

# **BIBLIOGRAPHY ON ‘CRIMES OF HONOUR’ – CASE SUMMARIES**

## **Preface**

This bibliography has been prepared under the auspices of the Project on “Strategies of Response to Crimes of ‘Honour’”, jointly co-ordinated by CIMEL (Centre of Islamic and Middle Eastern Law) and INTERIGHTS (International Centre for the Legal Protection of Human Rights) and has been slightly updated in September 2006. It includes case summaries from several countries (Australia, Bangladesh, India, Pakistan, the UK and the USA).

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## **AIMS**

This bibliography aims to assist those working to combat crimes of 'honour' by facilitating research and the development of strategies of response. We invite comments from users regarding possible improvements and additions to the bibliography, as it is clearly not exhaustive, and we intend to add further items at regular intervals to increase its usefulness as a tool for advocacy and research.

## **SUGGESTIONS FOR CHANGE**

We should underline that the annotations are the work of the project, not of the cited authors of the various items. If any of the authors, or others, feel that we have misunderstood the substance of the piece, or missed out critical points, please do contact us at the email below with corrections and we will ensure that the annotation is amended accordingly.

Please send any suggestions for changes or additions to the bibliography (indicating where such materials might be located) by email or post to [hcp@interights.org](mailto:hcp@interights.org) citing ‘changes to bibliography’ as the subject title or INTERIGHTS, Lancaster House, 33 Islington High Street, London N1 9LH.

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## a) Americas

### USA

#### State of Missouri v Maria Isa [1993] 850 S.W.2d 876; 1993 no. LEXIS 38

Supreme Court, Missouri  
Robertson J

USA  
23 March 1993

The defendant (“D”), a Brazilian Roman Catholic, appealed from a conviction and sentence in state court in which she was tried jointly with her husband, a Palestinian Muslim. Both had been found guilty and sentenced to death for the first degree murder of her sixteen-year-old daughter, Palestina Isa (“Tina”), who had acquired an after-school job against her parents’ wishes and begun dating a man of colour. The evidence at trial tended to prove that D had held Tina’s head while D’s husband stabbed Tina at least sixteen times. D raised 35 different points of error, all but one of which were rejected. These included failure to sever the joint trial or to perform a competency examination; jury selection rendered improper by exclusion of jurors opposed to the death penalty; and other procedural and evidential motions.

At the lower court trial, the prosecution introduced into evidence a tape recording of the murder, made during Federal Bureau of Investigations surveillance of D’s husband on suspicion of terrorism. Introduction of the tape was contested but ultimately approved by the Eighth Circuit Federal Court in *U.S. v Isa*, 923 F.2D 1300 (8<sup>th</sup> Cir. 1991)

The judgment notes that on defence counsel’s cross-examination, Tina’s high school guidance counselor stated she was aware of a call to a Child Abuse Hotline on Tina’s behalf, and that the State of Missouri had investigated this. Another witness at trial had stated that Tina had bruises on her face and neck in 1989 after an altercation with her parents. D had sought but had not been allowed to place on record a report by the Missouri Department of Social Services showing Tina had not been subject to child abuse.

In affirming the conviction, commuting the death sentence and remanding for resentencing, it was held that:

1. The surveillance tape was not hearsay inadmissible against D because the tape was evidence of her state of mind at the time of Tina’s death and of her participation in it. The Missouri statute for first-degree murder requires that the accused must “knowingly cause the death of another person after deliberation upon the matter.” RsMo. § 565.020.1.
2. D could be charged as a principal to murder but tried as an accomplice to murder. The Court had eliminated the distinction between principals and accessories in *Goodman*, 482 S.W.2d 490, 492 (Mo. S.C. 1972), and all persons who act together with a common intent and purpose in the commission of a crime are equally guilty.
3. The common-law presumption of spousal coercion is outdated and cannot be applied in a case of murder. No duress by D’s husband was shown. “First, the presumption that a wife, acting in the presence of her husband, acts under his coercion, had its foundation in the notion that marriage “cast upon [a wife] the duty of obedience to and affection for her husband.” *State v. Miller*, 162 Mo. 253, 62 S.W. 692, 694 (1901). Our society no longer tolerates the common law fiction that wives are the property of their husbands, unable to think independently, and obedient to the point of criminal acts. Second, even the common law presumption did not extend to murder. ... Such a presumption takes the marital commitment, “to love and obey” to an unreasonable extreme. More importantly, we note that the presumption did not arise because of any use or of threatened use of unlawful physical force.”
4. During the sentencing phase of the trial, the jury instruction on aggravating circumstances relating to the sentencing contained numerous grammatical errors and also mixed in phrases borrowed

from a guilt-phase instruction on responsibility for conduct of another. The instruction was patently confusing and invited the jury to sentence D based on her husband's role in Tina's death.

Observation:

Although it is possible to find a person guilty of murder for acts done in concert with another, it is never permissible to sentence a person to death for acts of another.

## **b) Europe**

### **England**

#### **Buckland v Buckland [1967] 2 All ER 300**

High Court of Justice (Probate, Divorce and Admiralty Division)  
Scarman J.

England  
19 February 1965

The Petitioner ("P") was charged under Maltese law with corruption of a 15 year old girl. He maintained his innocence, but was advised that he would almost certainly be found guilty of the offence, given a long prison sentence, and ordered to support the child he was believed to have fathered. The only alternative to this would be to marry the girl, which, terrified, he did. Several days after the marriage ceremony he went to England, where he acquired domicile. There he petitioned for annulment of the marriage on the ground that fear had vitiated his consent, and in the alternative for divorce on the grounds of adultery).

In granting his petition for a nullity declaration, the Court held that:

1. Duress vitiating consent would be shown if "the petitioner agreed to his marriage because of his fears". In this case P only agreed to the marriage due to his fear of imprisonment.
2. These were fears which had to be "reasonably entertained", and which "arose from external factors for which he was in no way responsible". P was informed twice that he had no option but to marry the girl to avoid imprisonment, despite the fact that he had not brought the fear upon himself.

#### **H. v H. [1953] 3 W.L.R. 849**

High Court of Justice (Probate, Divorce and Admiralty Division)  
Karminski J.

England  
30 October 1953

The Petitioner ("P") lived in Hungary. Due to the dangerous political climate existing in the country at that time, she feared danger to her life, liberty and virtue. In order to leave she, then 18, obtained a French passport by going through a marriage ceremony with her cousin, a French citizen. By agreement the couple then separated without the marriage having been consummated; she escaped the country, and duly petitioned for the marriage to be annulled on the ground of duress.

In allowing the undefended petition for a decree of nullity, the Court commented that:

1. The reason P married was out of desperation to escape Hungary, which was in turn caused by fear of the danger she would be in if she remained. This fear was reasonable given the political and social circumstances, and thus "of such a kind as to negative her consent to the marriage. In the absence of consent there can be no valid marriage".

2. Although there appeared to be no case reported where the fear or duress emanated from a party other than the respondent or his agents, in this case the fear seemed reasonably caused by P's political and social circumstances, rather than any fear caused by the respondent himself.

**Harper v Harper, [1981] C. L. Y. 730**

County Court, Kingston Upon Thames  
Baker J

England  
25 November 1980

H and W were married in a church in 1979. H and his family appeared to have overborne the will of W, who tried to indicate on a number of occasions that she did not want to go through with the marriage. On one occasion W even ran away from them for two days. On the day before the wedding, there was a violent incident involving H and W leading to the police being called. W was in a very shocked and distressed state and so a doctor administered a tranquilliser to her in the belief that the wedding would not then take place. However, the wedding went ahead. H and his family asserted that W was merely suffering from wedding nerves, but W had very little recollection of the ceremony and did not give very strong responses in church. On W's evidence the marriage was not consummated. H did not appear.

In declaring the marriage void, the Court held that:

1. There was no valid consent beyond the mere formality of presence.
2. There were some elements of duress in the very particular and special circumstances of this case.

**Hirani v Hirani [1983] 4 F.L.R. 232**

Court of Appeal  
Ormrod LJ

England  
5 May 1982

The Petitioner ("P") was a woman aged 19 years living in England with her parents, who were Hindus of Indian origin. In order to prevent P's association with a young Muslim, also of Indian origin, which they regarded as abhorrent to their religion, her parents arranged for her to marry a man whom neither they nor P had previously met. The marriage took place at a registry office and then religious ceremony, but was not consummated and P left after 6 weeks. She petitioned for a decree of nullity on the ground of duress exercised by her parents, upon whom she was financially dependent, and who had threatened to turn her out of the home if she did not go through with the marriage. P appealed from the decision at first instance where no decree was granted, the judge finding that since there was no threat to life, limb or property, there was no duress.

In allowing the appeal and granting the decree of nullity, the Court held that:

1. It was not necessary to find a threat to life, limb or liberty in order to find duress. The crucial question was whether the threats or pressure were such as to overbear the will of the individual in each case and destroy the reality of their consent.
2. Whatever the form of the duress, it must involve a coercion of the will so as to vitiate consent. On the facts of this case the threats and pressure used by the petitioner's parents had clearly overborne her will and thus invalidated or vitiated her consent.
3. "The crucial question in these cases, particularly where a marriage is involved, is whether the threats, pressure, or whatever it is, is such as to destroy the reality of consent and overbears the will of the individual. It seems to me that this case, on the facts, is a classic case of a young girl, wholly dependant on her parents, being forced into a marriage with a man she has never seen and whom her parents have never seen in order to prevent her (reasonably, from her parents' point of

view) continuing in an association with a Muslim which they would regard with abhorrence. But it is as clear a case as one could want of the overbearing of the will of the petitioner and thus invalidating or vitiating her consent.”

