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Legacies of Common Law: 'crimes of honour' in India and Pakistan

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ABSTRACT *Through a comparative analysis of crimes of 'honour' in India and Pakistan and an examination of appellate judgments from the two countries, we reflect upon how a rights-based discourse of modern nation-states forms a complex terrain where citizenship of the state and membership of communities are negotiated and contested through the unfolding of complex legal rituals in both sites. We identify two axes to explore the complex nature of the interaction between modernity and tradition. The first is that of governance of* polities *(state statutory governance bodies) and the second is the governance of communities (caste* panchayats *and* jirgahs*). We conclude that the diverse legacies of common law in India and Pakistan frame an anxious relationship with the categories of tradition and modernity, which inhabit spaces in between the governance of polities and the governance of communities, and constantly reconstitute the relationship between the local, national and the global.*

The issue of 'crimes of honour' has become prominent in the discourses of law and the state in recent years in South Asia. A mass of literature has documented cases where families and community governance bodies torture, abduct or kill women and men for transgressing the familial codes of honour. The term 'crimes of honour' has been critiqued for retaining the emphasis on male honour and eliding the widespread use of violence not amounting to murder to prevent women from sustaining relationships of their choice.[1] Often we find that non-state legal mechanisms as well as state law are used to frame and regulate women's sexual choices. In India and Pakistan ethnographic studies suggest that caste *panchayats* (village councils), *jirgas* (tribal councils), police officers, lawyers, prosecutors and even trial judges uphold localised notions of sovereignty often in contravention of constitutional law or even of the rule of law.[2] Judicial reasoning then must reckon with custom, how customary practices may abrogate rights of women and how such practices are constituted by the patriarchal politics of shame and honour.

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'Honour crimes' evoke competing spheres of legal subjection simultaneously: customary laws, family law, criminal law and international law. A range of laws, such as Islamic criminal laws (the Hudood Ordinances) in Pakistan and Indian laws on murder, rape, abduction and kidnapping, normalise violence against women and men who transgress familial, religious, racial, class and caste-based normativities. In both these countries, legal reform has been sparked off through the initiatives of feminist groups and, although the trajectories of the women's movements have followed different histories, many networks have been set up between women's groups to follow up individual cases and exchange information on the laws of each country.[3]

In this exploratory article we suggest that the emergence of new and old publics[4] as sites of murder, assault and rape is fashioned alongside the routine use of courts of law, whereby state law is used to 'recover', discipline and/or punish errant daughters. We look at appellate judgments from India and Pakistan, where state law has been used against *adult* women who exercise their right to choose whom they marry. The comparative framework detailing how the politics of honour is normalised, we hope, will allow us to delineate how women are subjected to competing ideas of rights, legality and justice. A comparative perspective also allows us to examine different ways of reading postcolonial legalities, how the law constitutes the nation-state by naturalising some forms of violence as indigenous and excluding others from the picture of national patriarchies, and the tense relationship of the law to emergent publics which are embedded in the politics of honour. In doing this we reflect upon how a rights-based discourse of modern nation-states forms a complex terrain where citizenship of the state and membership of communities are negotiated and contested through the unfolding of complex legal rituals on both sites.

State and the law in India and Pakistan

In the context of colonial law, Sarkar has argued that it was 'cultural' and not 'political' nationalism that enabled middle class modern women to enter the public sphere, by 'domesticating' the nationalist project within the home.[5] Further, the postcolonial state's insistence upon its secular character was mediated by its need to reassure religious minorities, which led to the recognition of 'personal law', first used by the colonial state, for religious groups. This created a context where the Indian constitution reflects the tensions between dominant (unequal) gender relations on the one hand, and some moves towards substantive equality between men and women on the other.[6]

Sarkar's argument about the effects of the colonial projects of cultural nationalism on political nationalism can, to some extent, also be read in the legal discourse in Pakistan. The genesis of the state of Pakistan exemplifies this plurality of norms, especially with regard to the original constitution. This, in its chapter on Fundamental Rights and Principles of Policy, provides for equality and non-discrimination on the basis, *inter alia*, of sex in a number of its provisions (article 25). In addition to article 25, articles 26, 27,

32, 34 and 37 of the constitution of Pakistan set out affirmative action measures enabling women to achieve meaningful *de facto* equality with men in all spheres of life. However, the Hudood Ordinances, Islamic criminal laws promulgated under General Zia-ul-haq in 1999, construct a discourse of difference between men and women, which situates women as fundamentally unequal within an Islamic public. While the Ordinances are an amalgam of five laws,[7] it is the Offences of Zina Ordinance that has the 'most devastating impact on women'.[8]

In reading the complex and divergent legal histories of India and Pakistan we argue that the use of the state in the normalisation of politics indicates that 'the state has an investment in preserving the hegemonic social order in order to mediate and contain social tensions that destabilize the socio-political frame of society'.[9] The state itself is constitutive of the dominant social relations and is therefore limited in its capacity to mediate social conflict: a patriarchal state is definitionally and politically embedded and circumscribed.[10] Moreover, the traditions of nationalism and national movements create a fractured discourse of modernity that half reflects and half rejects 'tradition'—the postcolonial state encounters consequent strains, which are difficult to contain.[11]

The fractured modernity of postcolonial states means that the pressures of globalisation also refract its responses—cultural heritage is fetishised, when, at the same time, the liberalisation of the economy creates new bridges to the 'modern' political economy. The naming of 'honour crimes' as violence against women as it inflects legal discourses and details the role of the state functionaries, such as the police, allows us to suggest how the two nation-states address this form of gendered violence. Through examining the modes of suffering and circumscribing of citizenships we hope to assess the consequences for women and men and communities of this form of violence in order to keep hegemonic social relations in place. The law is also a site where these hegemonic relationships are reconstituted through the recognition of the right to choice. This gains importance, since talk of 'honour' crimes is becoming a transferable discourse being used in other communities in a cosmic civilisational conflict on the one hand, and as a discourse of 'resistance' to globalisation—the erasure of cultural signifiers and the transformation of cultures—on the other.

