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9

Freedom to Marry: The Constitutional Choice and KHAP Panchayats

Indira Jaising

(Established in 1956)
Capacity Building for a Better Future

INTERNATIONAL INSTITUTE FOR POPULATION SCIENCES
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Freedom to Marry: The Constitutional Choice and KHAP Panchayats

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Freedom to Marry: The Constitutional Choice and KHAP Panchayats*

Indira Jaising

> "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men"
>
> --U.S. Supreme Court, *Loving Vs. Virginia*, 1967

I have chosen to speak today about the right to marry as an essential freedom of all human beings as it relates to their right to self-expression and their right to associate with a person of their choice. That apart, I have chosen to talk about what I consider to be an interference with this most essential right by Khap Panchayats on the ground that they oppose intra gotra marriages for scientific and genetic reasons, namely that such marriages reduce the gene pool and have a recessive health impact on the population. In other words, on the ground that it is not in the interest of public health. This is surely an argument of concern to population experts, geneticists, demographers and health experts.

Before we enter that discussion I would like to say a few words about the right to marry itself. Let us not forget that we live in an age of choice, not only in an age where the Constitution has gifted us the right to choose our marriage partner, but also in an age where we can choose whether or not to have children. These are also the times when worldwide demands are being made that the State should permit same sex marriages and challenges to laws preventing same sex marriages are pending in the Supreme Court of South Africa. These developments remind us that often the right to marry may have nothing to do with procreation and world over people do choose not to have children, not because they are infertile but because they choose not to have children. We must therefore distinguish between the right

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* The paper formed the basis of the author's Professor Asha A. Bhende Memorial Lecture at the International Institute for Population Sciences, Mumbai, on April 20th, 2013.

to marry and the procreation and its implications. We are at this stage discussing the very foundational right to marry.

As I indicated, marriage is or rather ought to be a union of choice entered into voluntarily. For women the law declares that it is a monogamous union with a man. As I see it, the purpose of the union is to share love and affection and though this may seem old fashioned, I believe that ought to be its only purpose. I am aware that it has indeed become a transaction, in which dowry may be exchanged, in which men may look for trophy wives or parents of daughters may seek upward social mobility for themselves by marrying off their daughters to persons of the upper class or caste. In India, the phenomenon of brahminization is also well known; the groups of upwardly mobile persons project themselves as upper caste. So we do know that marriage can be a means of upward mobility, very rarely downward mobility. Marriage in our society comes to be seen as an institution to be controlled as a means of controlling the sexuality of women and as a means of closing ranks over caste or class. In other words-- privilege. As this discussion will indicate, the objection of the Khap Panchayats to *intra gotra* marriages is also intended to preserve privilege and property .The other equally and better known institution to control and preserve privilege and power is endogamy, marrying within your own caste. This too leads to preservation of privilege and though these two institutions seems in contradiction to each other, they actually support a closed network, literally closing ranks, excluding vast majorities in their midst. What they have in common is a stated scientific justification, in the case of endogamy, the need to maintain the purity of the blood line and in the case of objections of intra gotra marriages, an objection that the gene pool will be diminished.

As a group of scientists you should be concerned with both these claimed justifications and come to your own conclusions whether they can be sustained and whether they have any public health implications or whether they are only a means of sustaining power and privilege.

So as a lawyer, let me first outline the law for you.

The right to marry or form matrimonial alliances is a fundamental right flowing from the right to life which every individual is entitled to enjoy. The *right to marry*

as a constitutional matter poses two sets of questions—the *content* of the right to marry and the *scope* of the same right. The content of the right lays down what the right keeps in store for people who are entitled to it whereas the scope of the right envisages the relationships that can claim it. At the heart of this, is the understanding that marriage is a state approved or state sanctioned licensing mechanism. The state decides who can marry and to whom can one be married. In other words, when we say that there is a fundamental right to marry a person of one's choice, we mean, that choice is limited by the sanction of the state. The sanction of the state is articulated through its statutes. The constitution reiterates this right embodied in municipal laws. The international laws, through its treaties and customs also articulate an individual's freedom to choose a partner and enter into matrimonial alliance. What all these laws categorically state, is that an individual has a right to marry a person of his or her choice within the boundaries of statutory laws. No person or association of persons has any right to interfere in the formation of such matrimonial alliance. This is the heart of the freedom.

Culture and tradition cannot be used as a tool to defeat the right to life or choice of marriage partner in accordance with law.

