Human Rights, Honour Killings and the Indian Law
Scope for a 'Right to Have Rights'

SNEHA ANNAVARAPU

This article argues that in the absence of normative criteria that can identify a set of universal human rights, the "right to have constitutional rights" can take on the onus of being that universal human right. In the case of honour killings, the right to have and, more importantly, access legitimate fundamental and legal rights is under severe doubt. A universal standard framework – such as a reading of "right to have rights" would have it – justifies the very purpose of human rights itself. The origin of human rights, thus, shifts from the matter of "being human" to a matter of social, political and legal constructivism.

Sneha Annavarapu (*a.sneha91@gmail.com*) is doing her integrated MA in the Department of Development Studies and Social Sciences, Indian Institute of Technology, Chennai.

There are several definitions of "honour killings" abound. Welchman and Hossain make a valid observation that most definitions of "honour crimes" or honour killings arise by the way of illustration (2005: 7). According to the Human Rights Watch, the mere perception that "a woman has behaved in a way that 'dishonours'" her family is sufficient to trigger an attack on her life (Kirti et al 2011: 344). Following Nasrullah, Haqqi, and Cummings,[1] for the purposes of this article, we will be defining honour killings as those murders that occur when a person (or persons) transgresses norms imposed by her/his community in the name of preserving honour as culturally prescribed. These norms may be with regard to sexual autonomy, marriage, religious conscience, caste, property, etc, all of which construct honour in ways that this article will explore.

In 2000, the United Nations (UN) estimated that there are around 5,000 honour killings every year worldwide (Chesler 2010: 3). In India, statistics from 2010 indicate roughly 900 reported honour killings in Haryana, Punjab and Uttar Pradesh, while additional 100-300 honour killings took place in the rest of the country (Chesler and Bloom 2012: 45). Despite international conventions like the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), honour killings in countries such as Jordan, Pakistan, India, etc, are rampant and the victims are not just women – although they are predominantly women – but also men who exercise certain personal freedoms and "sexual deviants" such as transgenders.[2] The prevalence of "crimes of honour" in several nations (GOI 2012: 2-3) highlights the relevance of using a framework of international law to address this macro-social malaise. Is there a feasible mechanism through which we can address this invidious crime across all nations?

The language of human rights – best represented by the Universal Declaration of Human Rights (UDHR) – is pervasive in ethics, law, political theory, sociology, anthropology and other domains. The influence of human rights is tangible, especially in the fields of international relations and law. While a detailed engagement with all the dimensions of the human rights is outside the purview of the purposes of this article, I will explore the adjudication of khap panchayats in matters relating to marriage. It looks at the International Bill of Human Rights which deals with the aspects of the "right to marry" (to borrow Martha Nussbaum's (2010) phraseology) and will provide a plausible solution to the debate surrounding universalism and cultural particularism in human rights discourses.

I base my arguments on the premise that the "aspirational" idea behind the documentation of universal human rights is put under severe duress owing to the recurrent and recalcitrant presence of honour killings in various countries and that the idea of "individualism" and "choice" is challenged by the prevalence of informal social systems which rely on ideas of "culture" – however contentious that term may be. The very fact that honour crimes stand at the confluence of "competing spheres of legal subjection simultaneously – customary laws, family law, criminal law and international law – makes this a very challenging case to study" (Baxi et al 2006: 1240).

An analysis of honour killings in India would be incomplete without an understanding of the origins of social systems that typify and actively promote this social phenomenon. Currently, honour killings in India are perpetrated most notably by the khap panchayats in states like Haryana, Uttar Pradesh, Punjab, parts of Bihar, and Rajasthan and katta panchayats in parts of Tamil Nadu.[3] The concept of khaps is said to date back to 2500 BC and is essentially an archaic form of social administration. A khap can be

defined as a unit comprising 84 villages belonging to the same *gotra*.[4] A khap panchayat is a council of five elders of the village who look after the administration of the village. With the introduction of the panchayati raj system via the 73rd and 74th Amendment Acts, official village panchayats have been established all over the country. Despite their legal and official status, village panchayats in some parts of the country are heavily dominated and coerced by these informal social systems like the khap panchayats (Kachhwaha 2011: 298).

Khap panchayats are said to adjudicate on matters related to social transgressions, marriage, property rights, inheritance, and caste issues (ibid: 298-99). The development of non-state parallel systems of adjudication has, especially after Independence, resulted in the constructions of gender and sexuality, tradition and honour.[5] In this article, we will explore the adjudication of khap panchayats in matters relating to marriage.

