

Habeas Corpus **Juridical** **Narratives** **of Sexual** **Governance**

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WORKING PAPER SERIES

Centre for the Study of Law and Governance
Jawaharlal Nehru University, New Delhi

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HABEAS CORPUS

Juridical Narratives of Sexual Governance

Pratiksha Baxi¹

INTRODUCTION

The discussion on habeas corpus, a legal term that literally means produce the body or the person detained in court, has ordinarily been evoked in discussions on political prisoners and illegal detention of subjects in state institutions in India. This discussion has eclipsed the routine use of the writ in the domestic realm. Yet procedural legality is a site where issues of substantive justice are regularly adjudicated. In this paper, I wish to point to the way people use the writ of habeas corpus in a domain of everyday life considered to be private, intimate and opaque to law. The paper

¹ I am grateful to the Ford Visiting Fellowship at the Centre for the Study of Law and Governance, JNU (July to December 2005) for giving me the opportunity to research this paper. Bharti Mohan helped me collect the material cited in this paper. Uma Chakravarti has been an important interlocutor during this research and pointed my attention to some key judgments. I also thank Julian Ronald Moti, Jaivir Singh, Shirin Rai, Upendra Baxi, Usha Ramanathan, Deepak Mehta and Ujjwal Kumar Singh for having provided me with important materials and constructive ideas on how to read the writ of *habeas corpus*. This paper was presented at the Critical Legal Studies Conference, NALSAR, University of Law, Hyderabad, 2nd September 2006, and thereafter a briefer version of this paper has been published in the *Australian Feminist Law Journal*, 2006, 25:59–78. I thank the anonymous referees for their useful comments.

illustrates how narratives of love are entangled in procedural law, how sovereignty is defined in relation to love and how love labours in the punitive corridors of law. The picture of heterosexual love presented herein underscores how love is a contested category that unfolds in the juridical field of force. The recent literature on the right of women to choose marriage, if and when they want to, has inaugurated feminist critiques of the techniques by which a range of laws are used to criminalise love in plural legal contexts in South Asia (see Welchman and Hossain 2005, Mody 2002).

While the criminalisation of love has found documentation², the use of the writ of habeas corpus in the realm of love needs foregrounding since it allows us to highlight the nature of custodial power over women by their natal families in alliance with state and non-state bodies of law and governance.

In this working paper, I suggest that analyses of procedural legality allow us to explore the relationship between state law and sexual governance. The issue of sexual governance has been detailed in the feminist critique of the enforcement of marriage in contexts of violence and abuse, whereby familial and legal discourses congeal to enforce reconciliation between a battered woman and her abusive husband, in the terrible struggle to break the intimacy of violence that marriage enforces. While marriages without love are enforced through the technique of reconciliation, marriages premised on heterosexual love (rather than other social arrangements) may be forced to die, suffer or endure punishing afterlives in courts and state-run institutions. Here, I am not going to turn to the many

²We know that the laws of abduction in late nineteenth century Canada, for instance, were used by parents to punish a daughter and her boyfriend for marrying against their wishes. Dubinsky (1993) suggests that the English laws on abduction which were applied in Canada in the 1840s expanded the criminalisation of the abduction of propertied daughters to include all women under the age of 16. She argues that the prosecutions against consenting adults were scripted around those 'improper' alliances between Canadian women and 'foreigners' from East or South Europe.

painful instances where consensual marriages forged on the basis of love have resulted in extra judicial killing, in what has now come to be named as ‘honour killings’. Rather, I wish to look at how state law is used as a resource to ‘recover’ an adult runaway daughter. The socio-legal discourse on the recovery of women who forge ‘improper’ alliances is most clearly explicated by the use of habeas corpus petitions. By juxtaposing recovery with reconciliation, I wish to highlight the contradictions within the Indian judiciary about the right of a heterosexual adult woman to choose her partner in marriage. I argue that the lower judiciary acts in complicity with the family to ‘rescue’ adult women from ‘improper’ alliances, which contradicts the juridical emphasis on enforcing marital relations through the technique of reconciliation. The emphasis on upholding the institution of marriage means that distinctions between arranged marriages and marriages of choice must find challenge within the judiciary. It is this tension between the discourses of ‘recovery’ and ‘reconciliation’ that is explored in this paper.

In order to understand, how different laws are deployed to criminalise marriages of choice, I must digress briefly to outline the picture of legality and illegality that the letter and practice of Indian law proffers. In Indian law, a woman attains the right to choose a partner in marriage at the age of 18, when she is recognised as a major. Even though the laws on kidnapping and statutory rape address the underage female subject, these laws are concerned primarily with securing the rights of the guardian over the underage female subject. The realm of control over the sexuality of the underage female is clearly gendered for the age of consent for girls is 16, and there are no such legal standards set for boys. There is a further distinction between married and unmarried minors, for a married female minor is not allowed to withhold consent to sexual relations within marriage when she turns 15, despite the law, which prohibits women from marrying until they are legal adults at the age of 18. The law on statutory rape of married female minors by their husbands is anchored in the colonial legal history on the prevention of child

marriage, and continues to be viewed as deterring child marriage rather than entailing the protection of married minors from sexual abuse in marriage. While young girls are taught to desire marriage at an early age, they may be severely punished if they engage in relationships of choice when underage. Furthermore, there are no exceptions in the laws on abduction and kidnapping that allow a minor to opt out of guardianship or to leave their home on grounds of domestic abuse and neglect. These are adult hetero-normative discourses. Thereby, it is important to examine how the law uses adult categories to constitute girls' and female children's experience of violence, and how it denies them an active agency.

In this paper, however, I look at how adult heterosexual women who choose to get married in contravention to the wishes of their families are brought under the fold of criminal and constitutional law. I argue against that picture of black letter law, which suggests that marriages of choice contracted by adult women are not criminalized since the law permits an adult woman to make a choice in marriage. I contend that this picture of rule of law elides how illegality resides in the heart of state law (see Foucault 1977). Illegality is operationalised through criminal complaints which forge the age of an adult daughter to present her as a minor or claim a prior marriage to suggest bigamy. A criminal complaint against the partner of the daughter charging him with statutory rape, abduction and/or kidnapping is a stabilised legal strategy to 'recover' a daughter who enters into an 'improper' alliance. This may be accompanied with a habeas corpus petition that claims that the daughter is held in private detention. The resourcefulness with which the laws on rape, abduction and kidnapping are deployed by the natal family in consultation with lawyers and police, then follows a rather efficient police procedure. The police hunt the couple down. After finding the couple, they are brought to the police station for questioning.

If the woman states that she was not abducted or raped, she may face custodial violence, which is normalised under the category of police remand. If she is able to withstand the pressure and violence to

break off her relationship, she may be jailed on grounds of a criminal complaint brought against her usually on grounds of having stolen some valuables from her parents' home before she eloped. Or she may be detained in a state-run institution for women. Detention in state institutions of consenting adults follows a stabilised legal strategy.³ The woman must bear the burden of proving that she was not raped, abducted or kidnapped. She must now prove to the court that she is a consenting subject in a situation when she cannot appeal for resources for legal representation from her natal family who initiate the proceedings against her, and all the resources for the legal dispute over her must flow from her affinal family who bear the costs of legal representation for their son and his wife.

How do courts then ascertain choice and what are the procedures that are instituted to set the stage of the judicial recognition of choice? Who evokes the writ of *habeas corpus* and to what end? First, the

³ While this paper is confined to marriages of choice, recent work on the use of criminal law and the writ of *habeas corpus* to control lesbian love remains critical to further our understanding of how state law is deployed to control women's sexuality. In a stunning paper, Arasu and Thangarajah (2006), show how the laws of abduction and kidnapping have been used against adult queer women in India. They document how criminal law has been deployed against 'runaway' lesbian couples, which results in charges of abduction against one of the women. While in some cases, the couples have been successfully separated whereby Judges have prescribed medical treatment as a 'cure' to lesbian love, in other cases charges of abduction do not succeed since use of force is not established. In *habeas corpus* cases, the court in some cases has ordered the woman, whose custody is contested by her parents, to live in a women's shelter. In other cases, Magistrates have ruled that if an adult woman chooses not to live with her parents, then she cannot be held in detention by anyone. Unlike heterosexual love, in such cases lesbian love remains a muted category, although the dominant issue in the *habeas corpus* cases remains whether the *adult* woman is held in illegal detention, underscoring thereby the status of the woman as an adult rather than her sexual preferences. While recovery of daughters seems to be the driving force of the criminal complaints of abduction, the argument that tests the legality of detention seems to hinge on whether the woman is an adult. This reading of queer sexuality in legal records allows us to understand how standardised legal strategies used to control heterosexual love are also deployed to litigate lesbian love in contexts where public disavowal of lesbian love is a norm.

writ of habeas corpus has been used by adult women to challenge their detention in state-run women's shelters or protective homes for women. When the fact that the woman is not underage and therefore is capable of giving consent to marriage legally is established in court, the stage is set to further establish that the woman is indeed a consenting subject. Second, habeas corpus is used routinely by parents to 'recover' adult daughters who run away and get married against parental consent. Here, we find a contestation between social constructions of adulthood and legal definitions of the rights of adults to choice in marriage. If the daughter, now married to the man of her choice, is produced before the court, she may be influenced, or threatened, by her natal family depending to her response to familial pressure to break off her marriage. Third, habeas corpus may be used by the husband or his family, in the instance when the woman is being detained by her natal family. This adjudication is often constructed as a dispute over the custody of the woman between two parties i.e., her natal family in dispute with her affinal family. Fourth, when couples file a writ petition under different constitutional provisions seeking protection from potential arrest and detention. Writ jurisdiction then comes to detail contestation over the legality of the detention of a woman who is described by her family as a subject who has been abducted for the purpose of illicit sex or forcible marriage, and by the affinal family as a consenting subject.