**Hussein Otherwise Blitz v Hussein [1886] 12 P. D. 21.**

High Court of Justice (Probate Divorce and Admiralty Division)  
Henn Collins J

England  
21 March 1938

The petitioner asked that her marriage to the respondent be annulled on the ground of duress. At the time of the marriage ceremony, the petitioner was eighteen years of age. It was alleged that the petitioner never cohabited with the respondent and that the marriage was never consummated. It was also alleged that the petitioner was induced to be a party to the ceremony of marriage not of her own free will, but through fear, duress and terror of the respondent who had repeatedly threatened to kill her if she did not marry him. The petitioner believed that the respondent would carry out his threats. Before the ceremony, the respondent prevailed upon the petitioner to sign a document which bound her to certain conditions of marriage including, *inter alia*, that she was aware of and would follow the Egyptian habits and character of the respondent, that she would never go anywhere without him, that she was signing the document without any obligation from any side, and that if she broke any of the conditions she would separate from the respondent, and would have no right to claim support from him in any Court, whether Egyptian or English.

In granting a decree nisi of nullity, it was held that:

1. The court had jurisdiction to entertain the suit notwithstanding that the de facto husband was domiciled abroad.
2. The petitioner's evidence was corroborated in material respects.
3. In the words of Butt J. in *Scott v. Sebright*: "Whenever from natural weakness of intellect or from fear - whether reasonably entertained or not - either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger."
4. The respondent's conduct clearly amounted to threats. He dominated the petitioner by fear and exercised the power which he had over her to coerce her into signing the document and into marriage.

**Islam (AP) v Secretary of State for the Home Department; R v Immigration Appeal Tribunal Ex Parte Shah (AP), [1999] 2 WLR 1015, [1999] 2 All ER 545.**

The conjoined appellants were two Pakistani married women who fled to the UK after suffering domestic violence in Pakistan. After being granted exceptional leave to remain in the UK, the appellants claimed refugee status according to Art 1A(2) of the Convention Relating to the Status of Refugees, 1951, as 'members of a particular social group'. Both appellants claimed that they faced the risk of being falsely accused of adultery in Pakistan by their husbands and that if they returned to Pakistan they would be subject to criminal proceedings for sexual immorality, which could lead to punishment by flogging or stoning to death.

The Court of Appeal dismissed their appeals against the Immigration Appeal Tribunal. In allowing the appeal setting aside the decision of the Court of Appeal, and remitting the cases to the Immigration Appeal Tribunal, the House of Lords held *inter alia* that:

1. Domestic violence and abuse of women is prevalent in Pakistan. However, the distinctive feature in these cases is that discrimination against women in Pakistan is partly tolerated and partly sanctioned by the state.
2. It is accepted that each appellant has a well founded fear of persecution if returned to Pakistan and the issue therefore turns on the meaning and the application of the words 'persecution for reasons of ... membership of a particular social group' in Art 1A(2).
3. This reasoning covers Pakistani women because according to the legal and social conditions existing in Pakistan they are discriminated against on grounds of gender and as such are a social group unprotected by the state.
4. Even if Pakistani women themselves are not a 'particular social group', the appellants are members of a more narrowly circumscribed group based on the unifying characteristics of gender, suspicion of adultery and lack of state protection.

**Sakina Bibi Khan & Mohammed Bashir, [1999] 1 Cr.App.R (S).**

Court of Appeal  
Henry LJ, Sir Patrick Russell and Beaumont J

England  
28 July 1998

Sentencing Appeal

The appellants (“K” and “B”) wished to contract an arranged marriage for their twenty year old daughter Rehana (“R”), and regularly tried to persuade her to go to Pakistan in order that this could occur. R would not agree to this and left the family home in order to study at university in Luton. R was later informed that her maternal grandfather had died suddenly, and consequently she returned to the family home and was persuaded to remain over the New Year period. K then gave R a drink into which she had placed sleeping tablets, and while R was asleep K and B took her to Manchester Airport with a view to boarding a flight to Pakistan. Since R was acting strangely and did not appear to wish to board the flight, the police were called to the airport. R was taken away and received medical treatment, later making an uneventful recovery.

K and B pleaded guilty at Manchester Crown Court to an indictment of two counts of kidnapping and administering a noxious thing. K received a sentence of 6 months imprisonment on each count concurrent, and B received a sentence of 2 years imprisonment on each count concurrent. They appealed against the sentences on the grounds that there was as objectionable disparity between the sentences imposed on the appellants. The sentence imposed upon B was four times the length of that imposed upon K, despite that fact that the activity of both parties in the case had been the same.

In allowing the appeal against the length of the sentence imposed upon B, but dismissing the appeal against the sentence imposed upon K, the Court held:

1. K was fortunate to have been initially sentenced as leniently as she was and therefore her appeal had no merit.
2. The judge had justifiably taken into account the fact that K was a mother in imposing a lenient sentence. However, there was undue disparity between the sentences of the two parties. Therefore B’s sentence of two years imprisonment would be quashed and replaced by a sentence of 12 months imprisonment.

**McLarnon v McLarnon, [1968] 112 S.J. 419**

Stirling J

10 April 1968

## Petition

W, then aged 17 years, refused to marry H who then lied to W's parents that she was pregnant. Both parents refused to accept W's denials and strongly pressed her to marry H, her father threatening to put her in a convent or home unless she agreed. The marriage thus took place and was consummated. W showed no signs of happiness with the marriage and soon after it became obvious that she was not pregnant. The parents realised the wrong that had been done and W petitioned for a declaration (undefended) that the marriage was null and void on the ground of duress. Her mother stood as next friend.

In granting the declaration that the marriage was null and void, the Court held that:

1. It was highly undesirable that the mother against whom duress had been alleged should be acting on behalf of W. The Official Solicitor should have been evoked, but since W was now of age and was satisfied with the case as prepared this would be disregarded here.
2. The father's threats, by which W believed she would be virtually incarcerated until she came of age, went far beyond ordinary pressure. W had been unjustly subjected to a grave fear stemming from an external consequence for which she was in no way responsible (applying *Buckland v. Buckland*).
3. Although the marriage had been consummated this was no bar to an allegation of duress; it was no more than evidential weight and not a ratification or estoppel. Mere sexual intercourse after a marriage had been entered into *ex hypothesi* under duress, would not negative a plea of duress.

### **R v. Haq; R v. Saleem, The Times 28 February 1996**

Court of Appeal (Criminal Division)  
Swinton-Thomas LJ, Harrison, Thomas JJ

England  
16 February 1996

The appellants ("H" and "S") were sentenced to life imprisonment at Leeds Crown court for the murder of their sister, Sharifan Bibi ("B") and her lover Hasmat Ali ("A"). B and A disappeared on 19 December 1988 and were never seen again. No bodies were ever recovered. At the trial the Crown had alleged that the motive for the murder was that B, who was a married woman, had brought disgrace upon the family by taking a lover. The trial judge rejected the submission that there was no case to answer.

H and S appealed against the conviction on the basis that the circumstantial evidence relied upon by the Crown at the trial did not give rise to an inference of guilt in relation to the crime of murder. This evidence included a statement allegedly made by H to the effect that "she was my sister but she is not my sister any more because she has brought a bad reputation to my family". Witnesses from Pakistan also gave evidence alleging that S had made statements to the effect that they had murdered B and A, and that he had told his wife that "if we can kill our sister, we can kill you also".

In dismissing both appeals, the Court found that: -

1. The case put forward by the Crown to establish the offence of murder against H was extremely strong, and the circumstantial evidence by itself was quite sufficient to found a verdict of guilty by the jury.
2. The Court was in no doubt as to the safety of the convictions, and the trial judge had rightly rejected a submission of no case to answer.

### **R v Shabir Hussain [1998] Crim LR 820 : LTL 12/11/98**

The appellant (“A”) appealed against his conviction for the murder of his sister-in-law on the ground that the Bradford Crown Court judge had improperly allowed a witness (“X”) to name him and had ruled X's evidence admissible. A had been convicted of murdering the deceased by driving at and over her several times. X witnessed the appellant drive the car in question before the killing and claimed that he recognised the appellant because he had seen or thought he had seen him on two previous occasions. X claimed that he knew that the appellant was the deceased's brother-in-law because he had been told so by the deceased.

In allowing the appeal and ordering a re-trial, it was held that:

1. It is against the hearsay rule for the witness to identify the appellant by name. The lower court judge was not entitled to allow the Crown to call X to give evidence that he had recognised the appellant.
2. The identification evidence was weak and had been left to the jury to be supported by any circumstantial evidence. Therefore, the conviction be unsafe.
3. A re-trial could be ordered because, even without the hearsay evidence of X, there was sufficient circumstantial evidence on which the jury, properly instructed, could have convicted and because the judge made it clear that if the identification evidence was all that had been before the jury, he would have stopped the case.