Two axes might allow us to explore this complex nature of the interaction between modernity and tradition at the local, national and global levels of governance. The first is that of governance of *polities* (state statutory governance bodies such as *panchayats*, courts and the police). The second axis is the governance of *communities* (caste *panchayats*[12] and *jirgahs*[13]). The regulatory power of both is limited as well as complex. This power comes to be articulated at the intersection of disciplinary power of caste or community discourses of honour with sovereign, or as Foucault would say politico-juridical, discourses of crime and adulthood. The translation of caste or community transgressions into crimes shows us how the politics of honour captures state law, while the suspension of legal action against forced marriages allows the familial to escape legal

intervention. The claims to citizenship in the realm of the domestic sphere must be understood in the interstices of the relationship between law, violence and governance.

Along the first axis, that of governance of polities, the naming of 'honour crimes' as a form of violence against women has located the *place* of sanctioned violence in caste *panchayats* in India. Recent campaigns against 'honour crimes' have pointed out that caste *panchayats* are illegal, and that the state must intervene in preventing such bodies from mimicking the state's monopoly over violence.[14] In fact, one High Court even refused to accept that caste *panchayats exist*.[15] The effect of the campaigns against 'crimes of honour' in highlighting the *illegality* of caste *panchayats* and in pointing out the way the caste system prevents and punishes marriages of choice, provides a specific critique of Indian patriarchies. The campaigns against 'crimes of honour' move away from benign descriptions of legal pluralism to grapple with how, for women, pluralistic legal systems may be seen as 'fields of overlapping and intersecting forms of subjection'.[16] These campaigns, with all their complexity, diversity and contradictions, foreground competing notions of governance: at the sites of the domestic, community and polity. As such, they become constitutive of affective and impassioned publics, working to fracture state regulatory forms and their much vaunted hegemonic prowess at the local levels. Although sociologists have suggested that *forms* of adjudication in non-state adjudicatory fora are equally constituted by statecraft,[17] it is the abdication of legal intervention against these bodies that has met with serious criticism by activists.

In recent years the governance of the polity at the local level in India and Pakistan has seen an unfolding discourse of decentralisation that has also been linked to the increased participation of hitherto marginalised groups. The 73rd and 74th constitutional Amendments addressed both these through the expansion of the remit of the *panchayat*'s workings and responsibilities as well as the 33% quota for women representatives and leaders. In Pakistan too the change of government in 1999 from a civilian to a military regime led to reservation of 33% of seats for women in all three tiers (union council, *tehsil* administrative unit and district) of local government and 17% in the national and provincial assemblies and the senate.[18] Even as citizenship of women was thus extended through participation in formal institutions of local governance, the government also augmented the regulatory power of the caste *panchayats*. The relationship between this expanded and more visible institutional framework of local governance and the traditional modes of governance of communities through caste *panchayats* was assumed to be one of state predominance. However, we find that the fracturing of state forms at the local level in the face of other hegemonic discourses and regimes of social power remains unmapped, unexpected and most often contingent on the flows of power in particular moments and spaces.

The second axis along which we explore governance is that of *formal and informal adjudicatory systems* and the overlaps that occur when the axis of governance becomes overgrown with the power play on the ground. The discursive and the institutional lines blur and notions of justice and rights

stand appropriated by caste *panchayats* and other non-state adjudicatory forums in the name of religion, caste, culture and history. State structures find this combination very powerful at times and threatening at others—the embeddedness of state power makes it vulnerable to co-option by 'civil society' institutions through personnel and institutions 'sensitive' to cultural demands as well as through hegemonic narratives of statehood. This affects the way in which resistance to public violence can be organised, at times with the state's help and at others in the face of the state's betrayal. Schemes run by the state for the empowerment of women can be undermined when local hegemonic communities oppose this and visit incredible violence upon women, without any intervention by the state to stop it.[19] Victim testimonies are not recorded in police stations, MPs and local politicians refuse to 'get involved' in informal 'decisions' passed by caste *panchayats*, and the spectacle of public violence then becomes the domesticated regulation of the wider family norms—intra-*gotra* (see below) marriage, inter-caste/religion marriage—despite their conflict with state law and constitutional mechanisms.