The criminalization of marriages of choice in state law narrates the techniques by which politics of honour is folded into state law. Such privatization of state law co-exists with the suspension of legal action against those bodies, in a plural legal context, that act to punish transgressive subjects. This issue gains particular poignancy when children or young people are the subjects of accusation of dishonour brought to a community by extra-judicial bodies such as the caste panchayat. For instance, caste panchayats in Haryana have meted out various forms of sanctions against alliances between couples considered to be 'illicit' violating norms of fictive kinship, village exogamy and caste norms (see Chowdhry 2004). There is other evidence to show

that young girls are also subjected to sanctions on the grounds of suspicions of having consented to ‘illicit’ sexual relationships. Apart from forcing the family or community of the accused couple to pay fines and go through rituals of public humiliation or social boycott, a couple may be forced to leave their home and in the worse case, killed. Such subject subjects are constituted as being beyond the circuits of power that routinely bind subjects to state law. This is most clearly articulated in the jurisprudence of habeas corpus that I wish to explore herein. I have mostly selected cases that concern adult women heard before Allahabad High Court in Uttar Pradesh, a state in North India that has witnessed widespread extra judicial killings of consenting adults who marry against existing norms of alliance and the extensive use of state law in the attempt to enforce these codes (see AALI 2004).

HABEAS CORPUS: COLONIAL LEGACIES

Usually standard legal textbooks narrate the histories of habeas corpus from 1950, when the Constitution of India granted the Supreme Court (SC) and the High Courts (HC) powers to issue the writ of habeas corpus⁴ under Articles 32 and 226. These textbooks emphasize that during the Emergency, the writ of habeas corpus was denied to people who were detained under the extraordinary powers of the state. Prior to 1978, the meaning of personal liberty was ‘restricted’ since ‘principles of natural justice or procedural due process’ were

⁴ There are many types of writs of *habeas corpus*. For instance, *habeas corpus ad presequendum* is a ‘writ issued by a court, when it is necessary to bring before the issuing court, for trial, a person who is confined for some other offence’ (Bakshi 2003:179). *Habeas corpus ad subjucendum* is a ‘writ directed to the person detaining another in his custody and commanding him to produce, before the issuing court, the person so detained. This is the most common form of the writ. Its object is to test the legality of the detention of a person and to secure his release if the detention is found illegal’ (Bakshi 2003:179).

not imported into ‘the words ‘procedures established by the law’ (Massey 2005:344). This underwent an alteration with *Maneka Gandhi v. Union of India*,⁵ which redefined personal liberty as well as ‘imported the element of fairness and justness in the “procedure established by law” depriving a person of his liberty. Therefore, now a writ of habeas corpus would lie if the law which deprives a person of his liberty is not fair, just and equitable....After the amendment of the constitution in 1978, the right to personal liberty under Article 21 cannot be suspended even during an Emergency, therefore the writ of habeas corpus will even be available to people against any wrongful detention during Emergency proclaimed under Article 352 of the Constitution’ (Massey 2005: 344).

This judgment marked a significant shift in underscoring the importance of procedural legality in situations of state and private detention. The legal meaning of emergency thus found new meanings within which the rights of detainees were safeguarded. However, it is curious that the circumstances that besieged those women and children classified as abducted in the aftermath of the Partition remain out of the framework of narrating how habeas corpus came to animate the judicial discussion on the constitutionality of detention in camps in the aftermath of the Partition. In order to re-visit the debates on the remedy of habeas corpus in the aftermath of the Partition, I first digress to the discussion on colonial law to look at how habeas corpus comes to occupy a place in the jurisprudence of choice marriages, and how legal subjects named as *abductors* use this remedy.

How did the use of habeas corpus in cases of choice marriages then stabilise as a legal strategy? In raising this question, I cannot promise a thorough historical analysis, however I do wish to read the literature available to us, to suggest that we need to see how colonial legalities inflect the present through the stabilisation of the

⁵ (1987) 1 SCC 248

use of specific legal strategies in the domestic realm. It is commonly known that habeas corpus was first introduced in British India in 1773, with the establishment of a Supreme Court in Calcutta. Clark and McCoy note that:

In 1861, legislation was passed to create a series of High Courts with a prerogative jurisdiction. But despite some efforts to apply the common law of habeas corpus to India, the writ was finally introduced in statutory form through a series of Criminal Procedure Acts in the nineteenth century. Initially the legislation confined access to the remedy to European British subjects, but later it was extended to all British subjects born in British India. The most important of these was the Criminal Procedure Code 1898 [India], section 491 of which permitted the courts to issue directions ‘in the nature of habeas corpus’, though only for the High Courts of Calcutta, Madras and Bombay and thus the remedy under section 491 was not available to those detained outside the limits of these three court districts, nor could the courts issue a common-law form of the writ outside the limits of the presidency towns. In 1923 the Criminal amendment Act 1923 inserted a new section 491 A into the 1898 CrPC which allowed the remedy to issue from all of the High Courts in British India, thereby dramatically broadening the availability of the section 491 remedy. The provision expressly excluded from its scope detentions under political or state legislation, and since bail was available under another provision of the CrPC Act 1898, bail could not be sought via section 491 unlike the common law version of the writ in England. The remedy although contained in the CrPC, applied to either public or private custody (2000:21–22).

Hussain’s reading of the histories of habeas corpus in the colony demands a refusal to submit to surprise at the obvious awkwardness at finding the writ of liberty in regimes of conquest⁶. He argues that the

⁶ Clark and McCoy also note that ‘the protection of personal security is perhaps the most important human right. If someone is in detention his or her ability to

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’ (2003: 69–70). He argues that:

Whether in its origins as a facilitation of sovereign power or in its subsequent and modern guise as a check on the executive, whether used to intern or to free, habeas corpus is a mode of binding subjects to the law and to its economies of power. Even in its wildest application, the writ demands clarification not of the correctedness or ‘justice’ of an imprisonment but only of its lawfulness (Hussain 2003:70).

This reading does not submit to the idea that early colonial law allowed ‘some quantum increase in freedom’ for individuals since the effects of habeas corpus functioned ‘in colonial India to ‘free’ people from either governmental or private confinement’ (2003:95). Rather, the irregularities of the process through which habeas corpus inscribed people ‘in a system of state power that has hardly altered today’ were ‘fraught with the contestations within the spheres or branches of the emerging state form’ (2003:95). The oscillation between intervening to test the legality of detention and claiming sovereign immunity from such judicial probes is evident through the reports of cases of habeas corpus.

Taking the example of Calcutta and Madras Courts, Hussain observes that ‘the court was even willing to use the writ to intervene in family disputes’ (2003:85). He cites several cases from different High Courts to make this point, while remarking that the ‘Madras

exercise all other human rights is severely restricted or virtually non-existent....As inspiring as the history of the writ has been, especially in late 17th Century England, it would be wise to appreciate that the writ had a darker history—and it has not always been an unimpeded march towards greater liberty’ (2000:3).

High Court agreed to issue the writ in some surprising circumstances' (2003:85). One such surprising circumstance is found in *The King v. DeUrilla*—a case published in 1814—where the Madras High Court held that the 'court will not, upon a habeas corpus compel a young woman that is marriageable to go home with her father contrary to her consent' (2003:85). Hence, 'the fact that the writ was petitioned for and granted in such instances suggests that habeas corpus had found a place in the social relations of early-nineteenth century India' (2003:85).

The suggestion here is that this legal strategy was stabilised in routine cases of choice marriages in colonial India. Indeed, this legal route allowed a legal subject named as an 'abductor' to file a petition of habeas corpus claiming that he did not abduct the woman concerned and she was a consenting subject. We may add to Hussain's readings of colonial law that this struggle to complete legal institutionalisation and establishing supremacy of state law over caste based or community based norms about kinship and marriage in routine cases was to find complete articulation during the Partition in 1947. This time it was through an understanding of what constituted an 'exception', which called for the suspension of the writ of habeas corpus so that notions of 'national honour' could be instituted through law. Muslim women who had been 'recovered' and sent to camps were constituted as impure body populations who had no claims to Indian citizenship, and no man or his family could claim that these women had been unlawfully detained in the camps, unlike under routine law.

Any overview of the writ then must take into account the position of the legislators in the Constituent Assembly who passed a bill to define who the abducted subject was in law, to appoint a tribunal which would decide citizenship and to declare that the law could not supersede the decisions of the Tribunal so appointed. It is this state of emergency that was inscribed by the Constituent Assembly Debates on December 15, 1949 with the enactment of the Abducted Persons (Recovery and Restoration) Act, 1949. The

Abducted Persons (Recovery and Restoration) Act was passed by the Constituent Assembly on 15 December 1949. The Act was in existence for eight years until 1957 and it was not renewed thereafter (Butalia 2000). The Constituent Assembly debates must be read along with the constitutional challenge to the Abducted Persons (Recovery and Restoration) Act passed subsequently, in the Supreme Court.

The official history of the law passed is best represented in the words of the Supreme Court judgment which adjudicated the constitutional validity of the Act. I quote the Supreme Court in *State of Punjab v. Ajaib Singh and Anr*⁷ below to indicate the reasons given for the legislation.

It is now a matter of history that serious riots of virulent intensity broke out in India and Pakistan in the wake of the partition of August, 1947, India to Pakistan and of Hindus and Sikhs from Pakistan to India. There were heart-rending tales of abduction of women and children on both sides of the border which the governments of the two Dominions could not possibly ignore or overlook. As it was not possible to deal with and control the situation by the ordinary laws the governments had to devise ways and means to control the evil. Accordingly there was a conference of the representatives of the two Dominions at Lahore in December, 1947, and Special Recovery Police Escorts and Social Workers began functioning jointly in both the countries. Eventually on November 11, 1948, an Inter-Dominion Agreement between India and Pakistan was arrived at for the recovery of the abducted persons on both sides of the border. To implement that agreement was promulgated on January 31, 1949, an Ordinance called the Recovery of Abducted Persons Ordinance, 1949. This Ordinance was replaced by Act LXV of 1949 which came into force on December 28, 1949. The Act was to remain in force up to October 31, 1951, but it was eventually extended by a year. That the Act is a useful piece of beneficial legislation cannot be denied, for up to February 29, 1952, 7,981 abducted persons

⁷ MANU/SC/0024/1952: AIR 1953SC10, 1953CriLJ180, (1953)4SCR254

were recovered in Pakistan and 16,168 in India. This circumstance, however, can have no bearing on the constitutionality of the Act which will have to be judged on purely legal considerations'.⁸

It is noteworthy that the Supreme Court clarifies that the 'efficiency' of the legislation had no bearing on determining the constitutionality of the Act. Before moving on to the purely legal considerations, we must note that the need for legislative control of 'evil', which the Supreme Court refers to, was embedded in languages of honour and purity in the Constituent Assembly debates.