**R v Shakeela Naz LTL 23/3/2000**

The appellant (“A”) appealed against her conviction on 25 May 1999 at Nottingham Crown Court for the murder of her 19-year-old daughter Rukhsana (‘R’). A's two sons, ‘S’, aged 21, and ‘I’, aged 17, were tried with her. S was convicted of murder and I was acquitted. After an arranged marriage, R had an affair with an old boyfriend and became pregnant. She planned to keep the child and live with the boyfriend. The Crown alleged that A and S murdered R because she refused to have an abortion and because of the shame she would bring on the family. A held down R's legs while S strangled her with electrical wire. Allegedly, I assisted S by pulling the ligature and S and I took R's body wrapped in a pillow case by car to a field 70 miles away. Evidence was led that R's sister was prevented by the family from reporting her disappearance and that A tried to get R to make a will in favour of her two children. Subsequently, I made a statement admitting that he had been present when R was murdered. I's statement implicated both S and A in many respects.

A appealed on the ground inter alia that in light of the Crown's case that the murder had been motivated by the disgrace that R would bring on the family, it was submitted that in reference to the Equal Treatment Bench Book the judge should have warned the jury about the risk of deploying their own assumptions to evaluate others' behaviour.

In dismissing the appeal, it was held that:

1. The lower court judge gave sufficiently careful and appropriate directions to the jury on how to treat L's evidence and of its risks. The jury was also aware of the risk involved in the outstanding charge casting doubt on L's testimony.
2. The summing up by the lower court judge was fair and given in neutral terms. The possible motive suggested by the Crown was justified by the evidence.

**Re KR (A Child) (Abduction: Forcible Removal By Parents) [1999]4 All ER 954**

High Court of Justice (Family Division)  
Singer J

England  
18 May 1999

A British citizen of Indian Sikh origin (“P”) left home and established a relationship with a man, to the deep disapproval of her parents. Her younger sister (“KR”), then sixteen, also attempted to leave her parents and go to live with P in her home. KR’s father alleged to the police that P had effectively kidnapped her. P claimed that her sister was at risk of being forcibly removed to India and forced into marriage by the parents as soon as she reached the age of eighteen. The police returned KR to the custody of her father, who beat her and forcibly took her to India, where her passport was removed and she was kept as a prisoner. On application by P, KR was made a ward of the Court. Her parents claimed that she had gone to India willingly and wished to remain there. The judge drew up an order inviting the Indian authorities to establish KR’s whereabouts and to put her in contact with the British High Commission in New Delhi. KR succeeded in persuading her family to take her to High Commission and she was returned to England.

In ordering the wardship to continue until the end of KR’s minority, The Court held that:

1. Child abduction is still child abduction when both parents are the abductors and the child is very nearly an adult.
2. Although the English courts are not insensitive to considerations of certain traditional values and concepts of family authority that may be held by minority communities, such sensitivity would usually give way to the integrity of the individual young person or child. On the specific issue of marriage the Court noted “the voice of the young person will be heard, and in so personal a context as opposition to an arranged or enforced marriage, will prevail.”
3. The risk faced by many young girls seeking to depart from the traditional norms of their religious, cultural or ethnic group, and the specific pressures caused by “the desire of their parents and family that they should marry in the way culturally expected of them”, needed to be brought more fully into the public consciousness. Thus education and local authorities should consider creating policies to easily enable children under such pressures to seek their help, and teachers and lawyers should also be aware of the issues involved. Parents of such children should be made aware of the difficulties and conflicts they faced in attempting to retain every aspect of their traditions and expectations, whilst simultaneously raising their children in an English educational system and society.

**Singh v Singh [1971] 2 All ER 828**

Court of Appeal  
Davies, Karminski and Megaw LJ

England  
1 February 1971

The petitioner (“P”) was the 17 year old daughter of Sikh parents who arranged her marriage. When P met the man, 21 years, chosen by her parents for the first time at the registry office she did not wish to go through with the civil ceremony, but claimed that she did so out of deference to her parents’ wishes and to her religion. According to Sikh custom, the parties separated after the registry ceremony, and arranged for the religious ceremony, after which the marriage was to be consummated, to be held in a Sikh temple a week later. However, P refused to attend the religious ceremony and did not have anything further to do with the husband. P’s undefended petition for nullity on the ground of (*inter alia*) duress induced by parental coercion was dismissed at first instance.

In dismissing the appeal, the Court held that in order to establish that there had been duress which vitiated consent to the marriage, a petitioner would have to show that their will was overborne by genuine fear induced by threats of immediate danger to life, limb or liberty. In the present case, even though P had acted

out of respect for her parents and her religion, there were no such threats and hence no duress. The Court noted in particular that: -

1. "It is common ground . . . that the first essential of a valid marriage is consent. Anything short of consent makes the marriage a nullity ab initio". (Karminski J).
2. The cases of *Szechter v. Szechter*, *H. v. H.*, and *Buckland v. Buckland* applied in this case with regard to what constitutes duress sufficient to vitiate a marriage.

[N.B. P's second argument, based on failure to consummate the marriage due to invincible repugnance, also failed, due to her inability to demonstrate that she had some physical or mental defect which made it impossible to have intercourse with the other party. The Court said that in this case there was no such a defect, only a lack of desire to consummate marriage.]

### **Szechter v Szechter [1971] 2 W.L.R. 170**

High Court of Justice (Probate, Divorce and Admiralty Division)  
Sir Jocelyn Simon P.

England  
9 July 1969

The parties went through a marriage ceremony in a Polish prison in order to extricate the wife from the three-year prison sentence she was serving for "anti-state activities". She was of poor health and the parties feared she would not survive the prison term. The plan succeeded and both came to live in England where the wife petitioned for a nullity decree on the ground of duress.

The Court held that according to Polish law the marriage would be void for duress, and that they had jurisdiction to reflect this by issuing a decree of nullity. It commented that:

1. "Where a formal consent is brought about by force, menace or duress... it is of no legal effect. This rule, applicable to all contracts, finds no exception in marriage."
2. Usually "the source of the fear and the agent of duress will generally be the other party to the marriage. But this is not necessarily so." The source of the fear may also originate from some other source such as political and social danger (see *H. v. H.*).
3. In order for this danger to amount to duress so as to vitiate an otherwise valid marriage, it must be shown that the will of one of the parties has been "overborne by genuine and reasonably held fear caused by threat of immediate danger (for which the party is not himself responsible) to life, limb or liberty, so that the constraint destroys the reality of consent".

### **Ireland**

#### **W. (C.) v. C., [1989] I.R. 696**

High Court  
Barron J

Ireland  
17 February 1989

The petitioner ("W") and the respondent ("C") had formed an abusive relationship, which she unsuccessfully attempted to break off on a number of occasions. When C had sexual intercourse with her against her will and she became pregnant, her parents told her she would have to marry him, and the principal of the school where W was employed as a teacher informed her that she could not stay on at her job as an unmarried mother. Accordingly, W felt that she had been dishonoured and had lost her position within society, and that unless she married she could not recover her self-respect or work again in the

teaching profession. Unable to think beyond her pregnancy, she decided to marry C, who agreed. However, C was cruel, sadistic and sexually abusive and W eventually left him. She sought a decree of nullity on the grounds that (1) there had been no valid consent to the marriage, and (2) C was unable to sustain a proper marriage relationship due to a personality disorder which had been diagnosed by a psychiatrist.

In granting the decree, the Court held that:

1. There was no valid consent by W to the marriage because the strain of her circumstances had made her unable to see beyond her pregnancy. Her decision to marry was not due to a wish to set up a matrimonial home with C, and she had only married him in order to resume profession and her place in society. Although the circumstances were not as extreme as the repressive political regime as in *Szechter v. Szechter* and *H. v. H.*, the quality of consent was the same and the cases were applied.

## **Scotland**

### **Akram v Akram [1979] WL 69232 (OH)**

Outer House  
Lord Dunpark

Scotland  
3 November 1978

The petitioner (“P”) asked for a declaration that her marriage was null on the ground that no true matrimonial consent was exchanged between her and the defender. Both P and the defender were of Pakistani origin and Muslims. While P had lived in Scotland for many years, the defender had only lived in Scotland for a short period at the time of the ceremony. The parents of both parties arranged the wedding for the defender and the petitioner, who were cousins. P decided to go through with the ceremony out of deference to her parents and so that the defender would be allowed to extend his stay in Scotland. In addition, because she believed that her religion did not recognise any form of marriage other than a religious ceremony in accordance with Muslim custom, P did not consider that the civil ceremony binding. Likewise, the court inferred that the defender's motive in participating in the civil ceremony was to enable him to extend his stay in Scotland and that he also did not regard the civil ceremony as binding. While it was intended that a Muslim religious ceremony would follow the civil ceremony, this ceremony did not take place as neither P nor the defender wished to proceed. Shortly after the civil ceremony, the defender returned to Holland and the marriage was never consummated.

In pronouncing a decree of declarator of nullity, the court held that:

1. If it is proved that, notwithstanding the trappings of a formal marriage ceremony, the parties did not voluntarily and seriously exchange their consent for the purpose of obtaining married status, the marriage may be annulled. As neither of the parties intended to be married by the ceremony, they cannot be said to have exchanged their consent for the purpose of obtaining married status. The ceremony therefore had no legal effect.
2. The petitioner's second motive for participating in the ceremony, namely to enable the defender to apply for an extension of his residential permit, is irrelevant to the question of validity.

Observations:

1. If the only motive for participating in the civil ceremony had been to extend the defender's residence permit, the decree of nullity would have been denied. To have granted the decree in these circumstances would have allowed the defender to defraud the Home Office.

2. The parties in this case abused the law by presenting themselves to the marriage registrar for marriage even though they did not intend to be married. The law permits itself to be abused in this way. It is for Parliament to decide how to respond to this abuse.