Community based adjudicatory systems such as caste *panchayats* have existed since medieval times in South Asia. Moog suggests that 'while there may well no longer be any truly 'traditional' panchayats left which are unaffected by the formal legal system, there still are tribunals of a traditional type in many areas'.[20] Activists have pointed out that the source of their regulatory power arises from the solidarity of the *gotra*.[21] Karat points out that caste *panchayats*:

> are all-male groups of self-proclaimed guardians of caste interests and 'honour' which have the support of the richer sections and enjoy political patronage. The most powerful of these caste panchayats are those of the upper and middle caste landowning sections. The caste panchayats function as a parallel judicial structure and elected panchayats are either subordinated to or co-opted by them. It is through these caste panchayats that the most regressive social views are sought to be implemented.[22]

Governance of communities by caste panchayats and jirgahs has allowed the development of non-state parallel systems of adjudication. These include not only resolving disputes between members of the community but also passing pronouncements on matters deemed to be relevant to the 'honour' of the caste and ensuring the execution of such pronouncements. At a seminar organised by the Department of Sociology, Maharshi Dayanand University between academics, activists and the heads of the *khap panchayats* in the state of Haryana in northern India, Sooraj Singh, Pradhan of the Meham Chaubisi *khap* (caste *panchayats* of the same *gotra*, from several villages) stated that the *khap panchayats* were invested with a 'divine right' to adjudicate marriages of choice that transgressed caste normativity. 'We cannot allow love marriages. Sarvakhaps do not recognise court marriages either', he said.[23] These pronouncements are of course gendered articulations of patriarchal privilege. Revenge rapes, burning down of homes of those judged to be transgressors of caste boundaries, lynchings and beatings are all employed by these *panchayats* as means of disciplining the communal body.

What then is the relationship between these newly empowered *gram* (village) *panchayats* and the traditional, informal caste *panchayats*, and how does the state negotiate between the two? It is often found that not only are individual members of the two *panchayats* from the same family, but that, as public bodies, *gram panchayats* are supportive of the caste *panchayat* pronouncements of excommunication and even murder. Similar religious and class-based exclusions are practised in Pakistan. Thus, what seems to occur here is the constant and complex negotiation of decentralised state structures with hegemonic informal governance structures that maintain a stable social geography.

It is in the moments of conflict between these two impulses that we can read the story of the socio-legal responses to violent practices such as 'honour crimes'. The dilemma that the state faces was recently articulated by the Indian Union Panchayati Raj Minister, Mani Shankar Aiyar. He said that informal pronouncements by caste *panchayats* were 'not in conformity with the Constitutional provisions or based on the objectivity of free of caste and creed consideration'.[24] The Rajasthan State Human Rights Commission filed a writ petition in the Jodhpur High Court against the caste *panchayats* in the area. The major political parties have, however, never opposed these non-state governance bodies.[25]

At the local level, where the tragic stories of opposition to romantic love take legal form, we find state officers such as the Inspector-General of Police, Rohtak, Haryana emphasising that 'caste played an important role in village life'. He did not think 'that the state had any business meddling in their [caste *panchayats*'] activities, for democracy ''essentially means minimal state intervention'''.[26] Chowdhry rightly points out that the belief that 'social issues must be resolved by caste leaders or caste panchayats and not according to the law of the land, which applies a different criterion of justice' has wide prevalence.[27]

If local governance bodies of both polities and communities have become embedded in the landscapes of regulatory violence, the police and the courts as institutions of governance of polities also become resources to enforce and contest notions of male honour and the custodial investments of parents in their daughters. In the next section, we use insights anchored in our reading of appellate judgements from India and Pakistan in specific cases in courts of appeals to reflect on how law is used to regulate women's sexuality and how 'protest' against the use of state law to enforce norms of kinship and alliance is framed within the categories of law.[28]

Juridical responses: legacies of common law

A review of appellate judgements in both countries indicates that the criminalisation of 'choice' in heterosexual marriage demonstrates how law is embedded in the constitution of publics based on notions of honour and how governance of polities and communities overlaps powerfully to regulate sexuality. This is operationalised through local practices of policing, whereby the police acting in concert with the family detain adult women and fabricate

criminal cases against both the woman and her partner. The police may position a woman as an accused and/or abettor to a crime, although technically she is named as a victim. The strategies for challenging the criminalisation of marriages of choice also follow a common route in India and Pakistan. The use of the writ of *habeas corpus*—literally, writ to produce the body in court—is a routinised legal strategy to adjudicate consent and coercion in both jurisdictions, which demonstrates the fractured nature of the postcolonial state in the two countries.

The genealogy of the criminalisation of choice marriages in Pakistan may be traced to two powerful legal norms—the colonial archive as it constituted the pre-Hudood jurisprudence and the postcolonial Islamisation of criminal law. In this paper we examine the Hudood Ordinance to explicate how certain forms of sexual autonomy outside marriage were criminalised and how the law itself produces the conditions whereby consensual relationships are legally transformed into *zina* offences.[29]

Zina crimes are defined as extra marital offences, ie wilful sexual intercourse between a man and a woman without being validly married to each other (such as adultery and 'fornication'). 'Fornication', ie hetero-sexual intercourse between two consenting unmarried adults, is now a crime. Rape (*Zina- bil- jabr*) is subsumed under other *zina* offences.[30] The Hudood Ordinance is applicable to the body population of Pakistan irrespective of religion, sect or creed.[31] One of its most dismaying aspects is that, in a situation where the prosecution fails to prove a woman's complaint of rape or there is no conviction because of insufficient evidence, the testimony of rape is treated as a confession of adultery. Moreover, pregnancy is treated as proof of adultery: used as 'physical confession'. A consensual sexual relationship in a marriage of choice can be converted into a *zina* offence by establishing that a marriage of choice is invalid or by producing 'proof' of an earlier marriage through forged documentation.[32] In this way the law then produces *unchaste* women, sullies their reputations, imprisons them and makes 'rehabilitation' a near impossibility. The number of women in prison has increased drastically since the promulgation of this law, because sexual intercourse outside marriage has become a cognisable offence. Any aggrieved person (not only an aggrieved party) may register a First Information Report (FIR)[33] with the police and the police can arrest such person/s. Further, bail cannot be assumed; women (and men) who are arrested can simply be left in prison for years without any legal assistance.[34]