Das (1995) argues that the languages of honour that were deployed by the state and the family were divergent in the way they spoke about women. In the family, 'there was a tacit consent to give different interpretations to certain norms of affinity, so as to enable the order of the family to absorb women who may have been sexually violated but whose condition had not been publicly enunciated or made visible. This was the realm of practical kinship—as Pierre Bourdieu calls it—distinct from official kinship, which is always on display' (Das 1995:65). However, for the new nation states the recovery of abducted women and children was a matter of 'national honour'. Das (1995) maintains that the concern with national honour operated at three levels. The new definitions of 'civilized' governments inscribed women as reproductive and sexual beings who had to be 'recovered' from the other side, while constructing the nation state of Pakistan as being 'party to this loot' in the words of Pandit Thankur Das Bhargava (cited in Das 1995:71). Finally, the 'presence of Muslim women to their own families was seen as a threat to the purity of the Indian nation, for two reasons: First, despite the rhetoric on barbarism of men who abduct women, this 'lapse' by men was seen as temporary: by returning abducted Muslim women, Hindu and Sikh men will supposedly regain their purity. Second, the very presence of these

⁸ *ibid* at para 14

women is seen as contributing to the ‘immorality’ in the country’ (Das 1995:70).

The crystallization of notions of national honour differed from the family in as much as practical kinship allowed absorption of ‘abducted women within the normal structures of family and marriage’ as long as breaches of norm relating to purity or honour could be covered by veils of silence (Das 1995:64). By creating a new legal category, ‘abducted person’, which brought women squarely within the disciplinary power of the state, an alliance was forged between social work as a profession and the state as *parens patriae*, making official kinship norms of purity and honour much more rigid by transforming them into the law of the state’ (Das 1995: 66).

The abducted subject was brought within the disciplinary power of the state by suspending the right to challenge ‘recovery’ as illegal detention. For, the Act ‘took away the freedom of women to make their own choices’ since the abducted person came to be defined then as ‘male child under the age of sixteen years or a female of whatever age who is, immediately before the 1st day of March 1947, was, a Muslim and who, on and after that day has become separated from his or her family, and is found to be living with or under the control of non-Muslim individual or family, and in the latter case includes a child born to any such female after the said date’. Thereby, divesting Muslim women of the choice to return to their original families, contest the powers given to the police to decide who was abducted and challenge the legality of detention at camps. Moreover, the Act held that a camp meant ‘any place established, or deemed to be established’ by the provincial government for ‘the reception and detention of abducted persons’. While detailing the procedure of hearing questions on whether the person detained in a camp is abducted or not, allowed to leave the camp or not and whether such person should be restored to her or his relatives, the Act specifies the formation of a tribunal to hear such matters. However, it states that ‘the detention of any abducted person in a camp in accordance

with the provisions of this Act shall be lawful and shall not be called in question in any court’.

The suspension of the writ of habeas corpus meant that ‘the recovered women themselves, although promised a free environment and ‘liberty’ were, by the very terms of the Bill, divested of every single right to legal recourse. The writ of habeas corpus was denied, their marriages were considered illegal and their children illegitimate; they could be pulled out of their homes on the strength of a policeman’s opinion that they were abducted; they could be transported out of the country without their consent; confined in camps against their wishes; have virtually no possibility of any kind of appeal (bar the compassion of the social worker or the generally unsympathetic authority of the Tribunal); and, as adult women and citizens, be once again exchanged between countries and by officials’ (Menon and Bhasin 1998: 105–6).

The protests by three members of the Constituent Assembly against this clause were discounted. Referring to the promise of fundamental rights in the Indian Constitution to be in place a month after the debates they ‘warned that the Supreme Court would not countenance the denial of the writ of habeas corpus, and it was the right of every Indian citizen—which they were—to choose to remain in India; by law and by right they could not be deported without their consent’ (Menon and Bhasin 1998:106). Unlike the expectations of these three members, the SC did not find the Act constitutionally invalid when the validity of the Act was tested after a habeas corpus petition filed by a man by the name of Ajaib Singh accused of abducting and wrongfully detained a 12 year old girl was heard. The facts of the case are as follows:

On 17 February 1951 an army officer made a complaint that Ajaib Singh had abducted three persons and had detained them in his house in village Shersinghwalla. The recovery police of Ferozepore raided his house on 22 June, 1951. They found a 12–year–old girl, Mussamat Sardaran who they delivered in the custody of the officer who was in charge of the Muslim Transit Camp at Ferozepore and later she was

sent to the Recovered Muslim Women's Camp in Jullundur City. The subsequent enquiries resulted in a report submitted on 5 October 1951. The police officer who enquired into the matter found that Ajaib Singh had abducted the minor during the 'riots' of 1947. On 5 November 1951 Ajaib Singh, who claimed to be her father, filed a habeas corpus petition. The Punjab High Court pronounced an interim order that the girl should not be removed from Jullundur until the petition had been disposed. This case was enquired into by two DSPs—one each from India and Pakistan. After hearing the statements of the girl, her mother, and her father's brother, they came to the conclusion that she was indeed an abducted person and should be sent back to Pakistan to be restored to her next of kin. However, she could not be sent to Pakistan until the High Court decided the appeal. The report was submitted on 17 November 1951. The matter was then put to the Tribunal, which comprised of two Superintendents of Police one each from both countries. The Tribunal pronounced its decision on the same day. The petition came up for hearing on 26 November 1951.

While the matter was referred to a full bench since it raised important constitutional matters, the following day 'the learned Judges made an order that the girl be released on bail on furnishing security to the satisfaction of the Registrar in a sum of Rs. 5,000 with one surety. It is not clear from the record whether the security was actually furnished'.⁹ The Punjab HC held that the Act was 'contrary to the mandate of Article 22—a fundamental right that does not permit the arrest and detention of a person for over 24 hours before being produced before a Magistrate' (Ramanathan 1999:97). The matter went on appeal to the Supreme Court. In the Supreme Court, the release was found to be lawful after the Solicitor General admitted that the constitution of the Tribunal was improper under Section 6 of the Act. However, the Solicitor General pleaded that

⁹ *State of Punjab v. Ajaib Singh and Anr* at para 7

the Supreme Court ‘pronounce upon the constitutional questions raised in the case and decided by the High Court so that the Union Government would be in a position to decide whether it would, with or without modification, extend the life of the Act which is due to expire at the end of the current month’.¹⁰ While the reasons for the decision were given later, the Court heard the arguments to hold that ‘in view of the urgency of the matter due to the impending expiry of the Act, that our decision was that the Act did not offend against the provisions of the Constitution’.¹¹

From the judgment, we do not know what became of the girl who was set at liberty. However, we learn that the Supreme Court, a bench of five judges, upheld the Act on the grounds that ‘the taking into custody of an abducted person is not an arrest at all’, thereby placing ‘the provisions of the Recovery Act beyond the reach of Article 22’ (Ramanathan 1999:98). The Court held that ‘physical restraint put upon an abducted person in the process of recovering and taking that person into custody without any allegation or accusation of any actual or suspected or apprehended commission by that person of any offence of a criminal or quasi-criminal nature’ did not amount to arrest and detention when that purpose was delivered to the in charge of the nearest camp under the meaning of Article 22[1] and [2].

The Abducted Persons Act, 1949 was extended to be in effect till 1957, eight years after the Partition. This judgment then points to the manner in which one of the objections against the suspension of habeas corpus during the constituent debates failed. By drawing attention to how the suspension of habeas corpus in the immediate aftermath of the Partition in the context of the ‘recovery’ of abducted women, notions of ‘national honour’ located the camp located outside judicial review or ordinary processes of appeal. The histories of the

¹⁰ *State of Punjab v. Ajaib Singh and Anr* at para 13

¹¹ *State of Punjab v. Ajaib Singh and Anr* at para 13

writ of habeas corpus then points our attention ‘to the extent that habeas is a protection from state power, the situation of emergency that allows for the suspension of that protection is deeply written into the rule of law’ (Hussain 2003:95). Equally, when we read routine use of law in relationship to extraordinary law, we encounter the use of habeas corpus by a legal subject named as an abductor—Ajaib Singh. Hussain’s reading of colonial law to regulate custody of women (whether minor or major), in early nineteenth century India, indicates how habeas corpus becomes a stabilized legal strategy to claim or contest custody of women.

Hussain’s analysis of habeas corpus in colonial law then is extremely important to flag since it directs our understanding of how habeas corpus by offering definitions of personal liberty is equally directed at bodies and conducts, ‘where rights may be understood as another resource that can be used to convince others how to behave’ in routine everyday cases (Hussain 2003:72). At the same time, the writ of habeas corpus brings the woman in circuits of sovereign power where her consent or choice must be staged in courtrooms as the ‘manoeuvre in the field of governmentality, invoking, prescribing and cancelling out new expectations of normative conduct on the part of both governors and governed’ (Hussain 2003:85). It is to the staging of women’s choice in courtrooms through the activity of the habeas corpus in contemporary postcolonial settings that this paper draws attention, while indicating that further research on the use of the writ of habeas corpus to regulate women’s sexuality remains critical to furthering our understanding of legal manoeuvres in the field of governmentality today.