**Mahmood v Mahmood [1993] S.L.T. 589**

Outer House  
Lord Sutherland (Lord Ordinary)

Scotland  
4 November 1992

The pursuer, Shamshad Mahmood (“SM”), brought an action seeking to have the marriage between herself and the defender, Zahid Mahmood (“ZM”), nullified on the ground that duress had vitiated her consent to the marriage. She alleged that her parents and ZM’s parents had arranged the marriage without her prior knowledge or consent, and that when she protested against the arranged marriage her parents threatened to disown her, to stop supporting her financially, and to send her to live in Pakistan. They said that by refusing she would bring disgrace on herself, her family and the Pakistani community. She had a boyfriend of whom her parents disapproved. In support of her belief that they would carry out these actions, SM claimed that her parents had already disowned her older brother and sister for refusing to enter into arranged marriages, and that she was totally reliant on her parents for financial support. She claimed that due to these factors her ability to give genuine consent to the marriage was affected by duress. She entered into the marriage and lived with ZM for three months before the parties separated. ZM argued that in the present case the threats were not grave enough to constitute duress sufficient to vitiate consent to the marriage.

Due to the specific nature of the alleged threats, the Court ordered that the case be sent for proof before answer, and held that:

1. Duress to a sufficient degree could vitiate consent and therefore form a ground for nullifying a marriage. However, the threats offered must be such as to overcome the will of the particular pursuer. Whether this had in fact occurred would be a question of degree on the facts of each case.
2. In this case the specific threats claimed by the pursuer could be argued as being beyond the limits of proper parental influence. In particular the threat to cut off financial support and send her back to Pakistan could be regarded as sufficient to overcome the will of a woman of her age and cultural background. However, disapproval of the parents or the community alone would not be sufficient grounds for vitiating consent.
3. In determining whether the pursuer’s consent was genuine it would also be necessary to explore the circumstances leading up to the threats being made, as well as what had happened after the marriage ceremony.
4. Observed, that the consent which had to be given to a marriage need not be enthusiastic consent; reluctant consent would suffice provided that the consent was genuine (p 592B-C).

**Mahmud v. Mahmud [1977] S.L.T. (Notes) 17**

Outer House  
Lord Kincaig

Scotland  
15 December 1976

The petitioner asked for a declaration that her marriage to M was null, on the ground that she had not consented to the marriage. The petitioner had lived in Glasgow since 1964 with her parents. She was of Pakistani origin and was Muslim. M, the petitioner’s cousin, was Pakistani and also Muslim. He had been granted a three month visa to study in Glasgow. Before M arrived in Glasgow, the parents of both parties arranged that M would marry the petitioner while he was in Glasgow. In February 1975, M arrived in Glasgow and moved into the petitioner’s parents house, where the petitioner was also living. However, M

neither saw nor spoke to the petitioner before the marriage ceremony. The parties went through the marriage ceremony on 27<sup>th</sup> February 1975. On the following day, M left for London.

About a week after the ceremony, at M's request, petitioner's father delivered the marriage license as well as the petitioner's passport and nationality documents to M. M required these documents in order to extend his stay in the United Kingdom. After another week, M telephoned the petitioner's father in order to inform him that he did not want to see the petitioner and did not wish to be contacted further by her or her family. This was the last contact between the petitioner's family and M. The parties had never cohabited and the marriage was never consummated.

It was clearly understood between the parties that a religious ceremony would follow the civil ceremony. Both parties, as Muslims, understood that they would only truly be married following the religious ceremony. The petitioner submitted that M regarded the civil ceremony as a mere formality necessary to enable him to remain longer in the United Kingdom.

In granting an annulment, the court held that:

1. Despite the fact that the statutory formalities of a registry office marriage were fulfilled, the marriage could be declared null on the ground that no true consent to marry was present.
2. The petitioner's appearance before the registrar was solely to comply with the formalities of Scots law as to the constitution of marriage in Scotland, and her consent was given before the registrar in that belief. She did not agree to be married by the procedure.

**Mahmud v Mahmud [1994] S. L. T. 599**

Outer House  
Lord Prosser

Scotland  
16 June 1993

Duress vitiating consent to marriage

The Pursuer ("P") was a member of a Muslim family of Pakistani origin under pressure from his parents and other family members to enter into an arranged marriage with a cousin from Pakistan ("D"). When he refused to do so he was made to feel that he was bringing shame on his family in the eyes of the wider Pakistani community by disobeying his parents' wishes in relation to marriage. Eventually, after twelve years and when aged thirty, he married D whom he had not seen prior to or since the marriage ceremony, at a registry office in Glasgow. At the time of the marriage he had been living with his girlfriend whom he intended to marry and with whom he had a child. After the marriage, P informed the immigration authorities of the situation and D was deported. P claimed that the marriage was null and void due to the fact that he had not fully consented to it, having acted under duress.

In granting P the undefended declarator of nullity of marriage, the Court held that:

1. The fundamental question in cases of this kind was whether the consent in the marriage was "free" consent showing an "agreeing mind". Such consent would not be present if it had been compelled by force.
2. In the present case the pressure did amount to force, resulting in the overbearing of P's mind and vitiation of his consent. The Court was satisfied that "in going through the ceremony of marriage with D, P was doing something directly in conflict with his own established wishes, intentions and strong commitments" to his girlfriend and their child.
3. The method by which consent was vitiated need not take any specific form. The crucial matter was the state of mind produced in the person giving the forced consent, which was a question of fact.

4. Parents and other persons were entitled to apply pressure upon someone refusing to marry, with a view to producing a change of mind. The marriage would only be invalid if the consent thus induced could not sensibly be described as a genuine change of mind, but was rather an act contrary to the party's own true intent.
5. The general cultural and social background of the parties involved should be taken into account, including "traditions of authority and deference" inherent in the custom of arranged marriages. However, one should assume from this that a female rather than a male, or a younger rather than older person, would be more likely to be coerced by moral pressure.

### **c) Asia/South Asia**

#### **Australia**

##### **Barca v R, [1975] 133 C. L. R. 82**

High Court, Sydney and Melbourne  
McTiernan, Gibbs, Stephen, Mason and Murphy JJ

Australia  
18 – 20 August 1995  
10 October 1995

The appellant ("A") was a Calabrian immigrant who had been convicted of the murder of his sister's husband. At the trial evidence was given of a Calabrian custom of vindicating the honour of a woman by murdering the man who has dishonoured her, and leaving a "sign of honour" in the form of a cross on his body. In this case the court heard that the deceased had been accused by his wife of dishonouring her, and that the bullets that had killed the deceased had intersected in his skull in the sign of a cross. According to custom the prime responsibility for vindication of the woman's honour in such a situation rests with her father. At the trial A attempted to argue that the father of the deceased's wife had carried out the killing, and not A. The trial judge directed the jury that there was no evidence that the father was responsible for the killing and that it would be wrong for them to acquit A on the basis that the murder may have been committed by the father. The appellant was granted leave to appeal against his conviction.

In setting aside the conviction in the Supreme Court of New South Wales, allowing the appeal, and ordering a new trial, the majority of the Court (McTiernan J dissenting) held that: -

1. It was for the jury to decide whether or not the evidence as a whole was inconsistent with the hypothesis that the father and not A had murdered the deceased. The judge had erred in directing the jury that they could not decide that issue in favour of A.
2. A was entitled, through the presumption of innocence, to advance the hypothesis that someone else committed the murder. Since the Crown had adduced evidence which tended to show that the murder was committed by a member of his family, he was entitled to attempt to show that since he was not guilty another member of his family was.
3. The evidential basis for inferring that a member of the family had murdered the deceased was the fact that "the method of killing was that of a ritual murder of vengeance for dishonour under Calabrian custom. The deceased had dishonoured A's family in a way which warranted his execution under this custom". In police transcripts A suggested that the deceased had not been killed for money or any other reason, but for reasons of honour.
4. The basis for inferring that the father was guilty rather than A was partly that he had allegedly been involved in a similar incident with his daughter's previous husband. Also, Calabrian custom in such situations was for the father of the woman who had been dishonoured to vindicate her

honour. Therefore the father in this case was “of the class who, according to what is said about the custom, may carry out the murder” in the name of honour.

**R. v Dincer [1983] 1 V.R. 460**

Supreme Court Victoria  
Lush J.

Australia  
28, 30 August 1982

The Defendant (“D”), a Muslim man of Turkish descent, was alleged to have killed his sixteen-year-old daughter, Zerrin, after a period of some months in which she had run away from home twice, associated with young men against her parents’ wishes, and been arrested for shoplifting. Two days before her death, Zerrin and her boyfriend asked for her parents’ permission to live together, and they eventually acquiesced and took the couple to the railway station. However, the parents then tried to trace her to bring her home. On receiving a call from the young man’s mother that they were at her home, the parents proceeded there, via the police station where they discussed, among other things, reports of her sexual activity. D and his wife confronted Zerrin and her boyfriend in his parents’ home, and D there stabbed his daughter fatally.

The question before the court was whether in the circumstances the defence of provocation could be pleaded to reduce the charge from murder to manslaughter. The Crown argued that the provocation defence requires the circumstances to be of a type that would include a similar loss of control in an “ordinary man”, and that since the ordinary Australian man would not respond in such a way there was no reason for the provocation issue to go to the jury. D argued that the jury should be allowed to take his Turkish and Muslim background and his traditional views into account in its consideration of the characteristics of an “ordinary man”. D further argued that he had for a long time lived with the stress of being shamed by his daughter and that this grievance smouldered into flame during the confrontation at the boyfriend’s home and resulted in a loss of self-control and the killing.