Marriage as a Right

In India, the right to marry is a component of "right to life" as enshrined by Article 21 of the Constitution of India. It is not simply the "right to marry", but it is the right to marry out of choice. However, as Perveez Mody has rightly noted, in India, the idea of "choice" is not individual as much as it is filial or social (2002: 226). Legally speaking, however, in the iconic case *Lata Singh vs State of Uttar Pradesh* (2006, SC 2522), the Supreme Court observed that, "This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes".[6]

According to the present legal system in India, citizens have a choice between respective religion-based and community-specific marriage laws and general and common laws of civil marriages. While the former unions are supervised by "personal laws", the latter unions are codified by the Special Marriage Act, 1954[7] and the Foreign Marriage Act, 1969. The Indian legal system, technically, allows for marriages that are *sagotra*[8] since it does not recognise gotra as being the defining unit of a family. While the Indian Penal Code (IPC), 1980 is yet to explicitly criminalise "incest",[9] village courts such as khap panchayats have taken it upon themselves to punish individuals engaging in sagotra marriages since, they argue, it would amount to incest (GoI 2012: 4). Khap panchayats denounce marriages that are inter-caste and violently react to marriages that are intra-gotra. Both of these unions are legally recognised by the Constitution of India and are not criminalised by the IPC, 1860. In fact, the Hindu Marriage Disabilities Removal Act, 1946 was passed and enacted in order to reinforce this notion of choice and free will in choosing one's partner (ibid: 4-5). The Supreme Court reacted strongly against village courts in *Arumugam Servai vs State of Tamil Nadu* (reported in 2011) 6 SCC 405 (ibid: 5).

The UDHR[10] can be read to assert the notion of free will when it comes to marriage in Article 16.[11] Apart from the explicit recognition of marrying out of choice in the UDHR, there are several other guarantees that are complicit in the assertion of free will and choice when it comes to matrimony. For instance, the preamble of the UDHR reaffirms the "faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women", while also ensuring to uphold the "freedom from fear and want". Article 3 espouses that everyone has the right to life, liberty and security while Article 5 prohibits torture and inhuman treatment and/or punishment. Article 8 guarantees effective remedial procedures in national judiciary systems for acts that violate the fundamental rights guaranteed by the national constitution. Article 12 prohibits arbitrary interference with privacy, family, home or correspondence including attacks on honour and reputation. The honour killings occurring everywhere in the world violate every single one of these articles. The UDHR also espouses the right to the protection of law against such attacks by Article 30[12] which acts as an umbrella right that acts as a barrier against any infringement of the rights enumerated in the UDHR.

The very notion that universal human rights are applicable to all human beings irrespective of any other consideration is important here. While the idea of "marriage" is a universal one, the terms and conditions of its execution and substance are culturally specific. A liberal view of marriage would consider it to be a matter of individual choice and freedom, whereas some communities – as in this case – consider it to be tied to ideas of lineage, honour and religion. It is obvious that the human right to life is violated by honour killings, but is there something more to this violence? Is there a metaphysical dimension to this idea of physical violence? What is the role of tradition and how does it justify killing people for the sake of honour? These are some of the aspects we shall cover in the next section.

Tradition, Marriage and Honour

As Martha Nussbaum (2010: 668) states:

> For many, if not most people, marriage is not a trivial matter. It is a key to the pursuit of happiness, something people aspire to – and keep aspiring to, again and again, even when their experience has been far from happy.

There are two elements in this statement that have strong implications when they come to culturally specific understandings of "marriage". First, the fact that marriage is not a trivial matter is reflected in the fact that "crimes of honour" and honour killings often occur due to the fact that certain individuals have flouted the society's normative stance regarding matrimony (Baxi 2006; Kachhwaha 2011; Viswanath and Palakonda 2011; GoI 2012).