**HABEAS CORPUS AGAINST DETENTION BY THE STATE:
THE CASE OF THE LEGALITY OF DETENTION IN A
PROTECTIVE HOME FOR WOMEN**

One of the ways women’s right to choice in marriage has been staged in courtrooms is through the evocation of the writ of habeas

corpus against illegal detention by the state in everyday contexts. The forms of state detention are varied. Women may be illegally detained in police stations, prisons, state-run women's shelters, or state-run asylums¹². Detention may be temporary or may span to long periods such as six months or more. When the woman refuses to go back to her natal family, the police and Magistrates often consider state-run institutions to be the only spaces where the woman can be 'safe' from the struggle over custody between two 'parties'—her natal family and her affinal family. In other cases, we learn the woman is sent to the shelter to be free of pressures brought upon her either by her natal family or her affinal family; hence this space is constructed as the 'neutral' space¹³ which allows a woman to know her mind. In *Chandrasinh K. Jadav v. State of Gujarat & Ors*, for instance, we learn that the woman was sent back to the *nari guruh* (women's shelter) despite the fact that she stated that she wanted to return to her matrimonial home:

[B]y way of abundant caution ... to enable her to disabuse her mind, if possibly under some threat or pressures she was not freely expressing herself before the court and further to coolly ponder over her fate embolden her and reassuredly (sic) telling us where she ultimately intended to return!¹⁴

¹² Pankaj Sharma and Sarika got married against her parent's wishes. Pankaj, an artificial jewellery maker, was not as well off as Sarika's family. The inter-caste alliance was opposed by Sarika's brother who alleged that she was mentally unstable and therefore, could not consent to marriage. On June 23, 2005, the Court ordered that Pankaj and Sarika should be examined for 10 days at the Agra Mental Asylum. The couple were in the Asylum for ten days till the certification from the doctor could declare them of sound mind (see [www.http//ndtv.com](http://ndtv.com)).

¹³ Although this space is constructed as a 'neutral' space, it is often a route to influence the woman to break off her relationship or marriage, or the institution itself may hold many dangers to her safety as the nature of such institutions curtails a number of fundamental rights while increasing vulnerability to different kinds of custodial violence.

¹⁴ Spl. Criminal Application No. 356 of 1996, 10–04–1996.

State detention in women's shelters has been challenged by women in courts of law on the grounds of illegal detention. Gian Devi, an eighteen year old woman, filed a petition for writ of habeas corpus against her detention in a Nari Niketan in Sonapat on 28 February, 1974.¹⁵ Her father was opposed to her marriage and wanted her to marry someone else. He brought criminal charges of abduction and rape against her husband and claimed in court that his daughter was already married to another man. The magistrate sent her to the Nari Niketan. Gian filed a habeas corpus petition in the Punjab and Haryana High Court, which failed on the grounds of jurisdiction on 18 March 1974. She then moved the Delhi High Court. On 15 April 1974, the Delhi High Court dismissed the petition on the grounds that she was a minor and continued to be so at the time of detention. Subsequently, she petitioned the Supreme Court under Article 32 of the Constitution for issue of a writ of habeas corpus to enforce her fundamental rights.

After hearing the lawyers representing all the parties,¹⁶ the court directed that Gian be presented before the court, whereupon she testified that she did not want to be detained in the Nari Niketan and wanted to live with her husband—denying her father's allegation that she was already married to someone else. The SC held that:

[W]hatever may be the date of birth of the petitioner¹⁷, the fact remains that she is at present more than 18 years of age. As the petitioner is sui generis no fetters can be placed upon her choice

¹⁵ *Gian Devi v. The Superintendent, Nari Niketan, Delhi & Others* (1976) 3 SCC 234

¹⁶ Initially the Superintendent of the Nari Niketan, the Judicial Magistrate (Sonapat) and State of Haryana were impleaded in the petition. Later, at the behest of the Supreme Court her father and the man he alleged she was married to were also impleaded.

¹⁷ Both father and daughter gave different date of birth, with the father claiming that she was two years younger than what she declared to be her age.

of the person with whom she is to stay nor can any restriction be imposed regarding the place where she should stay. The court or the relatives of the petitioner can also not substitute their opinion or preference for that of the petitioner in such a manner. The fact that the petitioner has been cited as a witness in a case is no valid ground for her detention in Nari Niketan against her wishes. Since the petitioner has stated unequivocally that she does not wish to stay in Nari Niketan, her detention cannot be held to be in accordance of law.¹⁸

Gian was freed after seven months of detention.

We shall read this case along with another case heard three years later in the Allahabad High Court. Here, we find that Kalyani Chowdhury filed a petition in the Allahabad High Court stating that she was illegally detained in a protective home for women (Mahila Ashram, Moti Nagar) in Lucknow.¹⁹ On the intervening night of 21 and 22 December 1977, she was ‘admitted’ to the home following an order issued by the Magistrate. The order followed after the dispute arose between her father and her husband or as the judgment says ‘a dispute between two parties’²⁰. Clearly here Kalyani’s wishes are seen as irrelevant in what comes to be a battle for custody between two parties. She is not constituted as a party whose consent is secured or whose interests can be represented to the court except through the voice of the father or the husband. The framing sentence of the judgment itself is revelatory of the performative demands made on

¹⁸ (1976) 3 SCC 234 at 235

¹⁹ See *Mrs Kalyani Chaudhari v. State of Uttar Pradesh and Others* 1977 Indlaw 62. The inhuman and degrading conditions in a protective home in Agra met challenge in the Supreme Court for nearly twenty years after a public interest litigation was filed in the Supreme Court [see *Dr Upendra Baxi (1) v. State of UP & Anr* (1983) 2 SCC 308; *Dr. Upendra Baxi (II) v. State of UP* (1986) 4 SCC 106]. Also see public interest litigation against a care home managed by the Welfare Department, State Government in *Vikram Deo Singh Tomar v. State of Bihar* 1988 (Supp) SCC 734.

²⁰ *Mrs Kalyani Chaudhari v. State of Uttar Pradesh and Others* 1977 Indlaw 62

the consenting subject, for it says that ‘the petition has been filed by a girl alleging herself to be Mrs Kalyani Chaudhury’.²¹ The allegation of an adult woman insisting on the fact of marriage based on choice and volition must meet exacting and discretionary judicial standards that establish her autonomy to choose.

When the Allahabad High Court (AHC) heard the case Kalyani testified that she had married Vinod Kumar Chowdhary and wanted to live with him. However, the authorities of the Mahila Ashram did not permit her free movement and she was detained against her will. This judgment is important since it clarifies that it is illegal to detain a woman in a protective home when she does not attract the provisions of the Suppression of Immoral Traffic in Women and Girls Act. The AHC held that the order of the Magistrate mentioned no provision of law and suffered from an ‘inherent lack of jurisdiction’. Thereby the detention was illegal. The AHC dismissed the arguments made by her father’s lawyer by maintaining that the issue whether she was a minor or a major was irrelevant since even a minor cannot be detained against her will or at the will of her father in a protective home. Kalyani was set at liberty after five days of illegal detention since she had not committed any offence.

It is essential to point out that the Allahabad High Court notes that there is no law that warrants Magistrates to send such women to protective homes, which are meant only for women who are detained or rescued under the Suppression of Immoral Traffic in Women and Girls Act. This judgment is important since it allows us to note how women caught in circuits of trafficking are conflated with women who refuse to be exchanged in matrimonial trafficking, to paraphrase Gayle Rubin (1975). However, we often come across discussion on how women are sent to state-run home including protective homes as if this was a ‘neutral’ space to make up their minds without pressure. This form of illegal detention is anchored in

²¹ *Mrs Kalyani Chaudhari v. State of Uttar Pradesh and Others* 1977 Indlaw 62

discourses of recovery of women from improper alliances, and habeas corpus then becomes a route to recover lost honour. The case law then is anchored in socio-legal discourses of the rescue and recovery of the woman named as abducted in law. Hence, how the consenting subject is represented in law becomes critical to understand the way choice is overwritten as coercion.

I wish to make two points here. First, we may argue that underlying this judicial method is the assumption that women are easily manipulated and do not know their minds. Their rationality and capacity to reason as adults is seen as suspect until they satisfy judicial standards of who is a consenting subject. The capacity to consent to a marriage of choice thereby may entail having the strength to survive contexts of incarceration and violence in state institutions.²² Second, we may argue that while the courts may not hand over the daughter to the father who contests his daughter's desire to live with her lover or husband, the court acts as *parens patriae*. In a sense, the sovereign power over an adult daughter is folded into state law, thereby localizing state law.

HABEAS CORPUS AS A ROUTE TO RECOVER HONOUR

If illegal detention in a state-run women's home that follows criminal charges, marks an alliance between legal and familial discourses of recovering adult runaway daughters, the other technique of exercising custodial power by the natal family is filing a petition of habeas corpus as a route for recovering adult runaway daughters. A habeas corpus petition becomes a route to recover a daughter, if the police do not 'recover' the missing woman. The habeas corpus case law is instructive in highlighting the natal family as a space of private detention, and underscores the need to look at the formative practices of violence against women prior to their marriages by their natal family.

²² Also see *Payal Sharma alias Kamala Sharma v. Superintendent, Nari Niketan, Agra and Others* 2001(3) AWC 1778 (cited in Chakravarti above note 17).

Even though habeas corpus has been traditionally understood as a writ of right and not a matter of course, we find that there is a certain routinisation of the use of the writ. For instance, Dwarka Prasad filed a habeas corpus petition in the Rajasthan High Court stating that his daughter Vedwati Kumari Sharma, aged 13 years old, was missing since March 2001.²³ He stated that Rajesh Sharma had kidnapped his daughter under sections 363 (kidnapping) and 379 (grievous hurt) IPC. The police did not investigate this complaint. The father of the abducted girl moved the court for tracing his daughter and hence, the court monitored the investigation such that the abducted girl was produced before the Court on 26 November 2001 within three days. The Deputy Registrar (Criminal) recorded her statement. The statement revealed that Vedwanti was a major and she had ‘eloped voluntarily’ with the accused.²⁴ She was 19 when she married Rajesh Sharma. She had given birth to a son who was three months old when she gave her statement in the court. The writ of habeas corpus was declared infructuous. The Court made two observations that are pertinent to the discussion herein.