A robust body of international law, both treaty law and customary international law have sought to protect the individual's right to marry without any limitation or consideration of race, nationality or religion. As early as 1948, the *Universal Declaration of Human Rights* in Article 16 underlined that men and women without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at the time of dissolution of marriage. It also stipulated that marriage shall be entered into only with the free and full consent of the intending spouses. The family, it said, is the natural and fundamental group unit of society and is entitled to protection by society and the State. The International Covenant on Civil and Political Rights, 1966 reiterated the same and in a similar vein emphasized that the right of men and women of marriageable age to marry and to found a family shall be recognized. No marriage shall be entered into without the free and full consent of the intending spouses. It further stipulated that State Parties to the covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.

In 1994, the historic Convention on the Elimination of Discrimination Against Women (CEDAW) in *General Recommendation No. 21* protected the woman's agency to enter into a marriage and her right to choose her partner. Article 16 (1) in Para a, b and c laid down the woman's right to enter into a matrimonial alliance.

> *Article 16*
>
> *1. States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*
>
> *(a) The same right to enter into marriage;*
>
> *(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;*
>
> *(c) The same rights and responsibilities during marriage and at its dissolution;*

It is pertinent to observe the language of the article—it puts a direct obligation of due diligence on the state parties to the convention to eliminate discrimination against women in all matters relating to marriage and family relations, including the right to enter into a marriage and freely choose a spouse with free and full consent. In many ways, the phrasing of the article is a construction of due diligence, which I shall discuss in a while.

The *Charter of the European Union*, a regional document also highlight the individual's right to enter into a matrimonial alliance. Article 9 lays down that the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights. This Article is based on Article 12 of the ECHR, which reads as follows:

> *"Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right."*

Hence in the international legal regime, both regional documents as well as international treaty laws have recognized and upheld the individual's right to enter

a matrimonial alliance with a person of his/her choice subject to the limitations of domestic laws.

It might be worthwhile to also glance at the US Supreme Court decisions in three cases namely, *Loving v Virginia*, *Zablocki v Redhail* and *Turner v Safley* articulated the right to marry. In the modern form, the right to marry in US is principally a product of these three cases. In *Loving v Virginia* the Court struck down a ban on interracial marriages. The court spoke in terms of the equal protection clause and viewed the ban as a form of racial discrimination. The court also held that the ban violated the due process clause. It stated that marriage is one of the basic civil rights of man, fundamental to our very existence and survival and that the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. In *Zablocki v Redhail,* the Court invoked the equal protection clause to strike down a Wisconsin law forbidding people under child support obligations to remarry unless they obtained a judicial determination that they had met those obligations and that their children were not likely to become public charges. The court emphatically pronounced that the right to marry is of fundamental importance for all individuals and went on to add that the decision to marry was placed on the same pedestal as the decision relating to procreation, child-birth and the like. Later, in *Turner v Safely,* the court followed *Zablocki* and struck down a prison regulation that prohibited inmates from marrying unless there were 'compelling reasons' to do so. The court emphatically laid down some of the foundational notions on the right to marry and held that even in prison the right to marry must be respected unless the state can produce compelling reasons to interfere with the said right.

While this remains largely the discourse on the freedom to marry in international jurisprudence, let us now take a look at our domestic laws. The source of this freedom to marry in India can be primarily obtained for Hindus from two sources—the Statutory Laws namely the Hindu Marriage Act, Special Marriage Act etc and the Constitution. While the first i.e. the statutory laws specify the conditions of a valid marriage, the latter does not expressly lay down specific provision for an individual's right to enter into a matrimonial alliance, but impliedly does so as the apex court has from time to time underlined the freedom to marry a person of one's choice in a number of decisions.

Two statutes that contemplate marriage for Hindus in India are

A. Hindu Marriage Act, 1955

B. Special Marriage Act, 1954

I am not dealing here with other communities since the title of my paper is Khap Panchayats with specific emphasis on the right to marry among Hindus.

These statutes outline the conditions of a valid marriage. The statutes lay down that the bride and bridegroom should not be related to each other within the degrees of prohibited relationship. The degrees of prohibited relationship are defined differently under both the statutes. The prohibition of *sapinda* marriages (though only unto five degrees from the father's side and three degrees on the mother's side) is still retained for Hindu marriage. Marriages in violation of this condition are null and void under both the statutes.

The *conditions of a valid marriage* under the Hindu Marriage Act, 1955 require under *Section 5*

a) That neither party has a spouse living at the time of the marriage,

b) That neither party is incapable of giving a valid consent to it in consequence of unsoundness of mind or

   Though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children or has been subject to recurrent attacks of insanity.

c) The conditions for valid marriage also require that the bridegroom has completed the age of twenty one years and the bride, the age of eighteen years at the time of marriage and

d) That the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two and

e) That the parties are not *sapindas* of each other, unless the custom or usage governing each of them permits of a marriage between the two.