The Court noted that there was evidence “that such a man expects to be the undisputed head of his house and that he expects his daughters to live in fairly close confinement in the home circle and to avoid contacts with young men other than those of the family’s selection. There is evidence that the loss of virginity of the daughter is a matter of shame and disgrace to the parents which may lead to their social ostracism. It is a matter which will, perhaps, make it impossible for them to secure a marriage for their daughter, and, although it has not been expressly said in the evidence, it appears implicit that the marrying of the daughters is regarded as the proper order of things for them.”

However, no witnesses could testify on D’s cultural or religious background.

The Court held that the issue of provocation should be left to the jury, noting that:

1. The characteristics put forward on behalf of the defendant were not characteristics amounting merely to more than an unusual excitability or pugnacity. They were characteristics of a permanent, as opposed to transitory nature, that distinguished the accused from the ordinary man of the community. As such, these characteristics could properly be taken into account in the consideration of the characteristics of the ordinary man. The question to be put to the jury was whether the ordinary man, possessed of a traditional Muslim and Turkish background, might have acted as the accused man did.
2. The defence of provocation applies only in the presence of loss of control. Accordingly, it is incapable of applying to anything in the nature of a ritual killing, or a killing dictated by the accused man’s religious or political beliefs and convictions.
3. In order for the defence of provocation to apply: (i) the accused must have lost self-control as a result of the provocation and must have reacted in a state of lost self-control; (ii) the provocation must be of such a kind that an ordinary man might in the same circumstances have reacted in the

same manner as the accused. The provocation and the accused man's reaction must therefore be proportionate in order for the defence to apply.

4. The crown carried the burden of proving either that the accused did not lose self-control or that an ordinary man with the defendant's characteristics would not have responded to the alleged provocation by losing self-control or by killing his daughter.

## **Bangladesh**

### **A. L. M. Abdull vs. Rokeya Khatoon and Anr 21 DLR (1969) 213**

Abu Md. Abdullah, J.  
High Court

Bangladesh  
11 December 1967

Abdull (A) brought a suit for restitution of conjugal rights and permanent injunction restraining Khatoon (RK) from marrying any other person. A alleged that RK's mother (D2) informed him of RK's proposal of marriage. Following the disapproval of A's family, D2 urged the pair to marry at the residence of RK's family members. A alleged that a *kabbinnama* was not taken on instruction of D2, rather RK swore an *avadavat* before a Magistrate stating that she had married A, thereafter A and RK lived as man and wife in RK's house. D2 wanted money from A for construction of the house, when he refused she asked him to leave. There was an attempted reconciliation where RK admitted that A was her husband, however she did not return. A alleges that D2 was trying to remarry RK for financial advantage and to do so she had to suppress the fact of marriage between A and RK. RK's disputed that a marriage ever took place. Further, at the time of the alleged marriage RK was bed-ridden due to a typhoid relapse.

The Court of First Instance concluded that the marriage between A and RK had been established and upheld A's suit for restitution of conjugal rights and issued an injunction to prevent RK from marrying anyone else. On appeal by the RK and D2, the Subordinate Judge overturned the lower court's ruling, concluding that there was no marriage as A had failed to establish the solemnisation.

In finding in favour of RK, the High Court held:

1. The essentials of a valid Muslim law are that there should be a proposal made by or on behalf of one of the parties to the marriage and an acceptance by or on behalf of the other party in the presence and hearing of two male, or one male and two female, adult, sane Muslim witnesses. The proposal and acceptance should be at one meeting. In the present case A did not testify that RK gave her specific consent to the marriage. In view of the absence of the essential element of the proposal and acceptance, and in particular the consent of the bride, 'there was no valid marriage, even if the evidence of the plaintiff [A] be accepted that there was some sort of ceremony' (para 9 p.217).
2. The marriage was not registered, as required by section 5 of the Muslim Family Ordinance (VIII of 1961). The 'non registration of the marriage causes a doubt on the solemnisation of the marriage itself' (para 11 p.217).

## **NEW ENTRY:**

### **Dabiruddin Ahmed v. Chittaranjan Deb 36 DLR (AD) 77**

Appellate Division  
Chowdhury A.T.M. Masud J

Bangladesh

CD filed an application under s491 CrPC before the High Court seeking release of his daughter, Chandana Rani Deb alias Nadia Begum, from jail custody and her transfer to his custody. DA then filed an application to be added as a party in the said proceedings stating that Chandana Rani, aged over 16 years had voluntarily converted to Islam taking the name Nadia Begum and that they were married, and seeking her release and return to his custody. The High Court held that DA had no locus standi to be impleaded in the proceedings under s491 of Cr.P.C.

The Appellate Division made the following observations:

1. s491 of the Code of Criminal Procedure is a summary procedure for enquiry as to whether a person is illegally or improperly detained in public or private custody and if it is so found the Court would direct the release of such person. para 6
2. Since both the appellant and the respondent are claiming custody of the detinue on release and the appellant's application for detinue's release is pending before the Metropolitan Magistrate, to avoid multiplicity of proceedings and for the ends of justice, it is necessary that both the parties, namely, the appellant claiming to be husband of the detinue and the father of the detinue, should be heard over the question of legality of the detention and the custody of the detinue on release, and matter should be disposed of by one judgment. para 7
3. "The application filed in the High Court Division by the appellant for being added as a party therefore be treated as an application under s491 of the Code of Criminal Procedure for release of the same detinue and both petitions should be disposed of after hearing the parties by one judgment by the High Court Division. With this observation the appeal is disposed of." para 8

**NEW ENTRY:**

**Hasina Ahmed v S. A. Fazal 32 DLR (1980) 294**

High Court Division  
S.M.Husain J.

Bangladesh  
13 June 1978

The Appellant, HA, applied for dissolution of marriage under the DMMO on the ground inter alia, of cruelty, namely her husband's falsely accusing her of adultery. Her suit was dismissed in the Trial Court and District Court.

In allowing the appeal, the High Court held:

1. Where the husband makes consistent allegations about his wife's illicit connection with another man, this is a "cruelty" within the meaning of sub-clause (a) of Clause VIII of Section 2 of the Dissolution of Marriages Act 1939. Cruelty need not amount to physical ill-treatment. P296 Para 4.
2. Also, under the principle of "lian" or imprecation in Muslim personal law, the wife is entitled to sue for a divorce on the ground that her husband has falsely charged her with cruelty. P296 Para 4.
3. Further, under Muslim Personal Law the wife can claim "khula" as of right, as against a consideration including the surrender of dower, despite the unwillingness of her husband, if she can satisfy the Court that there is no possibility of their living together consistently with their conjugal duties and obligations and further if she satisfies the conscience of the Court that it will otherwise mean forcing her into a hateful union. The wife had been able to make out both the above grounds. P297 Para 5
4. The Courts while adjudicating on family disputes and administering personal law must take into account not only the factual and legal position but also the social dynamics where concept of law

is changing in a changing society. Decades before a wife's claim for a divorce could be resisted for well-established reasons, but it cannot be resisted for the same reasons now. Women's independence of mind and will must be respected today while considering the legal and contractual position between man and woman. P 297 para 6

5. It is recommended that the Courts follow the decision reported in P.L.D 1967 (S.C) 97 where the principle of "ijtihad" was extended in bringing about a change of Muslim Personal Law with regard to their application in a changing society. P 297 para 6.

**NEW ENTRY:**

**Sherin Akhter v Md. Ismail 51 DLR (1999) 512**

High Court Division  
Qazi Shafiuddin J

Bangladesh  
26 July 1999

SA in exercise of her power of delegated divorce under the MFLO 1961, sent a notice of divorce to the Chairman, Dhaka City Corporation, and a copy to her husband I, pursuant to s. 7(1) MFLO 1961. I also filed a suit in the Family Court praying for a declaration that the divorce was illegal, collusive, null and void, and for restitution of conjugal rights. The Court found for I. SA appealed, but the appeal was dismissed. Both the Courts found that the notice under s. 7 read with s. 8 of the MFLO 1961 was not a valid notice, taand therefore the marriage was still valid, and directed the parties to start their conjugal lives again. SA appealed.

The High Court held:

1. In the present case the notice ought to have been served to the Chairman of the Union Parishad, Comilla, where the marriage had been registered, and not to the Chairman of Dhaka City Corporation, and the exercise of delegated power of divorce was void by virtue of the notice not being sent to the right person. P515 Para 6
2. However the plaintiff husband had acknowledged that he had received notice of the divorce. Also the parties had last been living at Dhaka. Therefore, the requirement of notice under s. 7(1) MFLO 1961 has been complied with. P515 Para 6
3. In the light of Nelly Zaman v Giasuddin 34 DLR 22, it has been held that in a suit challenging any marriage or divorce by way of declaratory relief, there cannot be any consequential relief in the nature of restitution of conjugal rights, and such a direction is unenforceable. Such a direction in matters of relationship between man and wife no longer holds good and is opposed to the principles laid down in Articles 27 and 31 of the Constitution. P 515 Para 7.

**NEW ENTRY:**

**Makbul Ali & Others v Manwara Begum and Others 39 DLR (1987) 181**

High Court Division (Sylhet Bench)  
Anwarul Hoque Chowdhury, and  
Abdul Bari Sarker JJ.