First, the Court emphasised that in habeas corpus petitions, it is not the High Court’s place, to monitor police investigations as that is the bounden duty of the police being the investigating agency without any interference of law courts and the High Court is certainly not meant to be treated as an executing court for enforcing investigation of the cases which are registered by entertaining habeas corpus.²⁵

Second, the Court remarked that the State—as the respondent—was at liberty to launch action against the father during the criminal trial ‘as to why he had lodged a false report of abduction when his daughter was a major and had left voluntarily with Rajesh Sharma’,

²³ *Dwarka Prasad v. State of Rajasthan and Ors* 2002 Cri LJ 1278

²⁴ 2002 Cri LJ 1278 at 1279

²⁵ 2002 Cri LJ 1278 at 1279

if it were established that she was indeed an adult at the time. This liberty was granted to the state in order to check ‘frivolous litigations which is repeatedly brought before this court in the form of habeas corpus’.²⁶ The ire at the father-complainant for patently falsifying the complaint is important to note since the Court suggests that such frivolous litigation is routine in the Rajasthan High Court. By and large cases, which are falsified by the parents, are not tried on grounds of perjury or contempt of court. Police officials, magistrates and prosecutors do not usually perceive the father as a subject of perjury since the understanding of elopement as a crime against the father is often a shared discourse—and therefore, ‘voluntary elopement’ becomes a marked category in legal discourse. Voluntary elopement is the counterpart to forced rape, a socio-legal category in Indian legal discourse that seeks to determine the meaning of rape in legal discourse in India.

What happens then when a father refuses to produce his daughter after a habeas corpus petition filed by her husband?²⁷ The case in concern involved a Muslim father, a practising lawyer whose daughter married a Hindu man and converted to Hinduism. Typically, the father pressed criminal charges against his daughter’s husband and recovered her. Her husband claimed that she was being illegally detained by her father. One of the questions that arose here is whether the accused-husband could file a writ of habeas corpus to secure the release of his wife, while he faces charges of having abducted and raped her? In October 1963, the Supreme Court (SC) held that such a petition was highly unusual. I quote:

The writ of habeas corpus issues not only for release from detention by the State but also for release from private detention. At Common

²⁶ 2002 Cri LJ 1278 at 1279

²⁷ See *Mohd Ikram Hussain v. The State of UP and Others* AIR 1964 SC (1625). Also see *Smt Suneeta through her husband Tulsi v. State of UP & Others* 2003 (1) JIC 1027 (All).

Law a writ of habeas corpus was available to the husband for regaining the custody of his wife if she was wrongfully detained by anyone from him without her consent. What amounts to wrongful detention of the wife is, of course, a question for the Court to decide in each case and different circumstances may exist either entitling or disentitling a husband to this remedy... Exigence of the writ at the instance of a husband is very rare in English Law, and in India the writ of habeas corpus is probably never used by a husband to regain his wife.²⁸

The SC held that the remedy provided under section 100 of the Criminal Procedure Code allowed husbands to take action when the detention was an offence, and the civil suit of restitution of conjugal rights could be evoked when the detention was not an offence. The SC further explained that:

In both these remedies all the issues of fact can be tried and the writ of habeas corpus is probably not demanded in similar cases if issues of fact have first to be established. This is because the writ of habeas corpus is *festinum remedium* and the power can only be exercised in a clear case. It is of course singularly inappropriate in cases where the petitioner is himself charged with a criminal offence in respect of the very person for whose custody he demands the writ.

A writ of habeas corpus at the instance of a man to obtain possession of a woman alleged to be his wife does not issue as a matter of course. Though a writ of right, it is not a writ of course especially when a man seeks the assistance of the Court to regain the custody of a woman. Before a Court accedes to this request it must satisfy itself at least *prima facie* that the person claiming the writ is in fact the husband and further whether valid marriage between him and the woman could at all have taken place... It is wrong to think that in habeas corpus proceedings the court is prohibited from ordering an inquiry into a fact.²⁹

²⁸ at para 97

²⁹ at page 98

The Supreme Court then clarifies that the petition of habeas corpus filed by the accused-husband must be preceded by an enquiry into the facts of the validity of the marriage.

The other issue before the court was whether the Court's sentence against the father was justified when he failed to produce his daughter in court despite court's orders. Upholding the contempt sentence, the SC held that the father seemed to have 'overreached' himself in 'saving his daughter' from her husband. The father was willing to go to jail rather than allow the marriage to survive. By the time the SC heard the appeal, the husband eventually 'compromised' the case with his wife's father. He had abandoned his wife and child, and did not pursue the habeas corpus proceedings he had originally filed. The criminal prosecution against him was dropped. In cases, such as this one, the woman's relationship with her husband or his family may not be able to withstand violence, criminal prosecution, and detention. This case allows us an insight into the way criminal law is used to separate a man and a woman in a marriage of choice. The case illustrates how a father prefers going to jail to regain control over the daughter; thereby a prison sentence is seen as accruing lesser stigma than relinquishing control over the daughter's marital destiny.

'PRO-LOVE' LEGAL STRATEGIES: THE PRODUCTION OF THE BELOVED'S BODY

State law is also used to counter the criminalisation of choice. In cases where the couple manages to go in hiding or move the courts to counter the criminal prosecution, we encounter a bewildering number of petitions and counter-petitions filed in different courts by both the parties. The appeals to state law range from petitions to quash the FIR (First Information Report), challenges to illegal detention and plea for personal liberty under the writ of habeas corpus, and filing collusive suits for the restitution of conjugal rights. Appellate judgments in India tell us that typically after the couple marries, the husband may file a case of restitution of conjugal rights against his

wife. The collusive case of restitution of conjugal rights is aimed to gain legal recognition of the fact that the woman was not abducted nor was she 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 i.e., fear of arrest, illegal detention and custodial violence. Courts of appeal have been fairly responsive to women when such petitions are filed.³⁰

The legal strategies adopted by 'pro-love' lawyers suggest that this sub-specialisation of law has grown in response to the growing demand for legal representation by consenting adults who wish to prevent arrest or illegal detention and seek protection from the state against familial violence. These legal strategies are used in marriages of choice across caste or community³¹. In *Oroos Fatima alias Nisha and another v. Senior Superintendent of Police, Aligarh and another*³² we find the Court's appreciation of fatherly restraint in a case where a Hindu woman converts and marries a Muslim man. The facts of the case are as follows:

On 5 May 1992, Mr. Jagdish Prasad Jain informed the police that his daughter, Nisha Jain had disappeared. Five days later, he filed a FIR stating that he had learnt since that Sabeeh Haider, who was assisted by his brother Aslam, had taken his daughter away. He also stated that the money his daughter had in her possession—a sum of over ten thousand rupees—and her papers (such as school certificates and degrees) were missing. He expressed his fear that his daughter's life was in danger. Oroos Fatima alias Nisha (petitioner 1) and Sabeeh Haider filed a criminal miscellaneous writ petition in the Allahabad High Court under Articles 21 and 226 of the Constitution of India seeking protection from arrest and detention. They petitioned the Court to quash the FIR and subsequent

³⁰ See Chakravarti op cit note 17

³¹ See Chakravarti op cit note 17

³² 1993 Cri LJ 1

investigation filed in the Civil Lines police station in Aligarh to investigate the crimes of kidnapping and abduction as defined under sections 363/366 IPC.

Sabeeh Haider and Oroos Fatima told the court that they refuted the claims made in the FIR. They told the court that they had married each other of their choice. They met in college as students in the computer-training institute at Aligarh. They fell in love and decided to marry. On 12 January 1992 when they married, Oroos was twenty-three years old. The copy of the nikahnamma was attached to the petition. Subsequently the couple moved to Delhi. The judgment details the subsequent action taken by the couple:

In paras 7 to 14 of the writ petition it was stated that the petitioner No 1 withdrew from the society of her husband, petitioner No 2 and hence a suit for restitution of conjugal rights was filed at Delhi which ended in compromise and the husband and wife again started living as husband and wife. In the subsequent paras it is stated that the informant Sri Jagdish Prasad Jain became very much annoyed with the petitioners and lodged a false FIR which is sought to be quashed in the present writ petition (1993 Cri LJ 1 at para 2).

I wish to make two points here very briefly before moving on to describing what happened next. First, the petition does not use the language of honour rather the category of annoyance (at the daughter for marrying a Muslim man, and converting to Islam against his wishes) is the framing device for situating the motive for a false complaint. Second, the reference to the restitution of conjugal rights litigation whereby Oroos Fatima ‘withdrew from the society of her husband’ was filed in anticipation of the criminal trial when the couple moved to Delhi. The Judge observed that ‘I am not expressing any opinion regarding the allegations of marriage of the two petitioners and its legality. However, in my opinion the suit for restitution of conjugal rights was apparently a collusive suit, but once again I am not expressing any final opinion about the

same'.³³ The judgment by offering us a probable explanation of the collusive suit is careful in not casting aspersions on the legality of the marriage yet offers a framework to understand the stabilisation of legal strategies in the face of criminal charges brought about by the woman's parents.

What happened in court then when the petition came up for hearing in the court on 11 June 1992? When the opposing counsel, pleaded for time to prepare his opposition, the Court ruled that the petitioners could not be arrested on the charges of kidnapping and abduction for one month. Subsequently, the Court heard the petition on 17 June 1992. We learn from the judgment that Oroos Fatima appeared in court with her husband. Her parents were also present in court. The Court made an oral direction that Oroos Fatima should sit in the room of the Court officers, so that the father and other relatives could 'talk to her at leisure throughout the day. This was done. At 4 p.m., the case was again called out. The father of the petitioner No. 1 stated that he had enough opportunity to have conversation with his daughter and felt satisfied. However, I [the Judge] gave another opportunity to the parents to talk to their daughter and try to convince her. The case was again taken up on 18-6-92 and again the petitioner No. 1 and her parents were allowed to talk among themselves at leisure. The case was called out after lunch'.³⁴

The Court makes space available to Oroos Fatima and her family members to allow repeated conversations so that her parents could 'convince' her at leisure. The failure of the negotiation marked the limits of judicial rectitude when the case was called out after lunch accommodating the hearing solicitously through the typically busy workload of courts. Subsequently, Oroos Fatima's statement was recorded in court in the presence of her husband and her parents. Oroos Fatima alias Nisha Jain stated that she was twenty-three years

³³ 1993 Cri LJ 1 at 3

³⁴ 1993 Cri LJ 1 at 2

old when married Sabeeh Haider on 12 January 1992. She stated that Haider had not deceived her. ‘She expressed her desire to go to and live with her husband and she has further stated that she was living with him out of her own free will’.³⁵ Commenting on the FIR, the Court held that ‘it was but natural’ for her father ‘to apprehend that the life of her daughter might be in danger’.³⁶ The Court was appreciative of the fact that Oroos Fatima’s father showed ‘restraint in his FIR by not making any wild or untrue allegations’.³⁷

This appreciation of fatherly restraint is noteworthy. It suggests that the High Court is aware that a father under such circumstances could make wild and untrue allegations. Moreover, it absolves the father of false prosecution or untrue allegations on the grounds that he apprehended danger to his daughter’s life. Even though the father’s petition is dismissed on legal grounds, he is not pictured as blameworthy. While the father is not found blamed, the police are held responsible for illegally detaining women who leave their natal home to marry against their family’s wishes. The Judge observed that Oroos Fatima had:

[F]iled the present writ petition seeking protection from arrest and detention and in my opinion her apprehension of detention are well founded and she has locus standi to file the present writ petition. Our experience tells us that when young females leave their parental roofs the police out of sheer sympathy towards the parents or for other reasons forcibly detain such women even if they are major and have taken a decision of their own the police coaxes and sometimes coerces them to make a statement suited to the prosecution.³⁸

³⁵ 1993 Cri LJ 1 at 2

³⁶ 1993 Cri LJ 1 at 3

³⁷ Since, the daughter’s statement established that she was a major who left her parents home of her own choice and hence the charge of abduction and kidnapping under Sections 366 and 363 were not valid. Oroos Fatima’s statement had shown that there was no deception and ‘she was living there out of her own free will’ (1993 Cri LJ 1 at 3).