Therefore it follows that if the conditions as aforementioned are satisfied then, there is no bar to marriage. It follows that these conditions remaining fulfilled an individual who is governed under the Hindu Marriage Act may enter into a matrimonial alliance with any person of her choice. This is the correct legal position.

The bar to marry a person within the degrees of prohibited relationship means that no marriage is valid if it is made between persons related to each other within the prohibited degrees, unless such marriage is sanctioned by the custom or usage governing both the parties. The custom, which permits a marriage between persons who are within degrees of prohibited relationship, must fulfill the requirements of a valid custom. The rules relating to 'degrees of prohibited relationship' are prescribed in the definition clause [s 3(g)] and have been discussed under that clause.

It is an interesting thing to note that although the Act deals separately with the questions of prohibited degrees of relationship and *sapinda* relationship, though in some cases, both the prohibitions may overlap.

There is a history to these provisions in the Act of 1955. It became necessary for the law to define "prohibited degrees" to undo a long legacy of history of custom and tradition sought to be sanctified by religion, that *intra gotra* marriages should not be permitted. In agrarian societies land was indeed a major asset of the upper castes and classes and marriage was itself a patrilocal institution as it continues to be till today. The ban on intra gotra marriages basically meant that a daughter was far removed from her natal family and virtually ceased to be a member of the natal family. Daughters were in any event not members of the coparcenery and had no right to ancestral property much less landed property. This is fortified by the ideology that daughters are " parya dhan" The institution of Stridhan in the form of jewelry made at the time of marriage given to the daughter was, so to say, meant to settle all her dues at the time of marriage.

The Hindu Marriage Disabilities Removal Act, 1946, was intended to undo the ban on *intra gotra* marriages and hence it must be seen not only as a measure of

social reform but also as a measure supporting the freedom to choose a marriage partner. It provided that notwithstanding any text, rule of interpretation of Hindu law or any custom or usage, a marriage between Hindus, which was otherwise valid, would not be invalid by reason only of the fact that the parties thereto belonged to the same *gotra* or *pravara.* Before that enactment came into force, it was held on the basis of custom and tradition that a man could not marry a girl of the same *gotra* or *pravara,* the theory being that his marriage could only be valid if sanctioned by custom. Section 29 (1) of the present Act re-enacts the above provision of the *Hindu Marriage Disabilities Removal Act, 1946*, because the latter enactment is now repealed by s 30. The rules now enacted in this and the next clause simplifies the position to a considerable extent.

Section 3 (g) defines “degrees of prohibited relationship”.

> *3 (g) “degrees of prohibited relationship”-two persons are said to be within the “degrees of prohibited relationship”-*
>
> *(I) If one is a lineal ascendant of the other; or*
>
> *(ii) If one was the wife or husband of a lineal ascendant or descendant of the other; or*
>
> *(iii) If one was the wife of the brother or of the father’s or mother’s brother or of the grandfather’s or grandmother’s brother of the other; or*
>
> *(iv) If the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two*

Father and the girl’s father were both descendants of a common ancestor in the *brothers or of two sisters;*

> *Explanation. -For the purposes of clauses (f) and (g), relationship includes-*
>
> *(i) Relationship by half or uterine blood as well as by full blood;*
>
> *(ii) Illegitimate blood relationship as well as legitimate;*
>
> *(iii) Relationship by adoption as well as by blood and all terms of relationship in those clauses shall be construed accordingly.*

Marriage within prohibited degrees is not a valid marriage. In other words if the bride and bridegroom are not related to each other within the degrees of prohibited relationship as outlined in Section 3(g), then there is no bar to marry.

Again, the bar to marry a *sapinda* means that no marriage is valid if it is made between parties who are related to each other as sapindas, unless such marriage is sanctioned by usage or custom governing both the parties. Additionally, Section 3 (f) defines *Sapinda* relationship.

> *3 (f) (i) "sapinda relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation;*
>
> *(ii) Two persons are said to be "sapindas" of each other if one is a lineal ascendant of the other within the limits of sapinda relationship, or if they have a common lineal ascendant that is within the limits of sapinda relationship with reference to each of them;*

The *Special Marriage Act, 1954* lays down "degrees of prohibited relationship" in the Schedule in two Parts. A careful reading will show that here also, the degrees are not beyond three generations in the line of ascent. Section 4, which stipulates the conditions relating to the solemnization of special marriages, proclaims that parties are not to be within degrees of prohibited relationship. However there is a proviso that reads that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized.