Bangladesh  
15 January 1987

MB filed a complaint with the Magistrate on the ground that she being the lawfully wedded wife of her husband and having children out of the wedlock, her husband had taken as wife another woman without her consent and knowledge. The Magistrate issued warrant of arrest in the name of the man and the second wife, who surrendered. The accused persons then made an application for revision, alleging that the Magistrate's order should be quashed.

In directing that the proceeding against the second wife be quashed, the High Court held that

1. While polygamy was not forbidden in the Muslim Family Laws Ordinance, it was made subject to the condition of obtaining permission from the Arbitration Council. P182 Para 9
2. Under s.6(5) of the MFLO 1961, liability is to be incurred by the man who acts in breach of its provisions, but there was no provision which stated that liability was to be incurred by the wife who had been married in breach of the provisions. Neither could she be made liable as an abettor. P 183 Para 12.
3. Penal statutes need to be strictly construed. While interpreting penal provisions in an attempt to find out the person or persons who would come within the mischief of the same, no violence should be done to the language of the statute, either by extending the plain meaning of the specific expression or by extending the operation of the same by way of an analogy drawn with from other laws on somewhat similar fields or by taking recourse to the provision of the General Clauses Act.
4. In order to determine as to whether the other persons are also within the mischief, the language of the statute must authorise the Court to say so. P 183 Para 14
5. Thus the proceeding against the second wife is wrong in law and needs to be quashed. P184 Para 16

**Younus Ali vs. State 51 DLR (1999)**

Md Ruhul Amin, J  
High Court

Bangladesh  
2 August 1998

The State alleged that YA and others attempted to kidnap NP to force her to marry against her will, and further threatened to kill her husband if she did not. However NP was not kidnapped as the police intervened. YA was charged under section 9(kha) of the Nari-O-Shisu Nirjatan Daman (Bishes Bidham) Ain, 1995 (hereafter the Act) – kidnapping for the purpose of forced marriage.

In dismissing the case, the Court held that:

1. A was charged with the actual offence of kidnapping under section 9 of the Act, however a kidnapping did not take place because the Police intervened. The charge against the YA is therefore not sustainable in law. Attempted kidnap for the purpose of forcing the kidnapped person to marry against their will is not an offence under this Act.

**NEW ENTRY:**

**Ananda and others v. The State**

High Court, Dhaka  
Anwarul Hoque Choudhury, J

Bangladesh  
24 May 1989

The appellant, A, allegedly abducted Afroza, and moved her from village to village and then confined her in a house where he raped her for several night.

In upholding the appeal, the Court held:

1. 'The offence in the instant case is the alleged offence of kidnapping or abduction of the victim girl [under s366 BPC]. Abduction or inducing a girl, less than 16 years of age, to go from one place to another, by itself under section 366 of the Penal Code unless it was done with the intention that the girl should be seduced or forced to illicit intercourse or be compelled to marry against her will.'  
Para. 12

**Ayazullah, Aftarullah and Rahimullah vs. The State 23 DLR (1971) 79**

A. M. Sayem and A. Quasim, JJ  
High Court

Pakistan (East – Bangladesh)  
May 7 1970

It was alleged that AY and Af abducted S (a 14 year old girl). As well as the uncle there were six other eyewitnesses to the incident, all of whom identified Af and Az as the culprits. Ay and Af took S to R's home, where she remained for several days until the police recovered her. Ay and Af denied abducting S and stated that S's recovery from R's home was a "stage managed affair". The Court of First Instance found Ay and Af guilty of abduction under section 366 of the Pakistan Penal Code, and found R guilty of concealment under section 368 of the Pakistan Penal Code.

In upholding R's appeal, the High Court held that:

1. There was no evidence that R was present in his house during the period S was held there, or that he was aware of her being held there. Consequently all findings and convictions against him were set aside.

In dismissing the appeal of Ay and Af, the High Court held:

1. There was no substance to the claim that they could not be found guilty under section 366 because they did not kidnap S with the intention of forcibly marrying her. The High Court found that it 'is not that in every such case actual marriage or passing through a form of marriage has to be established. The section [366, Penal Code] speaks of intention and not that the intention must be proved to have been put into effect' (para 7 p.78). The Court below believed evidence of S's family that they had previously rejected Ay's marriage proposal. This evidence was taken by the High Court as sufficient evidence that S was abducted with the intention to marry her to Ay.
2. There was no substance in the argument that the trial was vitiated by trying R under section 368 of the Penal Code together with Ay and Af under section 366 of the Penal Code. The High Court concluded that it 'could not be disputed that abduction is a continuing offence, as kidnapping is. The offence of concealment [under s. 368, Penal Code]...of an abducted or kidnapped person would thus fall to be committed in the course of the same transaction with the offence of abduction or kidnapping' (para 7. p.78).

**Mst. Sadar Bano vs. Saifullah Khan 21 DLR (WP) (1969)**

Muhammad Gul, J.  
High Court

Pakistan (East – Bangladesh)  
8 October 1968

Her father contracted MSB in marriage to SK at the age of 2 (1944). This was a "watta satta" marriage in exchange for the marriage of SK's paternal aunt to MSB's maternal uncle. MSB and SK never lived as man and wife, nor was the marriage consummated. MSB claimed that in 1958 (aged 16) she repudiated the marriage in exercise of her right of option of puberty. However, because the respondent insisted on claiming her as his wife, MSB bought a suit for a declaration of her unmarried status. The Court of First Instance made a declaration in favour of MSB, having heard the testimony of several of her relatives that she orally repudiated the marriage in 1958. On appeal by SK, the Additional District Judge found in favour of SK, stating that the evidence provided was "interested" and therefore inadequate.

In finding in favour of MSB, the High Court held:

1. The 'approach of the lower Appellate Court was wholly mistaken resulting in an error in the decision of the case' (para 6. page 117)
2. Whilst it 'is true that marriage between Muslims has a religious significance...marriage under Muslim law is essentially a secular contract which like any other civil contract requires...free consent of the parties thereto, either by them personally or by their authorised agents...In certain class of cases contracts entered into by guardians or agents do not take effect unless ratified by the principal' (para 7 p.117). Under Muslim law a minor girl contracted into marriage by her guardians during her minority has the option to repudiate the marriage on attaining puberty, as long as she is under 18 and the marriage is unconsummated (as consolidated in the Dissolution of Muslim Marriage Act 1939). Therefore in this case the option existed and was exercised before puberty and the marriage was not consummated.
3. Under the Dissolution of Muslim Marriage Act 1939, no particular form or repudiation of marriage is required. In *Shafi Ullah vs. Emperor* [AIR 1934 All, 589] it was held that repudiation of marriage takes place by something akin to oral repudiation before witnesses, in that case it was the marriage by the woman to another man on attaining puberty. No decree of the Court is required to confirm the repudiation of marriage, if the woman seeks a Court declaration, the Court is simply recognising the termination of the marriage and is not dissolving it by its own decree. Therefore, in this case MSB's oral statements to her family were sufficient evidence of repudiation of marriage.

Finally, the Court rejected as "amateurish [and] having no validity in law" (para 10 p.119) SK's secondary argument that the marriage of the paternal aunt and maternal uncle was still subsisting and therefore MSB was not entitled to any relief.

**NEW ENTRY:**

**Abul Bashar v Nurun Nabi 39 DLR (1987) 333**

High Court Division (Comilla Bench)  
A.M. Mahmudur Rahman J.

Bangladesh  
6 January 1987

The Appellant filed a complaint with the Magistrate that the accused had married his sister, and had four children then remarried committing a breach under s6(5) of the MFLO. The Magistrate acquitted the accused case The complainant appealed to the High Court.

The High Court held:

1. A plain reading of s. 6(5) MFLO 1961 indicates that for awarding punishment a finding as to the absence of a previous permission in writing of the Arbitration Council is necessary. P335 Para 5.
2. The learned Magistrate does not indicate any finding in this regard, although he framed a question to that effect. S. 367 of Cr. P. C enjoins a duty upon the trial court to decide the issue framed for its decision. P335 Para 5
3. In one breath the Magistrate held the accused guilty of the offence and in the next breath he acquitted him. This betrays non-application of the judicial mind, which has rendered the impugned judgment liable to be set aside. P335 Paras 6 and 7.

**NEW ENTRY:**

**Hosne Ara Begum v Reazul Karim 43 DLR (1991) 543**

High Court Division  
Fazle Hussain Mohammad Habibur Rahman and  
Kazi Ebadul Hoque JJ.

Bangladesh  
13 August 1990

The Petitioner wife filed a suit in the Family Court against her husband and inlaws for recovery of dower money, and for maintenance. H then sought restitution of conjugal rights. The Family Court decreed the suit in favour of the wife in part, ordering the husband to pay his wife certain sums as dower and as maintenance, and dismissed the suit filed by the husband for restitution of conjugal rights.