³⁸ 1993 Cri LJ 1 at 3

This judicial experience is grounded in awareness of local practices of policing whereby the police acting in concert with the family or in an advisory capacity to the family break the law by detaining adult women and fabricating criminal cases against both the woman and her partner.³⁹ Thereby, the ‘abducted’ woman who is ostensibly the ‘victim’ is often named as the accused or an abettor. It is significant that the Court felt it necessary to spell out that Oroos Fatima was not an accused but as the ‘alleged victim’, she could not be ‘arrested or detained even if an offence was committed’.⁴⁰ The Court is clear that an ‘alleged victim’ of a crime of abduction and kidnapping could not be treated as an accused, yet the practice of law divulges that the production of an ‘alleged victim’ sets in motion a series of illegal processes to produce a legal subject coerced to name herself a victim of abduction. Hence, this face of custodial violence at the site of the police station, which marks the alliance between the policing practices of the family and the state remain central to our exposition of the normalisation of the politics of honour by state law.

This judgment is important since it recognises that adult women are illegally detained by the police and coerced through the threat and/or actualisation of criminal charges, incarceration, violence and humiliation to name themselves as victims of abduction. The Court quashed the FIR and held that the police would not arrest any of the petitioners in connection with the above crime. The Court held that:

Even a temporary illegal detention is violative of the fundamental rights guaranteed under Article 21 of the Constitution. Coercion of any kind is an antidote to the concept of the personal liberty. Blackstone’s commentary on the laws of England 1 134, describes

³⁹ The Court cites a division bench judgment, in almost similar circumstances, to uphold its judgment. See *Pratibha Singh v. State of UP*, Civil Miscellaneous Writ petition No 7708 of 1991, decided on 1–5–91.

⁴⁰ 1993 Cri LJ 1 at 3

personal liberty as including ‘the power of locomotion of changing situation or removing person to whatever place one’s inclination may direct without imprisonment or restraint unless by due course of law’. I respectfully agree with the notions of personal liberty mentioned above. The word coercion in modern times cannot be construed in a narrow sense. It includes psychological restraints, psychological restraints are much more deterrent than physical restraints. They include all fear complexes of external origin and can be described as infringements of personal liberty. The fear of detention by police dilutes the concept of personal liberty and very attribute of living with human dignity.⁴¹

By focussing on the different forms of coercion during illegal detention, the judgment shifts the focus to practices of policing that suggest their investment in the use of law in enforcing codes of kinship and alliance in the context of intercommunity marriages. The judicial address here is to the way policing is embedded in the local in constituting a public, which is invested with affect rather than legal rationality.

In restoring the legal rights of adults to marry a partner of their choice, the Courts have also been mindful of the fact that even though inter-caste or inter-faith marriages may be considered to be ‘immoral’ by society, these are not illegal.⁴² In yet another case where a Hindu woman married a Muslim man and converted to Islam to marry him, the Court held that ‘efforts should be (made) to preserve the marriage rather than destroy the same’.⁴³ In this case, the Court observed that if the woman were to be married elsewhere and then it were to be known that she was previously married two lives would be ruined. Furthermore, if she were sent back to her parents she

⁴¹ 1993 Cri LJ 1 at 3

⁴² *Payal Sharma alias Kamala Sharma v. Superintendent, Nari Niketan, Agra and Others* 2001(3) AWC 1778 (cited in Chakravarti above note 17).

⁴³ *Mohd Kallu alias Mohd Jubeel v. State and Others*, Writ Petition No. 979 (MIB) of 1999 (cited in Chakravarti above note 17 at 324).

would be killed. The separation of law and morality calls for testing the legality of detention rather than enforce detention in order to uphold notions of male honour. Hence, courts have recognised that restoring daughters back to the custody of their fathers may be akin to signing their death warrants.

While similar legal strategies may be adopted in inter-caste marriages or inter-faith marriages, my reading of recent appellate judgments suggests that Hindu-Muslim marriages of choice are haunted by the spectre of communal violence. For instance, a case decided in December 2005 in the Allahabad High Court, details how a Hindu boy married a Muslim girl creating a 'furore in the local communities', which the Court points out is 'of course nothing unusual, in the prevailing social scenario. In cases such as these, the Law Enforcement Authorities usually buy peace at the cost of constitutional rights and privileges of citizens of this country.⁴⁴ The AHC directs the police not to 'interfere with the matrimonial life of the petitioners and to provide them adequate protection to them, as and when necessary'⁴⁵. It is suggested here then the police use the trope of maintaining communal peace to break up Hindu-Muslim marriages. The threat of the communal riot is then used as a resource. The practices of policing are embedded in the way these publics are constituted and the survival of a marriage of choice is seen as a threat to public tranquillity.

THE SUBJECT BODY: BEYOND HABEAS CORPUS

The pernicious effects of the constitution of local publics, which inscribe violence on women's bodies in the context of inter-faith or inter-caste marriages of choice, have been widely discussed by

⁴⁴ *Smt Pooja Arya & Anr v. State of UP & Ors* 2006 (1) ALJ 424 (DB) at 424. Writ Petition filed under Article 21, Constitution of India, right to life. The judgment was pronounced on 1-12-2005.

⁴⁵ *Smt Pooja Arya & Anr v. State of UP & Ors* 2006 (1) ALJ 424 (DB) at 424

feminists who have critiqued such local economies of punishment in India. Existing feminist work on the production of killable bodies through the decrees of non-state bodies such as caste panchayats, has remarked on the immunity of such bodies from state law. The fact that state law is suspended or it is ‘diluted’ to produce weak criminal cases against the perpetrators has been seen as an acceptance of the idea that consenting adults are ‘killable subjects’ in plural legal contexts. In the discussion that follows, I present a precarious account of how women’s bodies are made abject in plural legal contexts. This account aims to de-stabilise the picture of habeas corpus presented so far. This disturbing picture of how the abject body is discursively produced in court records is available to us through third party litigation on grounds of public interest. The discursive production of the abject body in the judgment cited herein accompanies the pronouncement that certain legal subjects cannot be bound to state law through habeas corpus.

I turn to *Miss M.S. Annaporani v. State of UP*⁴⁶ to illustrate the legal rendition of the spectacle of violence that was enacted against a young Hindu widow in rural Uttar Pradesh for marrying a Muslim man. This case came before the Allahabad High Court when the court received a letter from the Registrar, Supreme Court of India. The letter arose from the habeas corpus writ filed under Article 32, Constitution of India, by an advocate M. S. Annaporani who was aggrieved by the news reported in a local newspaper by the name of Hitavada on 30 July 1989. The newspaper report cited in the judgment detailed the violence suffered by a 30 year old woman named Santaraji Debi, who was gang raped and paraded in a Sourana village near Gorakhpur (Uttar Pradesh), after she married a Muslim man⁴⁷. The facts of the case as gleaned from the judgment are as follows:

⁴⁶ 1993 Cri LJ 487

⁴⁷ While the police may use the argument that Hindu-Muslim marriages of choice lead to communal tension or communal riots in order to break up such a marriage, this iconography is not used when a woman is subjected to gang rape and terrible

Santaraji was widowed for six years when she met Ali Raza. She met him after gaining employment in the government's Angan Bari scheme—a program for women that runs rural crèches and pre-school informal education centres in every village. Prior to getting a job, she was on the verge of destitution surviving on the sixty eight rupees pension after her husband's death with six children to support. She began to earn two hundred and fifty rupees when she started working with the Angan Bari. Ali Raza, employed in the adult education programme, and Santaraji met in 1988. They started living together from middle May 1998. They married in the registry office. At first, no one commented on this alliance. Matters got contentious when the Gram Pradhan—Paras Nath Yadav, who according to the newspaper report, 'had courted Santaraji's favour but without any success'—objected to this marriage and 'swore he would teach them a lesson'.⁴⁸ What happened next is best described in the words of the court:

In the afternoon of June, Yadav barged into their house. In the fracas that ensued Raza was beaten up by the headman's Hindu supporters. The police arrived and removed the three protagonists to the Camporganj police station about 15 kms away. Raza was remanded to custody but Santaraji and Parasnath were released, contravening standard procedure which requires all persons

forms of sexual humiliation in the view of village publics. This judgment allows us to trace how the police interpret the violence endured as an act of punishment for a transgression rather than a communal riot. The latter is steeped in a specific iconography of the riot, anchored in an understanding of communal violence as reciprocal violence between communities by anonymous crowds leading to death, injury and destruction of property. It may be noteworthy to mention that rape as an offence is rarely prosecuted during communal riots cases and in this case the sexual violence against a single woman by an identifiable mob of men is not framed as a communal riot. We may recall here that those Hindu women who chose to marry Muslim men featured on the death lists prepared during the surveys of killable subjects during the Gujarat 2002 violence (See IJ Report 2003).