While Indian law does not prevent an adult from taking an autonomous decision about whom to marry[35] (except for the prohibited degrees of marriage defined under various personal laws), and does not criminalise premarital sex nor punish women for adultery, the laws of rape, abduction and kidnapping are used against women to deter break-up, and to prevent marriages of choice.[36] In the Indian instance, typically, the father (or the guardian) files criminal charges of abduction, kidnapping and/or rape against an adult daughter, asserting that she is underage.[37] The police 'investigation' into the case may result in further criminal charges pressed against the boy's

family. Once the woman is 'recovered,' she may face different forms of violence in the police station. If the woman refuses to support her family, she may be declared insane and sent to a state-run mental asylum. Or criminal charges on the grounds of theft and abetting her own abduction and rape may be brought against her.[38]

Those women who do not submit to familial pressure are sent to state-run women's shelters. Chakravarti points out that although the shelter is constructed as a 'neutral' space between two 'parties' who claim custody over the woman, it is a space fraught with manifold dangers from the natal family, and the ever-present threat of custodial violence within the institution.[39] The practices of incarceration of women, then, are dispersed, just as the techniques of custodial violence vary. For instance, the case that sparked off the 1980 anti-rape campaign in India points to the risks of custodial rape when choice marriages are brought into the ambit of criminal law.[40] Thus they point our attention to the fact that, while thinking of how to rename the ethnographic category of 'honour crimes', we must remember that the category brings together custodial violence with domestic violence and hence raises issues of citizenship in the domestic sphere.

Our reading of appellate judgements in the two jurisdictions suggests that the use of state law—such as the criminal law on rape, abduction, kidnapping and theft, or the writ of *habeas corpus*[41]—against consenting adults is not an uncommon phenomenon. Rather the blurring between elopement and abduction is found in colonial legal discourse.[42] Colonial law inscribed women in circuits of sovereign power, where consent or choice was staged in courtrooms as the 'manoeuvre in the field of govermentality, invoking, prescribing and cancelling out new expectations of normative conduct on the part of both governors and governed'.[43] It is the staging of women's choice in contemporary postcolonial courtrooms through the criminal, constitutional and procedural law that complicates understanding of legal manoeuvres in this field of governmentality today.[44]

Unsurprising remains the fact that state law is used not only to foster but also to counter the criminalisation of choice. The appeals to state law range from petitions to quash the FIR, challenges to illegal detention and pleas for personal liberty under the writ of *habeas corpus*, and filing collusive suits for the restitution of conjugal rights and are a few of the ways by which runaway couples use law in complex economies of power. Indian appellate judgements tell us typically that the husband may seek restitution of conjugal rights *against* his wife. The *collusive* case of restitution of conjugal rights is aimed at gaining legal recognition of the fact that the woman was neither abducted nor forced into marriage. This sets the stage for the woman's *consent* to be certified. The performance of women's agency in court is grounded in the anticipation of police action, ie fear of arrest, illegal detention and custodial violence. Courts of appeal have been fairly responsive to women when such petitions are filed in India.[45]

The contestation within the judiciary over the embeddedness of law in local publics may be read off the recent reversals of the trial court judgments by the Federal Shariat Court in Pakistan. Superior courts now increasingly

reject honour killings of women by their natal families. They shun the old excuse of being 'provoked by sight of a female relative in compromising position' for murders.[46] In certain cases, courts have refused to give any benefit whatsoever to the accused of killing on the grounds of his '*ghairat*' (honour). In *Muhammad Siddique vs the State*[47] the court upheld the conviction of a father who had murdered his daughter, her husband and their infant child to teach his daughter a lesson for marrying according to her choice. Passing judgment Justice Jilani said:

> These killings are carried out in an evangelistic spirit. Little do these zealots know that there is nothing religious about it and nothing honourable either. It is male chauvinism and gender bias at their worst. These prejudices are not country specific, region specific or people specific. The roots are rather old and violence against women has been a recurrent phenomenon in human history.[48]

Likewise the appellate judgment, while reversing the sentence of stoning against Zafran Bibi,[49] held that 'the controversy around the applicability of hudood laws in Pakistan is related more to the erroneous applications of these laws in the country, rather than the laws per se'.[50]

These judgments characterise the embedding of law in honour, personal motives or politics as erroneous in order to re-signify a notion of an *Islamic public* constituted through the *correct* application of the hudood laws.[51] A combination of Islamic law, the constitution of Pakistan and international human rights instruments emanating both from the UN human rights regime and comparable documents from Islamic forums is increasingly cited. It seems to us that the appellate judgments, which critique the misuse of Hudood laws or evoke the rule of law, are mediating two forms of public critique. On the one hand, the critique is inflected by public discourse from women's groups and human rights activists that have campaigned against 'crimes of honour' in Pakistan. On the other hand, the judicial address intends to disrupt the stigmatic discourses that congeal the perpetrators of 'honour crimes' in the figure of the Muslim and cite Islam as the source of the legitimisation of violence against women. We argue that, by challenging the trial court judgments, the appellate courts in Pakistan are inflected by these discourses. The notion of Islamic publics based on the rule of law rather than on the effect and violence of the politics of honour marks the density of these judgments.