Second, unlike the liberal notion of "pursuit of happiness", in countries like India, marriages occur for a variety of reasons ranging from basic notions of "carrying forward the bloodline" to pecuniary motives like property acquisition to the more contemporary notions of love and exercise of choice.[13] In rural India, the notion of "proper" marriages is intertwined with adhering to certain norms in society which when disregarded cause disrepute to the family and kin of the "accused". As is indicated by all the papers referred to in this article, one of the most prominent reasons to execute an honour killing is when persons do not adhere to the traditional norms of society and marry out of choice vis-à-vis out of consent by the elders in the village. This is said to bring "dishonour" upon the family of the person engaging in such

activity. Punishments can be fines (nominal or substantial), ritual expiation, public humiliation (ranging from blackening of face to dipping victim's nose in human urine), forcing her/him to host a feast for the village, beating up, and/or banishment from the village (Yadav 2009: 17). Of course, honour killings automatically imply the harshest punishment of all – murder.

In an interesting analysis of the conception of honour, Johanna Bond (2012) has argued that there are definite intersections between the constructions of honour and the construction of property in societies. She also uses a lens of property in order to map gender-based violence in patriarchal societies. In the case of khap panchayats, scholars (Mhatre 2010; Ahlawat 2012) have already pointed to the strong linkages between land, property and norms regarding marriage as formulated by khap panchayats. Does honour have a specific role to play in the denial of free choice? Annie George[14] points out that:

> Honour is thought to reside primarily, but not exclusively, in the bodies of women and is maintained through female chastity, virtue, and subdued body language, dress, and demeanor. Individual honour is usually subsumed to family and religious or caste community honour, which, typically, is maintained through restrictions on women's movements, opportunities, and life choices.

The observation about the restriction of "choice" clearly collides with liberal ideas of choice, individual agency and personal freedoms. As S K Araji (2000) has noted, the idea of honour is external – dependent on the norms imposed by an external agent – and requires the sanction of a social system. This can be contrasted with a liberal view of honour as being internally sourced and lying with the individual. Furthermore, the single-minded focus on women indicates a skewed notion of equitable and equal access to rights.[15] Baxi et al (2006) discuss the notion of the Rule of Law in relation to the complexities inherent in a postcolonial terrain such as India where the tension between the forces of "tradition" and "modernity" is evident in informal systems such as khap panchayats. In the next section, we will juxtapose the legal aspects of marriage in formal Indian law and international law and trace the tensions between the written word and the ground reality.

A Tentative Solution

The friction between universalism and cultural relativism is manifest in the case of honour killings and honour crimes by khap panchayats. As argued earlier in this article, it is not just the act of the murder of "erring" individuals but it is the process behind the construction of honour which is the bone of contention here. The liberal notion of "individual agency" is in direct contrast with the notion of collective social agency and stringent norms. Arguing that human rights are indeed natural rights that are not given by any particular authority, but are inherent in the fact that one is born a human being, Jack Donnelly (1984, 2007) points to the universality of certain basic human rights as being both a positive and a normative issue. It is not just that there are certain inalienable universal rights but that it is a matter of advantage and gain that this is the case. Elizabeth Zechenter in a brilliant analysis of "cultural relativism" (1997) also supports this claim of Donnelly's that relativism and cultural particularism can be abused by states in order to engage in unethical practices against people.

In the case of honour killings by khap panchayats, one can see that if adherence to a particular cultural practice is imposed in the name of "tradition", the attack is not just on the individuals but on the institution of individual choice based on a conscious agency protected by the tenets of a Rule of Law which is assumed to be based on universal notions of justice and fairness. Thus, it is not just the marriage that is questioned but the exercise of free will in deciding whom to marry. It is obvious that universal notions of justice would deem the denial of such an exercise invalid, and even, horrifying. However, if we take the standpoint of relativism, it becomes contingent on the cultural ethos and values of that particular community. This is in violation of human rights as understood as something not dependent on an external source or not being a privilege – an argument that Donnelly (1982) has made, while trying to justify the origin of contemporary human rights as being an exclusively western one. The right to have rights is itself violated in the case of denial of fundamental rights which are not "given" by the State but are ensured by it. This subtle distinction has immense ramifications.

In this debate on universalism and cultural relativism of human rights, I would like to propose a mediating stance whereby the validity of both these ends remains intact much like the aspiration of "quality control" that Philip Alston (1984) had called for. Borrowing from Terence Turner's proposal of a "universal right to difference" (Turner 1997), I borrow the methodological relativism to an entirely oppositional conclusion. However, while this can be theoretically defended, it is harder to implement owing to political disinclinations. My basic argument is that since in the international discourse on human rights there seems to be a disagreement of what constitutes "human" rights owing to accusations of western dominance,[16] we can use Hannah Arendt's conception of "right to have rights" although not in terms of citizenship as was intended by her[17] but in terms of human dignity and the constant need to engage in a dialectic between fundamental rights and human rights. The fact that certain rights are codified in the Constitution does not automatically translate into their proper protection – there is the need for a universal human right to guarantees of culturally relative fundamental rights as enshrined in the constitution of each state, if we take the state to be the political community that we are concerned with. Therefore, the argument of cultural relativism in terms of honour killings would be deemed invalid by the universal human right to have constitutional rights protected. The constitutional rights of a country are privileged at the behest of the access to those rights becoming a human right.