⁴⁸ 1993 Cri LJ 487 at 488

immediately connected with a case to be taken in for questioning. Worse the woman was handed over to the villagers, to be used as they saw fit.

And then began the abominable outrage. Santaraji was taken to the house of one Badri Kiwat, one of the *dadas* (toughs) of Rampur. At nightfall they entered her room. She was repeatedly raped till early hours. Everyone seemed to be waiting to have his fill. At dawn, after satiating half a dozen men, she made desperate bid to escape. But she could then hardly walk and was predictably captured and punished for her temerity.

A grand carnival of sexual insult was arranged. One Bijlee Singh, assistant *pradhan* and Parsanath's right hand man, and Phool Singh, another heavy weight, were placed in charge of special effects. They cropped her hair, garlanded her with a neck-lace of shoes. Painted half her face with black ink and half with lime, stripped her, smeared her body with red paint, sat her on an ass and paraded her four hours through every lane in the locality. The bizarre procession featured amateur music makers heralding the principal exhibit with drums and trumpets. The *Pradhan's* Bullet motor cycle, symbol of power in the outback, brought up the rear. At any given time, atleast hundred people were involved in the proceedings. Santaraji was stoned and beaten with lathis all along the 50 km route. She often fell off the ass, only to suffer the indignity of being hauled back by the breasts. Finally she was thrown out of the village and warned never to return.⁴⁹

This case was reported to the local newspaper by a local schoolteacher after ten days.

This chilling account has been cited here to indicate the manner in which legal discourse discursively produces the abject body by anchoring terror in normative categories of the carnival i.e., bizarre processions, amateur music markers and participation of crowds in the proceedings. The genealogy of the description of women being

⁴⁹ 1993 Cri LJ 487 at 489

paraded has been stabilised in law and popular discourse in India such that collective and organised violence is domesticated through categories of 'parades', 'proceedings' or 'processions'.

The anchoring of the violence in communitarian forms of disciplining and punishing through processions of shaming in village spaces may be traced to the evocation of the colonial law on offences that evoke notions of divine displeasure. From the judgment, we learn that the police registered a First Information Report (FIR) against Paras Nath Yadav, Phool Singh Jethu, Ram Sevak and Rasul. The accused were chargesheeted subsequently for offences under s. 294 (obscene acts or songs), s. 342 (punishment for wrongful confinement), s. 354 (assault or force with intent to outrage a woman's modesty), s. 498 (enticing or taking away or detaining a married woman with a criminal intent), s. 504 (intentional insult with intent to provoke breach of peace), s. 508 (act caused by inducing a person to believe that he will be rendered an object of divine displeasure) and s. 509 (word, gesture or act intended to insult the modesty of a woman).

The chargesheet is revelatory. Even though some of the men who orchestrated this terrible violence were subsequently charged, they were not charged on the ground of gang rape or rioting. Rather, they were charged with breach of public peace, for outraging a woman's modesty and illegally detaining a married woman. The most telling evocation is the application of section 508, IPC. Section 508 holds that:

Whoever voluntarily causes or attempts to cause any person to do anything which that person is not legally bound to do, or to omit to do anything which he is legally entitled to do, by inducing or attempting to induce that person to believe that he or any person in whom he is interested will be rendered by some act of the offender an object of Divine displeasure if he does not do the thing which it is the object of the offender to cause him to do, or if he does the thing which is the object of the offender to cause him to omit,

shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or both (cited in Ratanlal and Dhirajlal 2001:714).

The police by evoking this clause seemed to have charged the accused for having acted against Santaraji to do that which she was not legally bound to do, and by inducing Santaraji to believe that she will be rendered by some act of the offender an object of divine displeasure if she did not comply. In other words, the police interpret this violence as a form of communitarian punishment that follows the transgression of an inter-faith marriage, which derives its authority from customs that source divine sanction.

It is startling how the police translates and authors the spectacle of sexual violence as legitimate customary punishment. The evocation of the colonial law on divine pleasure assumes a shared discourse amongst the perpetrators, witnesses and the victim about what constitutes custom and the divine sanction underlying custom. It positions the woman as a complicit subject in these local economies of power. The manner in which criminal law is translated here produces an iconography of customary punishment, which is not only based on a violent exclusion on the rights of the woman as a citizen but also sanctifies this form of violence by naming it as custom.

We are told tersely that the matter reached the trial court whereby the victim turned hostile to the case and her application seeking permission to compound the offence was accepted⁵⁰. We are told that Santranji 'specifically stated on oath that nobody had done any insult to her nor had any offence been committed vis-a-vis

⁵⁰ Section 354 and Section 509, IPC can be compounded, with the permission of the court, by the woman against whom the criminal force has been used or who has been insulted or whose privacy has been violated. Under section 342, which defines wrongful restraint, the person restrained can compound the offence. Likewise, section 498 allows the husband of the married woman who has been detained with criminal intent to compound the offence since the offence is seen as being against the husband rather than the woman.

her person nor was she mal-treated'.⁵¹ On 27 September 1991 the accused were acquitted. Dismissing the habeas corpus petition, the court further held that:

It cannot be helped observing that from the judgment of the Magistrate it is apparent that the helpless woman has helplessly surrendered to the might of her adversaries. That alone might be the reason why no evidence was forthcoming in such an outrageous case. However, the type of evidence expected to come in such matters may never be forthcoming if normal mode of the role of evidence is followed. What alternative method of investigation or of recording of evidence in order to bring the guilty to book shall have to be taken requires immediate and serious deliberation by those who are responsible for making and enforcing laws and maintaining order in the society.

Painfully and with a heavy heart, this petition is dismissed but with not too remote an optimism that necessity being the mother of invention, an appropriate law-net will be thrown to catch such rotten fish. After all, there is a silver lining to the blackest of the clouds.⁵²

We learn from the judgment that Santaraji's marriage broke up. We know nothing about how she was faring, whether she had any resources to support her children or how she survived this violence. Judicial inability to proceed without legislative changes to bring about alteration in evidentiary law marked the closure of this case. The evocation of criminal law here produces an iconography of customary punishment, which is not only based on a violent exclusion on the rights of the woman as a citizen but also sanctifies this form of violence by naming it as custom. We may argue then that judicial horror, at the appellate level, is displaced since it domesticates the violence in custom as if this were the natural habitat of this form of

⁵¹ 1993 Cri LJ 487 at 489

⁵² 1993 Cri LJ 487 at 490

violence. The painful and heavy heart of the court then beats in the patriarchal body of the law. It laments the patriarchy of customary punishment. The object of judicial horror is the failure of state law to preclude the formation of local publics that are embedded in the rule of law. The evocation of habeas corpus, in this case, points to those women who are made abject and not brought within such circuits of power.

DIASPORIC LEGALITIES: QUESTIONS OF JURISDICTION

I now turn to look at how manoeuvres of law and sovereignty are fractured in different sites, in the contexts of immigration and globalisation. To ask how spaces in Indian, Bangladeshi or Pakistani cities and villages become the locus of incarceration of, and violence against women of foreign nationality is to look at how law is implicated in governing sexuality in transnational contexts. The complex ease by which diasporic communities return to India in order to discipline and punish errant daughters for desiring autonomy and choice in marriage or sexuality is indicative of a distinct notion of diasporic legalities. In this instance, diasporic legalities describe the plurality of customs and laws that constitute formal and informal mechanisms that govern women's sexualities in transnational contexts.

Let us examine the judicial response to a situation when a woman who married a man of her choice is persuaded to leave the country, forcibly detained and killed in that country. Vasudha Dhagamwar points out that a petition in the Supreme Court of India for a writ of habeas corpus was given 'very unsympathetic hearing' on the ground of jurisdiction (2002: 313). The facts of the case, as narrated by Dhagamwar, are as follows:

In 1989, Farah Mohammed, a young Muslim student of Jawaharlal University incurred the wrath and grave displeasure of her family by marrying Abhiram Biswal, a Hindu. Biswal had taught her when she was an undergraduate student at Rourkela, Orissa, where her father was a highly placed civil servant. Under some pretext Farah's family

took her away to Karachi, in Pakistan. Her husband discovered her whereabouts after a period of two months when she was allowed to visit the British Council Library, and could smuggle out letters. In her letters Farah begged her husband to rescue her or to bring an instant acting poison for them both. Farah was kept a virtual prisoner in the house of her mother's sister. Her mother, who was a graduate of a prestigious college in Calcutta, wrote to her sister 'we would much rather have her die than return to her husband'. Farah did die, of 60 per cent burns. She was burnt in October 1989, soon after she wrote to her husband, and died a lingering death in January 1990, as per the communication from the Indian High Commission in Pakistan. A criminal case of kidnapping against her father and other relatives could only be filed after bringing extraordinary political pressure on the police (2002:313).

The petition of habeas corpus did not succeed on two grounds. First, the fact that Farah was taken out of the Court's jurisdiction, to Pakistan. Second, Farah had not been taken by force. Dhagamwar points out that kidnapping, is not only an offence against a guardian but also is offence when a person is taken outside of India 'by force or by fraud' (2002:313). Hence, kidnapping in the IPC is also an offence against the sovereignty of India. Dhagamwar adds, 'when the unfortunate girl was reported to have died, even though there was no verification, the learned judges were quick to dismiss the petition' (2002:314). The dismissal of habeas corpus on grounds of jurisdiction points to the operations of familial networks which escape from the sovereign power to capture the body and bring it into law.

I now turn to the accompanying discourse of 'rescue' found in diplomatic negotiation through law, which at times meets with the routine evocation of procedural law in the form of habeas corpus petitions. Let us consider reported case law in Pakistan, for example, where habeas corpus becomes the route for rescuing a woman of British nationality from the confines of a forced marriage. The legal subject then carries a dual identity as a British national and multicultural subject. Such petitions routed through the British

High Commission not only use routine and stabilised strategies used to ‘rescue’ Pakistani women but also show us how procedural law becomes a site where the contestations over diasporic legalities are enacted.