It may thus be noted that a valid marriage does not need the consent of parents to the marriage or of the Panchayat to be a valid marriage.

Marriage laws are not self explanatory but prescriptive. The Act does not explain the purpose of prescribing "prohibited degrees", it merely prescribes them. It is however generally believed that this encapsulated the taboo against incest and extends the taboo to other degrees as well. The scientific explanation often claimed for this ban against consanguineous marriages is medical recession among the progeny.

But the history of the drafting on the HMA indicates that there was indeed another purpose behind listing the prohibited degrees, and that was to expand the freedom of choice to marry beyond certain prohibited degrees. Before the HMA was enacted in 1955, marriage was considered a sacrament and it was the pious obligation of a father to do the “kanya dan” Forms or marriage and taboos of who you could marry and who you could not marry were designed to entrench privilege gained being a matter of gotra. Doctor Ambedkar, one of the architects of the HMA had a specific understanding of how privilege is entrenched and was aware that both endogamy and exogamy when practiced within sub castes and within gotras entrench power and privilege. His understating of caste led him to believe that endogamy is caste and caste is endogamy. In order to bring about a new society it was necessary to end endogamous marriages as also remove the intra gotra ban on maraiges making intermingling of castes and gotra more freely possible.

This was achieved by defining the term “ Hindu “ widely to include Buddhist and Sikh in the HMA and permitting a marriage between any two Hindus making inter-caste marriages lawful. The Act also limited the prohibited degrees of marriages to three in the male line and five in the female line (except where custom permits otherwise).

The Act struck at the very heart of Hinduism, which is what explains the resistance to the *Hindu Code Bill*. It is based on a specific understanding of how marriage was the primary institution that sustains caste by restricting choice in marriage especially for women.

It is in this context that the demand of the khap Panchayats must be viewed. In a writ petition filed by an NGO in the Supreme Court seeking measures to prevent interference by Khap Panchayats in Hindu marriage, several Khap Panchayats have made their submission articulating their position. For example, the submissions of Gill Gotra Khap of the State of Haryana states that:

> *“India is not only a country but a sub continent. Indian people of different religions and castes follow different religious and social customs. But the Hindu Marriage Act of 1955 does not recognize such diversity of customs. It recognized only 3 blood relations based on customary practices of South*

India. These are given in section 3 in the act no. (I) Total Blood Relation, (ii) Half Blood Relation (iii) Uterine blood relation. But this does not recognize customary practices of North India. In South India, particularly Brahmins have custom to marry their sister's children, whereas in North India, such relations are treated equal to real brothers and sisters in almost all communities. It seems that Hindu Marriage Act, 1955 was drafted in haste and elaborate debate was not held in the Parliament before passing the said Act with the result that the said Act is an incomplete Act. There should be amendment in section 5 of the H.M Act and a condition should be added that "Sankalp of Kanya Daan" must be performed either by the father, mother, if both are not alive or incapacitated, then real elder brother, her maternal or paternal uncles. This ceremony is performed from ages at the time of "Saptapadi". Mullah also mentions this ceremony in Para no.434 of the Hindu Law. This will not only prevent run away marriages but also will reduce the number of divorce petitioner in love marriage cases as per the report on the internet protection from the courts. This trend needs to be curbed."

The concern here is to prevent marriages of choice and to insist that a marriage will only be valid if *kanya-dan* is performed.

They then proceed to demand that *intra gotra* marriages be banned

" So, the Khap Panchayat demand that keeping in view, the customary practices of North India, Hindu Marriage Act should be amended suitably for debarring the marriages in the same Gotra & mother's gotra and within same and adjoining villages, so that the pious relations of brother & sisters are kept intact and honored. The importance of Raksha Bandhan festival celebrated throughout the country can be forgotten. Because a village is treated as a single unit in North India and living as a Bhaichare (brotherhood in relation), irrespective of the caste. Girls of the village of any caste if married at distance village, then any man even having no relation with the parents of the girl, if visits that village, he must give "Shagun" to that girl treating her as daughter or sister so the marriages should be allowed to be performed either under the H.M.Act after observing the above ceremony of "Sanklap Kanya Daan" or it should have been under the Special Marriage Act. The general trend of

run away marriages, is the performing of the marriage in Arya Samaj Mandir without any 'Sankalp Kanya Daan" getting the failure rate of the love marriage is 83%. It will also be a point for consideration that, generally marriages are being arranged by the parents of both the parents of both the parties, investigating the social status, income, character and all other aspects of both the families, but love marriage in caste or out of caste is nothing but age related physical attraction of boy and girl and after some time as attraction starts diminishing, marriage ends in divorce. In some cases, where the boy is not earning hard, no relief u/s 125 Cr.P.C or under Protection for Women from Domestic Violence Act can be enforced against the boy, except sending the boy to jail and the life of the girl is spoiled."