In deciding the question the Court held:

1. The Court of appeal under the Family Courts Ordinance can only decide the appeal, and has no power to send the case on remand to the Family Court. P 545 Paras 8 and 9
2. The Court of appeal below had been guided by the concept of absolute dominion of the husband over the wife and children, which is an archaic concept, emanating from Roman law and does not apply to Muslim law. P545 Para 8
3. Under Muslim law a wife can refuse to return to the conjugal domain of her husband if the husband treats her with cruelty such that it renders it unsafe for the wife to return to her husband and her prompt dower is not paid. P545 Para 8
4. In a well-to-do family, compelling a wife to do domestic work amounts to physical and mental cruelty of conduct by the husband. P545 Para 8

**NEW ENTRY:**

**Khodeja Begum v Sadeq Sarkar 50 DLR (1998) 181**

High Court Division  
Muhammad Abdul Mannan J

Bangladesh  
4 July 1994

The Respondent S filed a suit against the Petitioner K for restitution of conjugal rights and for restraining her from marrying any other person. S alleged that he had married K by registered kabin-nama, and the marriage was consummated, but then K went to the home of the second respondent. K denied ever having married or lived with S. The Trial Court found that S failed to prove the marriage and the kabinnama, but this decision was reversed on appeal. K brought an application for civil revision before the High Court

In holding in favour of K, the High Court held:

1. Muslim marriage is a socio-religious contract and the signatures of both parties are essential to prove the contract of marriage written in the form of kabin-nama. No amount of oral evidence will be sufficient to prove the marriage when the plaintiff failed to prove the kabin-nama according to law in the absence of the defendant's signature in the kabin-nama. In such circumstances the marriage was not proved. P184 Para 15.
2. S had alleged the existence of marriage, and a certain compromise deal between himself and K. The burden of proof was on him to prove these facts, a burden that he had not been able to discharge. P184 Para 15
3. Similarly, in the face of the total denial of marriage by K, the burden of proof with regard to the other documents, such as that of divorce, had not been discharged by S under sections 61, 67, and

103 of the Evidence Act. Thus the finding by the appeal Court regarding the existence of marriage was illegal. P 184 Para 16.

4. As the kabin nama is under challenge the very basis of the marriage is not proved, so the finding of marriage is based only on surmise. P 184 Para 17
5. Further, the defendant-petitioner K alleged that both she and S had, after the institution of the suit by S, married different persons, and had children out of their marriages. The advocate for S opined that this was not a material fact in the matter, but had not been in a position to deny that fact. The Court found this fact very material since the relationship between a husband and wife is a human relationship which cannot be ignored. P184 Paras 18 and 19.
6. The Muslim marriage is a social contract between a man and a woman and not a sacrament followed by recitation from the Holy Quran. If social justice, equality, adjustment and tolerance is lost, then the relationship can be terminated by the pronouncement of talaq by the husband, the exercise of talaq-i-tafweez if that is available to the wife in the contract of marriage, or by the dissolution of the marriage through a court of law on the wife's application. Where there is no divorce or dissolution both the husband and the wife can apply for restitution of conjugal rights. Since 1923 the law is that if there is a decree for restitution of conjugal rights, then it can be executed by attachment of the defendant's property if the judgment-debtor is unwilling to abide by the decree. P 185 Para 20
7. In most cases the wife has no property, so if the judgment-debtor is the wife, in most cases the decree becomes inexecutable, and the Court should not pass an inexecutable decree. If the judgment-debtor is the husband, the Court can execute an order for periodical payments, but the unwilling husband can divorce his wife by pronouncing his arbitrary power of divorce. Thus the suit for restitution of conjugal rights is always instituted to compel unwilling wives to live with their husbands, in which case it is always a repressive law and an engine of harassment used against the wife. P 185 Para 20
8. The law of restitution of conjugal rights is a violation of social justice as enunciated in the preamble of the Constitution. It is also a violation of the principle of equal protection of the law, the principle of non-discrimination against any citizen on the grounds of sex, against the principle that women will have equal rights with men in all spheres of state and of public life, the right to enjoy equal protection of the law, and the right to life and personal liberty, as guaranteed in Articles 27, 28, 31, and 32 of the Constitution. Being repugnant to the Constitution, the law of restitution is void by reason of Articles 7(2) and 26(1) of the Constitution. P185 Para 21
9. The petitioner K was happily married to another man and enjoyed a social life and she should not be harassed and disturbed in her social life, because that would go against social justice and public policy. P 185 Para 22.

**Rehana Begum vs. Bangladesh 50 DL (1998) 557**

Hmainur Reza Chowdhury, J.  
High Court

Bangladesh  
4 September 1997

RB, a sixteen-year-old British citizen, was taken to Bangladesh by her father on the pretext of a holiday. The father subsequently took RB's passport and returned to the UK, leaving RB behind as a commodity to be sold on the bridal market. RB fell in love with IK; they eloped and married, and registered the marriage. IK was arrested and RB placed in judicial custody following an application by the police to the Magistrates Court. The father alleged that IK had commissioned the drugging and kidnapping of RB, and further that IK had raped RB. The father alleged that since RB had been drugged she was mentally unstable and further, RB was a minor and therefore could not make decisions regarding her marriage. The Magistrates directed the police to treat the case as FRI. The father and IK made two applications each to the

Magistrates for the release of RB, both of which were denied. Having remained in judicial custody, RB bought an application for her release under article 102 of the Constitution – a writ of *habeas corpus*.

The State declared that it had no objections to setting RB at liberty. However, RB's father, although not a party to this case, stated that releasing RB would prejudice a pending case in which he was seeking custody of her.

In finding for RB, the High Court held:

1. RB is not the accused or witness to a crime, but is alleged to be the victim of alleged kidnap and rape. It must therefore be decided whether such a category of persons can be held in judicial custody.
2. The Court found that if the detent is neither an accused or witness to a crime, and is over the age of sixteen the will of that person must prevail. In support of this proposition the Court referred to: *Jahanara Begum alias Jotsna Rani Banerjee vs. State and Anr.* 15 DLR 148  
“Where a person is brought before the Court is aged 16 years or over, the will of such person when the question before the court is whether she or he should be detained or allowed to go from Court's custody, must be allowed to prevail. The position of such a person is, at most, that of a witness and therefore not an accused she or he cannot be detained against her or his will’
3. RB, according to a medical examination in 1996, was aged between fifteen and sixteen, therefore she was deemed to be over sixteen at the time of hearing the present case. This coupled with her emphatic refusal to be held in judicial custody, lead the High Court to release her. However, RB was ordered not to leave Bangladesh pending her father's custody case.

**NEW ENTRY:**

**Atiqul Huque Chowdhury v Shahana Rahim 47 DLR (1995) 301**

High Court Division  
Mahmudul Amin Choudhury and  
KM Hasan JJ.

Bangladesh  
20 February 1995

The Respondent, S, was married to A by a registered kabin nama. A sent a notice of divorce to S. S filed a suit in for recovery of dower, and also for maintenance and guardianship of the child. Trial Court gave judgment partly in favour of S, ordering that maintenance and arrears, but not dower, be paid to S,. S appealed against the decision, and the District Judge decreed that A was to give S the dower in full, and also increased the amount of maintenance A claimed that dower had already been paid, and if not paid, was now barred by limitation and alleging breach of s. 6(3) FCO 1985.

In declining to interfere with the impugned judgment of the District Judge, the High Court held:

1. There was no evidence to show that the deferred part of the dower had been paid. The ornaments given to S at the time of the wedding would not be considered as counting toward the stated value of the dower as there was nothing in the kabin nama to indicate that. P302 Para 8.
2. The Family Court Ordinance 1985 is a special law enacted for the special purpose of protecting the interest of the married woman by providing a speedy relief. Bu since it did not specify any limitation period within which a suit for dower should be brought, it cannot be brought within the ambit of 29(2) of the Limitation Act 1908, thus allowing the application of Articles 103 and 104 of the LA 1908. P303 Para 17
3. Article 116 of the Limitation Act had laid down a limitation period of six years for cases instituted for breach of registered contracts. A Mohammedan marriage was contractual in nature, the kabin

- nama being the contract which contained the terms of the marriage, including the dower and the nature of the dower. Therefore, where the dower deed was registered, Article 116 could apply, the only question being whether it would apply instead of Articles 103, and 104. P304 Paras 21 and 22.
4. S. 9A of the Bengal Mohammedan Marriages and Divorces Registration Act 1876 specified that talaq-i-tafweez could not be registered as a divorce in the divorce register unless it had first been registered under any law for the registration of documents. P 304 Para 24
  5. But that Act had been repealed by the Muslim Marriages and Divorces (Registration) Act 1974; and ss. 6 and 9 of the latter made no distinction between registration of marriages and registration of documents. Therefore that Act made the year 1974 a dividing line for talaq-i-tafweez. In the case of a marriage where the right of divorce is delegated and entered into before 1974, s. 6 of the said Act lays down that a talaq-i-tafweez should not be registered by the Nikah Registrar unless the marriage is a registered one under the Registration Act of 1908. But for marriages that have taken place since 1974, the MMDA 1974 will apply and an attested copy of an entry in the register of marriage will be required for registration of talaq-i-tafweez. P306 Para 32.
  6. Under s. 3 of the MMDA 1974, all kabin namas are required to be registered by the Nikah Registrar. So if there is any breach by way of non-payment of dower fixed in a kabin nama registered by a Nikah Registrar, it will amount to a breach of a registered contract invoking, in the absence of a prescribed period of limitation for filing a suit for dower in the said Act, the application of Article 116 of LA 1908., under which the time limit for filing a suit for dower is six years from the date of the breach of contract. P306 Para 34
  7. Also, the suit for dower is a suit to enforce a simple money claim founded solely on a contract entered into by the husband with the wife. P306 Para 36.
  8. Having regard to the changing social scene, and to the fact that all the recent relevant Acts are enacted for the purpose of providing relief to the Muslim married woman and not to defeat her interest, and also that no specific period of limitation is prescribed for a suit of dower in the MMDA 1974, in a suit for dower the application of Article 116 of the LA 1908 is the most appropriate and intended by the legislators, and would apply in preference to Articles 103 and 104 of the same Act. Since six years had not transpired since the divorce the suit for non-payment of dower was maintainable P306 Para 35 and 36.
  9. There has been no breach of s. 6(3) or s. 10 of the Family Courts Ordinance by virtue of the plaintiff's failure to examine the two witnesses mentioned in the plaint, since the provisions do not make such examination mandatory. P306 Para 38.