Pointing to the fact that the current legal system in India is a colonial legacy, Baxi et al (2006) analyse the impact of a modern, alien Rule of Law to the traditional structures of polity (such as khap panchayats) in India. They observe that the rise in "honour killings" is a reaction against the construction of a modern notion of justice and law in which the attempt is to inscribe tradition in clear boundaries that can be attributed to the authenticity of an "Indian culture". In a

report by the Law Commission of India, there was a call to criminalise honour killings by making it a penal offence under the IPC, 1860 and/or making a congregation of elder members in the village itself illegal (GOI 2012). While I admit to the effectiveness of these solutions, unless the international community is involved using the crutch of a universal human right which is not mired in controversies surrounding its content, the seriousness of honour killings will be under severe doubt which will make it harder to prevent future incidents in this regard.

It becomes hard to justify the universality of a right that is particular in terms of substance. I argue that form can be universal. For instance, if the human right is specific on how it defines "free choice", the relativists can raise questions pertaining to the origin of this idea of free choice since the substance of the right is articulated and that substance is cultural. However, it is harder to find issues with the form of a right such as the right to have rights since it is an a priori right that is not defining the tenets of "being human" but is articulating the right to have rights that are culturally specific or "aspecific".

In terms of implementation, this kind of an "umbrella right" is hard to execute owing to the political machinery in the country. Not only is there a problem with whether the constitutional rights are just and fair, but the question of how does having an umbrella right to have rights make any difference to the institutional execution required for any effect to be palpable comes up. While I admit to the weaknesses in terms of execution, there is a facility in terms of at least theoretically coming to a "relatively universal" solution to the problem of conflicting perspectives on the universality of human rights.

NOTES

1 As cited in Dorjee et al (2013: 3).

2 The magnitude of honour killings is, thus, not restricted to men and/or women, but empirical evidence shows that the victims are mostly women. The construction of "gender" and the notions of masculinity, femininity and queer in the case of honour killings is an interesting route to take in order to deconstruct this violent phenomenon. However, for the purposes of this article, I shall be sticking to "given" categories of male/female.

3 See GoI (2012).

4 The closest English translation is the word "clan". There is a belief that at the beginning of existence, there were seven *rishis*/saints who generated seven clans and thus, by extension, all those born into a particular clan are brothers and sisters.

5 Vishwanath and Palakonda (2011). While these three are inextricably linked in a web of patriarchy, a discussion using a feminist lens is out of the scope of this paper.

6 See GoI (2008), 17-19. Of course, there are "reasonable restrictions" to this fundamental right, such as the concept of "prohibiting degrees in marriage" which explicitly denounces the validity of a marriage between relatives as codified by family law.

7 The first law of civil marriages in India was governed by the Special Marriage Act, 1872 enacted during the British Rule in India. For details regarding that and other legal specifications, please refer to a report by Law Commission of India (GoI 2008).

8 Within the same gotra or clan, as defined in Note 4.

9 Karthikeya, "We Need Special Laws to Deal with Incest", *The Times of India*, 23 May 2009. Link: http://articles.timesofindia.indiatimes.com/2009-03-23/mumbai/28020095_1_incest-laws-crime, accessed on 13 April 2013.

10 For the full text, please visit: http://www.un.org/en/documents/udhr/index.shtml

11 Article 16 states that:
(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
(2) Marriage shall be entered into only with the free and full consent of the intending spouses.
(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

12 Article 30 states that "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.".

13 For more depth in the sociological analyses of the family structure in India, please refer to Dyson and Moore (1983) and Madsen (1991).

14 As cited in Bond (2012: 12).

15 For a detailed discussion on patriarchal ideology and the notion of honour in village courts, please read Vishwanath and Palakonda (2011).

16 Further accusations of how this thrives on a conflation of modernisation with westernisation.

17 Helis (2008) has used such a reading of Arendt too.

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