Here we see a classical support for the maintenance of the caste system and intra gotra marriage as a means of repudiation of caste and class.

The written submissions filed by the Khap Panchayats in the districts of Jhind, Rohtak and Sonepat state as follows:

"Gotra based social tradition of marriage and bhaichara:

According to Prof. S.C.Dubey (Indian Society, 1990, p.48), an internationally known social scientist, gotra is an out-marrying sub-division of communities. One marries outside one's gotra. Gotra denotes descent from a common ancestor in the distant past. The kula (vansh) represents a lineage, with a five or six generation depth. Marital traditions and customs in North India are based on gotras. He further asserts (ibid p.81), a man is not expected to marry in the gotra of his father, mother, father's mother and mother's mother in North India. However, avoiding the marriage within these four gotras has recorded dynamic change and variation from one community to other. Established by Ancient sages, intra-gotra marriages are not customary hence objected to, since these are based on the established findings of the medical science and genetics. These are that inbreeding results in and accentuates the genetically transmitted diseases while cross-breeding dilutes and diminishes these diseases effectively. Because people of the same gotra derive their lineage and ancestry from the same person, therefore, it is a larger family tree as

well as brotherhood expanding to the same gotra villages. By avoiding same gotra marriages and marriage in blood relations, the dangers and adverse effects of consanguinity and inbreeding are checked. The social system has also been avoiding the mother's gotra as well as grandmother's gotra (nani and dadi); the inherent dynamic flexibility in the social system has now dropped the nani's gotra and dadi's gotra. The custom of avoiding these gotras is practically practiced in the villages where the total number of same gotra population is less than a few lacs. Some communities like Rajputs and baniyas avoid their own gotra only for marriage and very large Brahmin gotras have been divided into sub gotras (shasnas) which are also avoided for marriage. Because, the Jat gotras are in thousands and the population base of an individual gotra is small, therefore, gotra system becomes sacrosanct in conformity with avoiding consanguinity. However, intra-gotra marriages are avoided in all communities all over India. Same gotra marriages fall within the wider parameters of consanguineous marriages. According to medical science research, such marriages can result in any one of over 250 genetic diseases. Prof. J.B.S.Haldane, an internationally renowned British biologist has said that the Hindu way of marriage is highly scientific being a check on inbreeding, characterized by exhibition of regressive characters in the progeny (The Tribune, Vol.132 No.165, June 15, 2012 p.8). According to Dr.Rajiv Gupta, Sr.Professor & Head, Department of Psychiatry, PGIMS, Rohtakand CEO, State Institute of Mental Health, Rohtak (Haryana), consanguineous marriage remains the choice of an estimated 10.4% of the global population only, although there has been an overall decline in its popularity, especially in developed countries. Higher rates of mortality and rare diseases and disorders are more common in the offspring of consanguineous unions. It has been observed that genetically, population base the incidence of diabetes, hypertension, IHD and obesity is much higher in South India where people marry their close blood relations. While Haryana's performance is much better on health and sports fronts which are intra-related and concept of cross-breeding is a major factor in these achievements."

Here we see an unholy alliance between caste, gotra, marriage and science. What is being claimed is that the intra gotra marriages are not desired. Gotra here is

defined as anyone descending from a common ancestor, and also anyone living in the neighboring village on the basis of bhaichara and the tying of the rakhi, produce progeny which has regressive characters.

In a similar vein they outline the concept of Village Bhaichara, Gotra Bhaichara and Khap Bhaichara:

> *"The traditional moral code of conduct, mainly related to marriages, is based on village bhaichara (brotherhood), gotra bhaicharaa (clan brotherhood) and khap bhaicharaa (brotherhood of persons belonging to same khap, signifying equality within the khap), akin to Sikh sangat or Islamic brotherhood based on equality, fraternity and socially acceptable democratic behaviour. These principles apply to all communities within the village and khap. The daughters, sisters and buas of the village and adjoining villages are rakhi-relationship for all communities and are considered and treated as sacred relationships, which cannot be married in the same village and the khaps. This custom has been perpetuated because most of the villages are based on the same gotra. In the present scenario, marriage within the same gota is unimaginable especially in village communities that are why their reaction is volatile if it happens."*

Thus, the stated object to intra gotra marriages is a claim to medical science and genetics namely, that regardless of the number of degrees by which the parties are removed, and that inbreeding results in and accentuates the genetically transmitted diseases.