The importance of women's and human rights activist movements that strive to secure the rights of adult women persecuted by their family cannot be underestimated. *Mst Humaira Mehmood vs the State*[52] narrates the traumatic story of Humaira, a 30-year-old woman who married Mehmood Butt, against the wishes of her parents. Her father was a sitting member of the Provincial Legislature at the time. He filed a case of alleged *zina* and abduction against Mehmood Butt. The father knew, at the time of his complaint, that Humaira and Mehmood were lawfully married but went ahead and filed a case of *zina* implicating his daughter and her husband, as a result of which they had to flee their home to avoid being arrested. The couple, apprehensive of their lives and safety, fled to Karachi and sought

refuge in the Edhi Centre.[53] Her brother filed a FIR to the effect that his sister had left home after a row with her mother and that he should be given her 'possession'. The police, contrary to procedural laws, illegally detained Humaira in order to 'restore' her to her natal family from whom she had fled in the first instance. After she was 'recovered', Humaira was forced to stage a 'false' marriage ceremony which was documented on video and later produced in court as proof of a prior marriage to a groom of the family's choice. The staging of a false marriage indicates the technologies of power used to simulate elopement as abduction, and translate marriage as bigamy—a *zina* offence—by forging documentary and visual evidence.

Humaira's detention and wrongful confinement was challenged by the AGHS legal aid cell in Lahore pioneered by Asma Jehangir and Hina Jillani. Shahtaj Qazilbash, the Co-ordinator of AGHS who filed the petition, invoked the writ jurisdiction of the High Court of Lahore under the Constitution of Pakistan (Article 199), praying that the court pass directions to produce Humaira in court. Justice Jillani pronounced a landmark decision:

> I find that the police officials who handled this case passed orders and acted in a manner which betrayed total disregard of law and the land and mandate of their calling. Articles 4 and 25 of the Constitution of the Islamic Republic of Pakistan guarantee that everybody shall be treated strictly in accordance with law. Article 35 of the Constitution provides that the State shall protect the marriage, the family, the mother and the child. As Member of the international Comity of Nations we must respect the International Instruments of Human Rights to which we are a party.

The judge reminded the parties that Pakistan is a Member of the United Nations and is a signatory to the Convention on the Elimination of all Forms of Discrimination against Women. He especially drew attention to Article 16, which enjoins all member states to respect the rights of women to family life on a basis of equality with men. Justice Jillani also refered to Article 5 of the Cairo Declaration on Human Rights in Islam to reinforce his argument of women's human rights within an Islamic framework. He condemned in no uncertain language the practices of policing by the state and the family by holding that, 'If these guards become poachers then no society and no State can have even a semblance of human rights and rule of law'.[54] Common law is aligned with Islamic law to regulate the family as an institution that cannot mimic the state by appropriating legitimacy to detain and take custody of adult women in the domestic realm.

Unlike in Pakistan, Chakravarti argues that the category of 'honour crimes' has become prevalent in public discourse in India rather late.[55] This does not mean that such forms of violence were not reported earlier. Rather, they became a regular way of plotting such narratives of violence during the 1990s. During this period the collapsing of 'crimes of honour' in Islamic ways of life in discourses of right wing governance has had pernicious effects. The right-wing discourse on 'honour crimes' makes the claim that, while such crimes occur frequently in 'Islamic' countries like Pakistan, these are not 'normal' to secular Indian contexts. Hence, honour crimes become a terrain

to mark *differences* between different kinds of patriarchies, which then are tied to the concerns of *Hindutva* nationalism. This discourse thereby stabilises the iconography of honour crimes as 'pre-modern', characterising honour crimes as an example of a *pathological* form of patriarchy which is excluded from the recognition and domestication of other forms of national patriarchies brought under review and reform by the state. Women's groups such as AIDWA have criticised the stance taken by the right-wing government, which shows evidence of violence against consenting adults who marry against the customary norms of caste, community or class.[56]

This iconography of the modern and the pre-modern, secular and Islamic, offers us an *internalist* perspective on how to read, in terms of Stanley Fish, the 'interpretive communities' of appellate courts in a comparative framework.[57] We turn to a judgement pronounced by the Allahabad High Court in response to the petition of a young couple seeking the court's help, since they feared that they would killed for violating caste norms by marrying each other. The narrative detailed in the judgement concerns Sujit Kumar, a 30-year-old *Jat* and Rashmi, a 22-year-old who hailed from the Tyagi caste. Rashmi's parents wanted her to marry a person much older than her and when she refused this marriage proposal, her parents threatened to kill her.

This judgment elaborates judicial disapproval of 'honour killings' or 'harassment of people who love each other and want to get married'.[58] The Court takes note of the accounts published in the newspapers to support its observation that 'honour killings' have been permitted by state machinery:

> The barbaric practice of 'honour killings' that is, killing of young women by their relatives or caste or community members for bringing dishonour to the family or caste or community by marrying or wanting to marry a man of another caste, community or whom the family disapproves of, is frequently reported to take place in Pakistan which is a State based on feudal and communal ideology. However, this Court has been shocked to note that in our country also, which boasts of being a secular and liberal country 'honour killings' have been taking place from time to time, and what is deeply disturbing is that the police and other authorities do not seem to take steps to check these disgraceful and barbaric acts. In fact such 'honour killings', far from being honourable are nothing but pre meditated murder.[59]

In relegating communalism and feudalism to the 'other', the judgement makes a fantastic hermeneutic leap, by denaturalising 'honour crimes' as not belonging to the everyday patriarchal practices of a 'secular' nation. The 'horror' of the killing is simultaneously placed alongside another imagery—that of such crimes being located in primordial temporalities and backward spaces in the interior of Pakistan. Distancing itself from its *absolute other*—the state of Pakistan—the Indian nation-state is pictured as 'secular' and 'liberal', where such 'barbaric' and 'disgraceful' acts are found to be intolerable.[60] The juridical discourse on honour crimes then becomes a site for contestations that succeed in *displacing* the place of violence in such

spaces of law. One may even argue that the processes of naming specific forms of violence against women as 'honour crimes' itself entails this displacement.