To illustrate this argument, I turn to an instance of forced marriage, illegal detention and violence against a British national in Mirpur, Pakistan.⁵³ This was an important case, as pointed out by Hannana Siddiqui, a spokeswoman for Southall Black Sisters ‘because it was one of the first occasions when a woman had spoken out in a Pakistani court⁵⁴’. Here, I detail the characterisation of forced marriages as tantamount to illegal detention and the use of habeas corpus petition as a legal strategy for producing a foreign national held in a marriage under duress in court. In *Cindy Parker v. Saeed Saleem and 5 Others*,⁵⁵ we find that the British High Commission’s, Second Secretary (Counsellor Section) Cindy Parker filed a writ of habeas corpus under section 491 Cr.P.C. for the production of a

⁵³ ‘The United Kingdom is home to about 600,000 Kashmiris, mostly from the AJK’s southern Mirpur division. Forced marriages between British-born nationals and their relatives in AJK are an issue of serious concern for the UK government which has formed the community Liaison Unit at the Foreign and Commonwealth Office to deal with these cases. The AJK and West Yorkshire police have also signed an MoU for bilateral cooperation to deal with the issues confronting the Kashmiri community and officials admit that forced marriages are dominant of such issues (Forcibly married British-born girl freed from in laws’ custody’, 3 May 2003, *DAWN*, <http://www.dawn.com/2003/05/03/nat21.htm>, accessed on 28–1–2006). ‘India has protested to Britain over the appointment of an honorary consul in Mirpur, pointing out to London that its office was located in what India calls Pakistan Occupied Kashmir’. The spokesperson from the BHC explained that this was done since ‘there are nearly 500,000 people from this area in UK. This appointment is purely in response to a high demand for consular facilities’ (UK move on Mirpur consul irks India, 16 December 2004, *DAWN*, <http://www.dawn.com/2004/12/16/top12.htm>, 28–1–2006).

⁵⁴ Zaffar Abbas and Jamie Wilson, British Woman in forced marriage freed, *The Guardian*, May 8, 2003, <http://www.guardian.co.uk/Pakistan/Story/0,2763,951204,00.html>, accessed on 28–1–2006.

⁵⁵ PLD 2003 Azad J&K 34

British national Neelum Aziz. This petition was supported with an affidavit and a letter written by Neelum to the High Commission. As a result of this petition, Neelum Aziz was produced in the court of Chief Justice Syed Manzoor H. Gilani on 30 April 2003. It is pertinent that the court followed similar procedures followed in Indian courts before recording the woman's statement. 'Before recording her statement, Neelum Aziz was given sufficient time to sit along with a lady Advocate to be sure that she is free to make a statement of her free will. After being satisfied that she is free of influence of everybody, the Court recorded her above statement in open court'.⁵⁶ The statement has been reproduced in the judgment recording that she was making the statement without any threat or coercion. Her father brought her to Pakistan and she was 'threatened, beaten and forced' by her father to marry Saeed Saleem, who was her father's sister's son and mother's brother's son. She stated in court that she was forced and beaten into consenting to the marriage:

Actually I was not agreeing to the marriage ... I had tried 4 times to go out of Pakistan and join my family in England but I was stopped, beaten and threatened to be shot if I attempt to go again, or approach the Embassy. I have tried to come to the Court but they stopped me from coming to the Court. Today, I have been threatened to say that I am happy; but I am not happy with Saeed Saleem ... I have been detained at the residence at Kotli against my consent and I want to go back to England to join my family. In case I am sent back to my husband or uncles, they will kill me and I would never like to go back with them.⁵⁷

Neelum stated that she had told her husband that she did not want to marry him prior to the marriage. He knew that she had written to the British High Commission. Her answer to a question by Saeed

⁵⁶ PLD 2003 Azad J&K 34 at 36

⁵⁷ PLD 2003 Azad J&K 34 at 36

Saleem (indicating that the husband was allowed to question her) as cited in judgment is revealing: ‘I do not like him whether he likes me or not’.⁵⁸ Her husband Saeed told the court that ‘he had no objection if she is sent back to her family in England’ and that he knew that she did not want to marry him nor did she like him.⁵⁹ He asserted that the marriage was arranged by her father. Neelum was not allowed to phone her family in UK, her identification—national insurance card—was burnt and her visa had lapsed. She wanted to appeal to her mother, two brothers, sisters and friends in UK. Her ornaments were stolen by her husband and her uncles. Her father had returned to England and was supportive of her uncles detaining her in Pakistan. The Court found that Neelum had been ‘forcibly married to Saeed Saleem’ and ‘illegally and improperly detained’⁶⁰. She was set at liberty with instructions to the SSP, Muzaffarabad to provide security and protection for a safe passage to the British High Commission at Islamabad. The representative of the British High Commission and the advocate representing Neelum were directed to lead the police officers escorting Neelum to the High Commission. They were also directed to ensure an air ticket and other arrangements for a safe passage to England to ‘join her parents’.⁶¹ Moreover, it was held that ‘the court shall be informed by the High Commission about the safe arrival of Mst. Neelum Aziz at her residence in England’.⁶²

This judgment states that the detention of an adult woman forced to marry and forced to live with the man without her choice amounted to ‘improper and illegal detention of a person who is major and entitled under law to reside and live at any place of his/her choice’.⁶³ Further, the Court held that:

⁵⁸ *Ibid*

⁵⁹ *Ibid*

⁶⁰ *Ibid*

⁶¹ PLD 2003 Azad J&K 34 at 37

⁶² PLD 2003 Azad J&K 34 at 37

⁶³ PLD 2003 Azad J&K 34 at 37

The marriage of a girl does not make her living or residing with her alleged husband legal or proper, if it is forced and she is compelled to live. The marriage is a civil contract between the spouses solemnized according to the social and religious rites of the parties with their free or independent consent. Union has to remain free of coercion and duress, not only at the time of marriage. This is Islam as well as a common law/ principle. If one is forced to marriage or does not feel convenient to live with spouse at the place where the husband wants but wife feels insecure and threatened to live, it amounts to illegal custody and detention, irrespective of validity or otherwise of marriage.⁶⁴

This judgment is a noteworthy illustration of how forcible marriage comes to be characterised as illegal custody and forcible residence with the husband characterised as illegal detention. It demonstrates how common law is aligned with Islamic law to regulate marriage as institution that cannot mimic the state by appropriating legitimacy to detain and take custody of adult women. The judgment highlights the importance of looking at forced marriage as an act of detention, and brings the jurisprudence of extraordinary laws to contest the way the diasporian subject—the father—returns to the homeland. The return however haunts the Court in terms of a safe passage under armed escort, while it haunts us since Neelum returns to her family—but also to her father. The judgment is singularly silent on the figure of the father as the diasporian subject who uses the diasporic space to colonise his daughter who asserted a British nationality into discourses of fixed Pakistani origins.

How then does the diasporian subject translate a ‘homing desire’ into techniques of violence? This translation of male homing desires folding women into discourses of fixed origins localised in India or Pakistan is definitive of diasporic legalities. The nature and

⁶⁴ PLD 2003 Azad J&K 34 at 37

limits of diasporic legalities leads us to the question of how does the diasporian subject return? While ‘the homeland is one aspect of diasporic imaginary’, Axel suggests that ‘rather than conceiving of the homeland as something that creates the diaspora; it may be more productive to consider the diaspora as something that creates the homeland’ (2004:426). He argues further that ‘most commonly, the ‘identity’ of a diaspora is understood to be impinged upon, determined, demonized, or encompassed by the external force of a nation–state. In other words, the diaspora and the nation–state are seen to be isolable entities’ (2004:426). Contesting this picture of the diaspora, Axel argues that the ‘diaspora and the modern nation–state have become intertwined in a dialectical relationship’—a dialectic that underscores ‘the fragile—yet enduring—ground of the nation form itself, even as it animates the desires of diaspora to enter into representation’ (2004:426).

This capacity of the nation form that finds animation from the desires of the diaspora allows us to re-read Indian or Pakistani appellate jurisprudence in relation to the form and nature of what I label as diasporic legalities. I have used the term ‘diasporic legalities’ to label the way in which subjects living in diasporic spaces represent, circumvent, recognise, adopt and deploy laws in a plurality of contexts, and in legally plural environments. The intersection of personal laws with English law termed as the *angrezi shariat* by some scholars or evocations of culture in courts of law in Britain on the grounds of cultural defence have recognised diasporic legalities. We also know that the characterisation of ‘arranged marriages’, for instance, as definitive of South Asian identities has marked the jurisprudence of immigration in UK. The recent shifts in the discourse from arranged marriage to moves to legislate against forced marriage mark the tensions between multicultural and feminist concerns in UK. These discursive shifts are exceedingly important to detail to understand how technologies of surveillance, policing and punishment dispersed in different locations traverse the borders and locality to constitute the diaspora space.

CONCLUSION

In this paper, I have suggested that the habeas corpus case law is instructive in highlighting questions of citizenship in the domestic realm and the constitution of the spaces of the family or the community as a site of illegal detention and custodial violence. In other words, it persuades us to look at the nature of custodial power in the domestic realm, and how state law is privatised. I have gestured towards the competing socio-legal discourses of recovery and reconciliation which frame notions of male honour and the rule of law respectively. I have suggested how law is used to ensure that the intimate project of heterosexual love remains incomplete and how law is used to prevent the terrible separation of love that parental or community based sanctions seem to guarantee. The apparatus of state law is used as a resource to destroy relationships based on love and longing by producing a body devoid of autonomy to make a choice in marriage. In contrast, the abject body, which cannot be produced in court, on grounds of insufficient evidence in a criminal trial, points our attention to the manoeuvres of law and sovereignty in different sites, to show how habeas corpus fails when legal discourse excludes women from claims to citizenship in the domestic realm. We may suggest that in the contexts of immigration and globalization, the histories of the writ of habeas corpus in the ‘post’—colony rather than signifying the ‘production of a right, new or otherwise’ indicates ‘a maneuver in the production of a new configuration of law and sovereignty’, and that the ‘legitimizing project of procedural legality’, is incomplete without an understanding of how legal regimes are intrinsically entangled with genealogies of dispersion⁶⁵.

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⁶⁵ Hussain above note 4 at 71–2

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