shah

PESHAWAR, Aug 18: Women
in more than a dozen union coun-
cils of Peshawar district could
not cast vote in the first round
of local body elections on Thursday
due to local customs and unwrit-
ten agreements among various
contesting candidates.

The overall turnout of women
was low in most areas. Women

A visit to these union councils
revealed that women were stopped
from exercising their right to
vote under by local elders and
also by candidates.
Awakening
Bushra Ijaz

No matter that my wings are cut
I have learnt to fly
With my prison on my back
(translated by neelam hussain)

اے گھی

میرے سے پھیک کے پین
گھر
مچکر وردنال کے دو پاروودر
باغت دکر ہاتووقل سے
اثن کا ورک
پندرہ اعجاز
Contributors to this issue ...

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