Conclusions

Only a few tentative concluding remarks remain warranted by this exploratory paper. First, we see in the rise of the visible and violent display of power by forms of communitarian 'justicing' under the auspices of caste *panchayats* and *jirgahs* in India and Pakistan a marker of increasing tension between the governance of communities and the governance of polities through an attempt to regulate decentralised local economies. We suggest that this 'inter-legality', to evoke Santos,[61] stands ruptured through the campaigns against 'crimes of honour'. Second, we see in the overlapping of governance of polities and communities, of refracted responses of state fractions—the courts and the police—an uneasy reflection of the tense relations between tradition and modernity. Constructing the Self and the Other is a complex social negotiation which takes place upon a fractured terrain of social power, with unpredictable, contradictory and unstable outcomes. These boundaries of Self and Other are often defended and policed through demonstrations of violence, which, while not legitimated by all state fractions, is tolerated and even participated in by others. 'Crimes of honour' and of passion then become more than just crimes: this is violence that regulates sexuality within communities, which is seen as 'legitimate' within the community as a means of securing its cultural borders and insuring against transgression of its norms.

Third, and related, our analysis of the universe of appellate judicial discourse is suggestive of both the embedding of law in the politics of honour and the new-found honour of human rights languages and rhetorics. For example, in the case of *Sujit Kumar and others v State of UP*, judicial discourse constructs a secular and modern public in opposition to the feudal and communal Pakistani publics, while placing the onus on the police to protect the couple from the threats of the family. And in the case of *Mst Humaira Mehmood v the State* the court reinscribes a notion of the Islamic public, challenging the idea that an Islamic public is tolerant of 'honour' crimes, while addressing the international obligation of Pakistan as signatory to various UN conventions to uphold the equal rights of women.

The politics of naming 'crimes of honour' enters a specific modality of delineation where certain places come to be seen as 'natural habitats' of this form of violence, even though the displacement of this place of violence through legal discourse is precisely what has been contested by feminist scholars. Moreover, the naming of 'honour crimes' needs to be chronicled to detail its circulation in local, national, diasporic and global spaces, not least to flag the kinds of legal and institutional innovations that these campaigns have achieved. Since the 'legitimating project of procedural legality' remains incomplete without an understanding of how legal regimes are intrinsically entangled with genealogies of dispersion,[62] we must surely examine what

kinds of *manoeuvre* of law and sovereignty are fractured in different sites, in the contexts of nationalism, immigration or globalisation. Hence, the circulation of the category of 'honour crimes' is critical to furthering our understanding of how law is embedded in the constitutions of publics.

The diverse legacies of common law forge an anxious articulation with the categories of tradition and modernity, which inhabit spaces between the governance of polities and the governance of communities, and constantly reconstitute the relationship between the local, national and the global. As our discussion on appellate judgements shows, the languages of women's equality and women's rights do not lend themselves to easy translations. The interpreters of legal regimes and the challengers to these negotiate and contend over the meanings attached to laws, their purview and their wider social importance. It is in these interpretative contestations that women's rights, their claims to citizenship in the domestic sphere, and, indeed, the forms of statecraft take shape.

Notes

We would like to thank Prof Upendra Baxi and Uma Chakravarti for providing a close as well as supportive scrutiny of our work. Any shortcomings are, of course, ours alone.

1 U Chakravarti, 'From fathers to husbands: of love, death and marriage in north India', in L Welchman & S Hossain (eds), '*Honour': Crimes, Paradigms and Violence against Women*, London: Zed Books, 2005, pp 308–331.

2 The same is the case in Afghanistan, where experience suggests the Loya Jirgah was invoked to institutionalise a post-Taliban constitutional ordering.

3 See the CIMEL/INTERRIGHTS Project on 'Strategies to Address Crimes of Honour' at http://www.soas.ac.uk/honourcrimes/.

4 Publics can be defined in three distinct ways and spheres. First, 'there must be as many publics as polities, but whenever one is addressed as the public, the others are assumed not to matter . . . [second], public also has a sense of totality, bounded by the event or by the shared physical space [and third there is] the kind of public that comes into being only in relation to texts and their circulation'. M Warner, 'Publics and counterpublics', *Public Culture*, 14 (1), 2002, pp 49–90.

5 ME John & J Nair (eds), *A Question of Silence? The Sexual Economies of Modern India*, New Delhi: Kali for Women, 1998, p 3822.

6 Z Pathak & R Sunder Rajan, 'Shah Bano', *Signs: Journal of Women in Culture and Society*, 14, 1989, pp 558–582.

7 The Prohibition (Enforcement of Hadd) Order 1979; Offences Against Property (Enforcement of Hudood) Ordinance 1979; Offences of Zina (Enforcement of Hadd) Ordinance 1979; Offences of Qazf (Enforcement of Hadd) Ordinance 1979; and Execution of Punishment of Whipping Ordinance 1979.

8 F Gardezi, 'Nationalism and state formation: women's struggles and Islamization in Pakistan', in N Hussain, S Mumtaz & R Saigol (eds), *Engendering the Nation-State*, Lahore: Simorgh Women's Resource and Publication Centre, 1997, p 92.