Matters do not end at the level of contentious objections to intra gotra marriages, The phenomenon of "Honor killings" has been associated with intra gotra marriages and the Khap Panchayats. The dictat against intra gotra marraiges is forcibly enforced sometimes resulting in the death of a woman who chooses her own partner.

When confronted by this phenomenon the khap panchayats argue that it is not they who kill daughters but the families of the girls themselves who would rather die of shame (hence the term "Honor killings ") and they have no role to play in it.

Given their stated position of intra gotra marriages, it is perhaps difficult to believe that they have not actively instigated the death of the women of the gotra who choose their own marriage partners and enter into valid marriages.

Forms of violence associated with Khap Panchayat include the killing the girl as well as the boy, who enter into marriage of choice, ex-communication of the family of the girl, OR declaring the girl and the boy siblings.

Modern societies have offered education to girls and boys in villages and in small towns, which has brought about intermingling of the sexes. Given the opportunities of a modern society to meet the opposite sex, it is normal to expect women to make a choice of their marriage partners. Given that the concept of the gotra has been expanded to everyone descending from a common ancestor, and given that it is now extended to the neighboring village on the concept of “bhaichara” there is virtually no one a girl could marry within her own zone of influence and in the locality in which she resides.

Recognizing the violence of the Khap Panchayats, the Government of India at the demand of the women’s movement, referred the matter to the Law Commission, which issued a consultation paper suggesting a new law to prevent interference of matrimonial alliances.

A major national Women’s Organization AIDWA has also made interesting suggestions to enact the law specifically criminalizing forms of violence faced within the context of the Khap Panchayats and including imminent threats of violence, misusing social evils like dowry, female feticides, declaring the couple siblings, excommunication and depriving the family, including the male partners of any land or property, directing the couple not to associate with each other, and forcibly marrying the girl or boy to someone else.

The fundamental right to choose one’s partner in accordance with law has also been encapsulated by the Supreme Court in a series of judgments holding that the right to choose one’s partner, or the right to marry a person one chooses is a fundamental right under Article 21 of the Constitution.

In *Lata Singh Vs. State of U.P. & Another* the Court articulated that the right to marry a person of one’s choice is a fundamental right protected under Article 21. It is also a matter involving freedom of conscience and expression in terms of right to marry person of one’s choice outside one’s caste. The Court noted with dismay that—

> "14. This case reveals a shocking state of affairs. There is no dispute that the petitioner is a major and was at all relevant times a major. Hence she is free to marry anyone she likes or live with anyone she likes. There is no bar to an inter-caste marriage under the Hindu Marriage Act or any other law. Hence we cannot see what offence was committed by the petitioner, her husband or her husband's relatives."

In *Arumugam Servai Vs. State of Tamil Nadu,* the right to marry person of one's choice was held to be a right to freedom of expression and conscience. The Khap Panchayats' encouraging of honor killings and interference in such marriages was condemned and necessary directions to prevent such acts were issued. The right to marry was articulated as a human right as well as a civil right. The same view was taken by the Court in *Bhagwan Das vs. State*.

In *Ashok Todi Vs Kishwan Jahan*, this Court while taking the same view as above outlined the duty/responsibility of the law enforcement/administrative agencies to ensure/protect the victimized couple.

The State has a role as a duty bearer to prevent unlawful acts. In this context, CEDAW, General Recommendations 19 may be observed where the state parties have been urged to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."

The concept of due diligence has been developed and used by the SR VAWs as a key principle to hold States legally accountable for the prevention, investigation and punishment of violations by non-State actors.

Due diligence implies that states ensure implementation of laws. States are responsible to protect, respect and fulfill human rights. States are held responsible for acts of private actors in both the public and private sphere.

Obligation of States includes:

(i) *Prevent* -- by recognizing specific forms of violence, enacting legislations, ratifying treaties, taking positive action by states through policies and

programmers such as commissions, public education campaigns, sensitization of agencies, collection of data. To prevent has the potential of the state actively transforming social and material structures that are at the root cause of the act. Sensitizing the police may fall within its ambit. The Supreme Court in *Lata* has articulated this suggestion as well as in a spate of later judgments.

(ii) *Protect* -- establish or promote institutional arrangements vital to respond to such acts such as shelters, crisis support, restraining orders, financial aid to the victimized couple and prosecution and punishment of perpetrators. Ensuring that the police act to protect the victims may come within its ambit.

(iii) *Fulfill* -- treating law a part of a broader effort that encompasses public policies and services. Interventions must be effective and responsive. Responsiveness requires data collection to ensure responses are designed to respond to context of violations, monitoring of impact.

It may not be out of context to mention that the Supreme Court in *Vishakha* also articulated the role of the state as duty bearers to prevent gender based discrimination and to protect and promote the dignity of women at workplace. The same principle must also apply in all other cases.

The duty to prevent protect and fulfill includes the duty to reverse inherited social norms which violate human rights and to ensure that “tradition” and “culture “ are not used as tools to deny the exercise of fundamental rights of any person. Is the demand for ban on intea gotra marriage protected by the right to feedom of religion?

It is noteworthy that Article 25 guaranteeing freedom of religion states:

> *25. Freedom of conscience and free profession, practice and propagation of religion*
>
> *(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion*

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law

(a) Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) Providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus

***Explanation I** The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion*

***Explanation II** In sub clause (b) of clause reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly*

Article 25 opens with the words" subject to public order, morality and health and to the other provisions of this Part…" indicating very clearly that neither religious practice nor tradition nor social custom can be claimed as a justification to interfere with the right to marry as clamed by the *khap panchayats*. It is also noteworthy that Article 25 (2) permits the State to undertake the making of laws providing for social welfare and reform.

The State is bound by its duty of due diligence to ensure that social custom or tradition or any alleged religious sanction is not used as a justification to deny to any person the exercise of his or her fundamental rights.

The discussion on "prohibited degrees: brings up the question, what is the purpose of prescribing prohibited degrees of relationship and where does one draw the line of prohibited degrees?

We have just seen that the law draw the line at three degrees in ascendency of the father and five degrees for the mother, The Marriage Acts do not give any justification for this ban nor do they offer any justification why the line is drawn where it is. However, the history of the drafting of the Hindu Marriages Act does show that

the drawing of the line was meant 17 to undo a complete ban placed by custom and tradition of marrying anyone descended from a common ancestor. Such taboos though couched in the language of medical regression were in fact intended to maintain the purity of a bloodline of a common ancestor, and were indeed racist in its construction. It is no secret that science has and can be manipulated in support of racist arguments and population's scientist must ask themselves-- what is the origin of the ban on consanguineous marriages? It is the possibility of regression and depletion of the gene pool in the progeny and hence in the community, how many degrees of consanguineous marriages should be prohibited? Is the ban of a religions and political nature or is it of a scientific nature? These questions become relevant in the context of the demand by the khap panchayats that the ban is extended to everyone descended from a common ancestor regardless of how far back the descent can be traced if at all it can be traced thereby extending the ban on marriage to any marriage within the gotra.

As a group of population scientists it is for you to consider if this represents a scientific fact or whether it is a social construct intended to control the freedom of choice of a woman's right to marry. Interestingly, the majority of persons killed in the name of honor happen to be women, thought men too have been victims of "honor killings". Khap Panchayats have, however asserted that they do not indulge in violence and killings but the family feels disgraced that the daughter has married out of choice within the gotra, and they kill their own daughter to protect their honor. Killing in only one form of violence that the woman faces, others are excommunication of the family, denial of access to social assets and services etc.

As I see it, there is evidence to suggest that the demand of the Khap Panchayats has escalated after the Hindu Marriages Act was amended in 2005 when the Hindu Succession Act was amended to include daughters as coparceners in the family property which hitherto was a male prerogative. Studies suggest that the object of opposing intra gotra marriages is to ensure that the son-in-law does not belong to the locality of the daughter's family and is unlikey to make a claim to a share in immovable property which now in places like Haryana has become as valuable as gold.

The HM Disability Removal Act was enacted precisely to undo custom and tradition which prevented intra gotra marriages. Eventually, the HMA of 1955 made any marriage between two Hindus possible save marriages within prohibited degrees. It was thus a progressive piece of legislation, expanding the freedom of choice in marriage and respecting the choice of the two people marrying. The sapinda repationship which hitherto extended to the entire gotra was limited to the prohibited degrees. As mentioned earlier, there is no justification of the degrees of prohibited relationships but in any event the prohibited relationships were restricted.