9 K Sangari & S Vaid, *Recasting Women, Essays in Colonial History*, New Delhi: Kali for Women, 1993; and J Stacey, *Socialism and Patriarchy in Communist China*, Princeton, NJ: Princeton University Press, 1983.

10 S Watson & R Pringle, 'Fathers, brothers, and mates: the fraternal state in Australia', in S Watson (ed) *Playing the State, Australian Feminist Interventions*, London: Verso, 1990; C McKinnon, *Toward a Feminist Theory of the State*, Cambridge, MA: Harvard University Press, 1989; C Smart, 'The woman of legal discourse', *Social Legal Studies*, 1 (1), 1991 pp 29–44; and SM Rai & G Lievesley, *Women and the State: International Perspectives*, London: Taylor and Francis, 1996.

11 U Chakravarti, 'Rhetoric and substance of empowerment: women, development and the state', unpublished paper, 1999; P Chatterjee, 'The nationalist resolution of the women's question', in K Sangari & S Vaid, *Recasting Women: Essays in Colonial History*, New Delhi: Kali for Women, 1993, pp 233–253; K Jayawardena, *Feminism and Nationalism in the Third World*, London: Zed Press, 1987.

12 *Panchayats* are councils historically consisting of five members, although that number is by no means sacrosanct. *Gram* (village) *panchayats* are local government bodies and caste *panchayats* are regulatory bodies of caste-, *biradari*- and *gotra*-based communities.

13 *Jirgas* are councils which, like *panchayats*, also assume a state (*sarkari*) form and a tribal and community regulatory form.
14 B Karat, *Survival and Emancipation: Notes from Indian Women's Struggles*, New Delhi: Three Essays Collective, 2005.
15 See A Takhtani, 'A multi-faceted study of society and culture', *Times of India*, 13 April 1997, p 3.
16 Abu-Lugodh, cited in EP Moore, 'Law's patriarchy in India', in M Lazarus-Black & SF Hirsch (eds), *Contested States: Law, Hegemony and Resistance*, New York: Routledge, 1994, p 92.
17 BS Cohn, 'Anthropological notes on disputes and law in India', *American Anthropologist* (special issue on 'Ethnography of Law', ed Laura Nader), 67 (6, Part 2), p 106, noted that, while the intersection of 'lawyer's law' and 'local law-ways' may shape the outcomes of cases heard in courts, equally forms of state law are mimicked while adjudicating disputes in non-state fora. MN Srinivas, 'A caste dispute among washerman of Mysore', *Eastern Anthropologist*, 7, 1954, pp 149–168 for example, describes how in a caste *panchayat* the plaint and rebuttal were written, written evidence was relied upon and the English word 'damages' appeared in the vernacular.
18 SM Rai, F Bari, N Mahtab & B Mohanty, 'South Asia: gender quotas and the politics of empowerment: a comparative study', in D Dahlerup (ed), New York: Routledge, 2006.
19 Chakravarti, 'Rhetoric and substance of empowerment'.
20 RS Moog, 'Conflict and compromise: the politics of Lok Adalats in Varanasi District', *Law and Society Review*, 25 (3), p 550.
21 *Lineage* or patrilineal descent from the same ancestor, which prohibits inter-*gotra* marriage.
22 B Karat, 'Price of honour: caste panchayats as instruments of terror', *Times of India*, Editorial, 14 April 2004, at http://timesofindia.indiatimes.com/articlesshow/614604.cms.
23 TK Rajalakshmi, 'Caste injustice', *Frontline*, 22 (1), 23 April–6 May 2005, at http//:www.hinduonnet.com/fline/fl2209/stories/200506001005000.htm.
24 *The Hindu*, 20 October 2004.
25 Indeed, the Indian representative at the UN Social, Humanitarian and Cultural Committee and a BJP member of the Rajya Sabha, SS Ahluwalia, protested vigorously when Kofi Anan included India among the countries where violation of human rights was taking place under the garb of protection of cultural norms.
26 Chakravarti, 'From fathers to husbands'.
27 P Chowdhry, 'Enforcing cultural codes: gender and violence in northern India', in John & Nair, *A Question of Silence?*, p 337.
28 See SE Merry, 'Courts as performances: domestic violence hearings in a Hawai'i family court', in Lazarus-Black & Hirsch, *Contested States*, pp 35–58.
29 The definition of who is a minor or major in the eyes of the law has become quite complex. An adult has been defined in section 1 of the Offence of Zina (Enforcement of Hudood) ordinance 1979 as 'a person who has attained, being a male, the age of eighteen years or being a female, the age of sixteen years, *or has attained puberty*' (emphasis added). This definition has an adverse impact on women, because a girl as young as 12 or 13 (or even younger) who has reached puberty may be considered an adult and punished under the zina laws or the accused may use the consent of such an 'adult' as grounds for seeking acquittal. *Bashir v The State*, Pakistan Legal Decisions, 1986 FSC 196 is a case in point.
30 Asifa Quraishi argues that under the Hudood Ordinance the language that frames *Zina-bil-jabr* does not draw on debates within Islamic law about *Zina* under duress either as '*Hiraba*' (forcible assault upon the people, involving some sort of taking of property) or civil redress for a rape survivor in its law of '*jirah*' (wounds). Rather the definition of the offence of rape (*Zina-bil-jabr*) retains the language of colonial law that was in effect after the independence of Pakistan in the pre-Hudood period. A Quraishi, 'Her honor: an Islamic critique of the rape laws of Pakistan from a woman-sensitive perspective', *Michigan Journal of International Law*, 18, 1997, p 287.
31 For a critique, see S Beulah, 'The state and the minorities in Pakistan . . . but some are more equal than others', in Hussain *et al*, *Engendering the Nation-State*, pp 260–266.
32 A Muslim woman cannot contract marriage with a non-muslim by law in Pakistan. See MA Mannan (ed), *DF Mulla's Principles of Muhammadan Law*, Lahore: Pakistan Legal Decisions Publishers, 1995. The principles of Islamic family law thus supersede the equality provisions of the Constitution of Pakistan.
33 The law has now been amended in so far as the procedure for a FIR and arrest is concerned. Where a complaint is registered under the Zina Ordinance, a senior police officer has to make an inquiry to determine whether there exist, *prima facie*, any grounds for filing the case and, if so, to proceed further. Since this amendment is only very recent, it is too early to evaluate its impact.
34 In 2003 over 7000 women and children were in prison in the 75 jails throughout Pakistan, of which most were charged with the offence of *zina*. In 1982 there were a total of 70 female convicts in Pakistani prisons. *Report of the National Commission on the Status of Women*, Pakistan, 2003.

35 Indian laws do not prevent inter-caste or inter-community marriages of choice between men and women under the following laws. 'Under Section 3 of the Indian Majority Act, 1975 . . . [t]here is no prohibition of inter-caste or inter-community marriage in the law. If a person who is a major wants to get married to a person of another caste or community the parents cannot legally stop him/her. That being so, the Administration must ensure that nobody harasses or ill-treats or kills such people for marrying outside his or her caste, community or class'. *Sujit Kumar and others v State of UP and others*, 2002 (45) ACC 79 at 81.
36 See P Chowdhry, 'Private lives, state intervention: cases of runaway marriage in rural North India', *Modern Asian Studies*, 38 (1), 2004, pp 55–84; and Chakravarti, 'From fathers to husbands'.
37 If the girl is below 16 years she cannot consent to sex and, if she is below 18, she is considered a minor.
38 P Baxi, 'The social and juridical framework of rape in India: case studies in Gujarat', unpublished PhD thesis, Department of Sociology, Delhi School of Economics, University of Delhi, 2005.
39 Chakravarti, 'From fathers to husbands'.
40 Mathura, the young tribal woman who was raped by policemen, was detained in the police station following a complaint by her brother for having eloped with her lover in *Tukaram and Anr v State of Maharashtra*, 1979 AIR 185 SC. See also *Premchand v State of Haryana*, AIR, 1989, p 937.
41 Nasser Hussain argues that the colonial history of the writ of *habeas corpus* must be seen as 'a history of increasing and ultimately complete legal institutionalization', which details 'the disparate ways in which law posits legal subjects, and extends and consolidates state power'. Citing a case published in 1814, Hussain observes that 'the court was even willing to use the writ to intervene in family disputes'. N Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law*, Ann Arbor, MI: University of Michigan Press, 2003, pp 69–70, 85.
42 V Dhagamwar, *Law, Power and Justice: The Protection of Personal Rights in the Indian Penal Code*, Delhi: Sage Publications, 1992.
43 Hussain, *The Jurisprudence of Emergency*, p 85.
44 Indian judgements labour the point that courts act to allow the expression of women's autonomous desires freed from patriarchal constraints. This is performed by giving a woman time to 'cool down', either in the court or the shelter, in conversation with herself, her natal family or a 'lady advocate', during which she composes herself or is persuaded, emboldened, reassured and/or freed of familial pressures.
45 Chakravarti, 'From fathers to husbands'. See *Oroos Fatima alias Nisha and another v Senior Superintendent of Police, Aligarh and another*, *Criminal Law Journal*, 1, 1993.
46 S Warraich, '"Honour killings" and the law in Pakistan', in Welchman & Hossain, '*Honour*', pp 78–110.
47 Pakistan Legal Decisions, 2002 Lah 444.
48 *Ibid*, pp 447–448.
49 Zafran Bibi was convicted of *zina* and sentenced to stoning to death. Her husband had been imprisoned for nine years in a murder case, hence the pregnancy was considered a 'confession' of adultery. She alleged rape but, because of contradictions in her statement, the accused was acquitted while she was found guilty. On appeal the Federal Shariat Court set aside the conviction.
50 Pakistan Legal Decisions, 2002 Federal Shariat Court 1 at p 12 bc.
51 Also see *Zarina Bibi v The State*, *Pakistan Criminal Law Journal*, 1997, p 313 Federal Shariat Court.
52 Pakistan Legal Decisions, 1999 Lah 494.
53 The Edhi Trust is a national welfare organisation established by Abdus Sattar Edhi in Karachi. It is now the largest welfare organisation in Pakistan, with over 300 centres across the country, providing medical aid, family planning and emergency assistance.
54 However, the illegality of the police is evoked alongside Article 35 of the Constitution, which reinscribes the woman in love within the parameters of reproduction and marriage.
55 Chakravarti, 'From fathers to husbands'.
56 Letter written to the Union Minister for External Affairs (Government of India, New Delhi) on 16 October 2002 on behalf of AIDWA by Brinda Karat.
57 S Fish, *Is There a Text in This Class? The Authority of Interpretive Communities*, Cambridge, MA: Harvard University Press, 1980.
58 *Sujit Kumar and others v State of UP and others*, 2002 (45) ACC 79 at 81.
59 *Ibid*, at 80.
60 *Ibid*.
61 B de Sousa Santos, *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, New York: Routledge, 1995.
62 Hussain, *The Jurisprudence of Emergency*, pp 71–72.