In this context it is prudent to remember Dr Amdedkar who was the author of the Hindu Code Bill. His analysis of caste as endogamy led him to believe that the only way to end endogamy was to permit marriages of choice. He believed that Brahmanism was built and supported on endogamy and in the Hindu Code Bill and the Hindu Marriage Act we see the liberty to enter into inter caste marriages and intra gotra marriages expanding the choice of marriage partners. It was a well worked out strategy based on his understanding of Indian society as being built on a network of endogamous groups with no equality between the groups. In a manner to speaking the HMA strikes at the heart to Brahminism by breaking the endogamous route to marriage, making mobility between groups and within groups possible.

It is therefore a matter for research by scientists such as you whether there are any scientific and demographic reasons for the intra gotra ban on marriage or whether it is nothing more than a desire to control the choice of the woman in marriage and keep control over the family property and assets, including in the case of jats, land and valuable immovable property. Interestingly, the HMA itself permits consanguineous marriages within the second degree if custom permits. The sanction given to custom in the law seems to be a concession made to the demands of endogamous caste communities who permit the marriage of a girl to her uncle.

I am not aware of any studies on the impact of consanguineous marriages genetically beyond the prohibited degrees and would welcome your views on the subject.

Science has often been used in aid of particular political theories more so in history on the issue of racial purity and maintaining the bloodline. The khaps still believe that we can trace our decent to a common ancestor, regardless of how many centuries back you can trace that common ancestor. There are scientists who believe that the caste system has contributed to diversify the Indian gene pool. On the other hand Dr Ambedkar believed that India had an amazing homogeneous culture and caste was an institution devised to destroy that homogeneity and introduce privilege.

We must however ensure that science cannot be used to justify the manipulation of power and privilege and must be focused on the public health implications of research and be focused on the Constitutional values of equality and freedom of choice.

International Institute for Population Sciences

International Institute for Population Sciences was established in 1956 by the UN, Government of India and the Sir Dorabji Tata Trust as a premier Institute for training and research in Population Studies for developing countries in the Asia and Pacific Region. It is the training centre for population studies for the ESCAP Region, recognised by the United Nations Fund for Population Activities (UNFPA). Now the institute is an autonomous institution under the administrative control of the Ministry of Health and Family Welfare, Government of India. It offers regular academic courses, at graduate and post graduate level; conducts research and training programms; and provides consultancy to Government and Non-governmental organisations. The Institute was awarded deemed university status in 1985 and since then the PhD programme also initiated at the institute.

Besides teaching regular courses, the Institute has from time to time, conduct short-term courses for various organizations covering various themes and issues. The courses have been sponsored by the WHO, Department of Family Welfare, Asian Development Bank, Nordic center, John Hopkins University and so on. The University Grants Commission sponsored refresher courses have also been organized at IIPS.

The Institute conducts research using its own resources and through external funding. The externally funded projects are usually initiated at the request of the concerned agencies. These are generally large-scale surveys, requiring primary data collection. It is worth mentioning that all the three rounds of nationwide DHS surveys of India - National Family Health Surveys I, II & III- were conducted by the Institute at the request of Government of India with the financial assistance of USAID and UNICEF and the technical assistance provided by ORC Macro and the East-West Centre, USA. Another major project undertaken by the Institute is the District Level Household and Facility Survey (DLHS - RCH), conducted at the behest of Ministry of Health and Family Welfare with World Bank funding. Currently the Institute has been appointed as the nodal agency for the Concurrent Evaluation of National Rural Health Mission (NRHM) for all the states of India.

Prof. F. Ram
Director & Senior Professor

Dr. Indira Jaising

Indira Jaising went to school in Mumbai and graduated in Bangalore, before getting her degree in law in 1962. Jaising became the first woman to be designated as a Senior Advocate by the High Court of Bombay in 1986. She became the first woman to be appointed as Additional Solicitor General of India in 2009. From the beginning of her legal career, she has focused on protection of human rights, rights of women and those of the poor working class. Indira Jaising became the founder secretary of *The Lawyers Collective*, an organization that provides legal funding for the under privileged sections of Indian society. She founded a monthly magazine called *The Lawyers* in 1986. She had a fellowship at the Institute of Advanced Legal Studies, London and has been a Visiting Fellow at the Columbia University, New York. She was member of the United Nations Committee for the Elimination of Discrimination against Women. Jaising was awarded Padma Shri by the President of India in 2005 for her service to the cause of public affairs.

Vision Vision "To position IIPS as a premier teaching and research Institution in population sciences responsive to emerging national and global needs based on values of inclusion, sensitivity and rights protection".

Mission "The Institute will strive to be a centre of excellence on population, health and development issues through high quality education, teaching and research. This will be achieved by (a) creating competent professionals, (b) generating and disseminating scientific knowledge and evidence, (c) collaboration and exchange of knowledge, and (d) advocacy and awareness."