**NEW ENTRY:**

**Pochon Rikssi Das v Khuku Rani Dasi 50 DLR (1998) 47**

High Court Division  
Mahmudul Amin Chowdhury,  
Mohammad Fazlul Karim, and  
Md. Joynul Abedin JJ.

Bangladesh  
12 June 1997

The Petitioner P married the Respondent R under Hindu law, was given dowry by R's father. P sent R to her father's house and failed to maintain her or the child and married again. R filed a suit in the Family Court for maintenance.

In discharging the Rule without any order as to costs the Court held:

1. The words “subject to the provisions of the MFLO 1961” appearing in s. 5 of FCO 1985, do not imply that since the MFLO 1961 is for Muslims only, the FCO is also applicable to Muslims only. The relevant words just mean that while disposing of disputes between Muslim parties the provisions of MFLO 1961 shall have to be followed. Thus the rights and liabilities of Muslims under MFLO have been fully protected by s. 5 of FCO 1985. P51 Para 13
2. While the MFLO 1961 provided for substantive rights for Muslims, so the FCO 1985 provided a forum where such rights can be enforced. Under s. 5 of the FCO 1985, the Court shall have to protect the pre-existing rights of the litigants of any faith. However, the Family Court cannot go beyond the personal laws or rights of the litigant. P 50 Para 15.
3. The Hindu Woman’s Right to Separate Residence and Maintenance 1946 gave a right to Hindu wives to live in separate houses and to have maintenance. But neither the Hindu Personal Law, nor the Act provided for a forum. The FCO 1985 has now provided the forum.(P53 Para 16). s. 3 of the FCO 1985 made it available to all citizens irrespective of their faith. The FCO 1985 is a self-contained Code which provides a forum to litigants for enforcing their rights in respect of the five subjects enumerated in s. 5. P 53 Para 16.
4. FCO 1985 has not in any way curtailed or superseded the personal laws of the subjects. The Ordinance provides only a special forum for speedy and effective disposal of the cases which may be filed before the Family Courts as is evident from s. 4 thereof which provides that there shall be as many Family Courts as there are Courts of Assistant Judge and the latter Courts shall be the Family Courts for the purpose of the Ordinance. P53 Para 17.
5. Also, after the FCO 1985, the forum for disputes under the Guardian and Wards Act 1890 is now the Family Court, while the District Court is the appellate Court for such disputes. If s. 24 is read along with s. 5, it will be very clear that not only Muslims but non-Muslims can avail of the forum of the Family Court for settling any dispute arising out of the guardianship and custody of children as that Court has been given exclusive jurisdiction in the matter. This shows clearly that the FCO 1985 is not meant only for Muslims, but applies to all citizens irrespective of religion. P53 Para 18.
6. In the light of sections 3, 4, 5 and 27 of the FCO 1985, the Criminal Courts’ Jurisdiction, including that of Magistrates’ Courts with respect to awarding maintenance has been ousted except in pending proceedings. After the Ordinance came into force, all matters relating to subjects enumerated in section 5 shall have to be brought before the Family Courts. Therefore the ordinary criminal courts have lost jurisdiction to entertain and decide cases that may be filed under s. 488 of the CrPC relating to maintenance after the coming into force of the FCO 1985. P54 Para 20.

**NEW ENTRY:**

**Utpal Kanti Das v Monju Rani Das 50 DLR (AD) (1998) 47**

Appellate Division (Civil)  
 ATM Afzal CJ  
 Mustafa Kamal J  
 Md Abdur Rouf J  
 B.B Roy Choudhury J

Bangladesh  
 22 July 1997

Both parties belonged to the Shudra caste of the Hindu community. M claimed they married at a Hindu temple according to the Hindu Shastra in the presence of several persons, and then later swore an affidavit together before a First Class Magistrate confirming the marriage. However U later abandoned her and remarried, after she refused to accede to dowry demands. M claimed maintenance in the Family Court. U denied being married to M.

The Court held:

1. It has been contested that the marriage is bad in law because the two essential ceremonies of Hindu marriage, namely, 1) saptapadi, and 2) invocation before the sacred fire had not been performed. (P48 Para 8). The findings in the lower courts neither denied that these rites had been performed, nor positively affirmed the contrary. But what the final court of fact, the lower appellate court, and the High Court Division found was that there was a marriage ceremony between the parties in the temple of the deity Kali in presence of many persons, and that garlands had been exchanged. P48 Para 9
2. There a number of various and complicated nuptial rites in Hindu Shastra in addition to the two mentioned above. (P 49) An exact observance of their details is not easy and is beyond the comprehension of the ordinary participants of the ceremony. But once the celebration of a marriage in fact is established there shall be a presumption of there being a marriage in law and observance of the essential ceremonies. P49 Para 17
3. In the present case, there was evidence on record to show that the marriage between the parties had taken place and that they lived together as husband and wife. This evidence was the testimony of the witnesses, the affidavit, and even the married appearance of the woman. P50 Para 18
4. As marriage in fact has been proved, marriage in law must be presumed. In the absence of any evidence to the contrary, it is amply proved that the plaintiff and the defendant were married according to the Hindu Shastra. P50 Para 18.

**NEW ENTRY:**

**Krishna Pada Dutta v Bangladesh 42 DLR (1990) 297**

High Court Division  
Fazle Hussain Mohammad Habibur Rahman  
and Habibul Islam Bhuiyan JJ.

Bangladesh  
12 March 1990

The Petitioner filed a complaint with the police regarding the kidnap of his minor daughter. A case was filed under 364 of the Penal Code, read with s. 4(b)(c) of the Cruelty to Women (Deterrent Punishment) Ordinance, 1983, and the Special Powers Act, 1974. The girl, along with her alleged abductor M, was arrested and sent to custody. A medical examination revealed that she was aged 18-19 years. Thereafter the girl made an application to the Magistrate to the effect that she was major, being aged about 18 years, that she had married M out of her own free will through a *kabin-nama*, having first embraced Islam voluntarily, and that she had been living with her husband for more than a month. The Magistrate released her bail on application of the father of M, but later the application was cancelled and she was sent to judicial custody. In addition to the Medical Report both the girl and M filed affidavits alleging the girl's majority, and her voluntarily marriage and change of religion. Upon being brought to Court the girl refused to return to her parents whereupon she was returned to judicial custody, where she lived for six months, and gave birth to child there, that subsequently died. The petitioner, contesting the majority of both the girl and M, produced school-leaving certificates of both that showed they were both minor. She also filed an application under s. 491 Cr. P. C. for a Rule to be granted to the effect that her daughter had been detained illegally and without lawful authority and that she should be returned to the custody of her father, being a minor.

In making the Rule absolute in favour of the petitioner, the Court held:

1. In the absence of a neutral home in our country for unfortunate allegedly kidnapped immature girls, the moot point is the age of the girl. The crucial question is whether the girl is sui juris, or not. The majority or minority of the girl will be the deciding factor as to whether she should be

- allowed to go wherever she likes or she should be handed over to the custody of her lawful guardian. P300 Para 15.
2. In the Child Marriage Restraint Act 1929, marriage of a girl below the age of 18 and of a boy below the age of 21 has been made a punishable offence. Under the Guardians and Wards Act , 1890, read with the Majority Act, 1875, any person (male or female) below the age of 18 years is a minor for the purpose of guardianship of a minor's person and property. P300 Para 15.
  3. Even for Mohammedans, although under Mohammedan law, a Mohammedan female child attains majority with puberty, she is still a minor and subject to the control of the guardian till she has attained the age of majority under s. 3 of the Majority Act 1875. P300 Para 17.
  4. Also, reference to the age of sixteen in case of minors in s. 361 of the Penal Code is only for the purpose of commission of the offence of kidnapping under s. 363 of the Penal Code, and not for the purpose of deciding whether or not the girl is sui juris. P 300 Para 18.
  5. If there is other cogent evidence in respect of a person's age, then conflicting medical evidence cannot be utilised to override the effect of other cogent evidence and should be rejected. P300 Para 20.
  6. Also, in this case, although a Medical Report had been adduced which opined that the girl was major, yet, it appears the Report was based on superficial observation and was too general in nature. For example, there was no statement that any Radiological Examination had been done. On the contrary, the school-leaving certificate produced by the petitioner was more positive in nature, stating the sources of the stated date of birth. P301 Para 22.
  7. On the issue of the minority of M, as alleged by the petitioner, the latter had produced evidence to this effect, which counsel for respondents had not successfully negated. So the principle of admission by non-traverse will apply in this case.
  8. Therefore, since the girl was a minor, her refusal to return to her parents was not at all material, and her parents were the best persons to get custody of her. P301 Para 26.

**NEW ENTRY:**

**Kazi Mohammad Elias v. Firdous Ara**

High Court, Dhaka  
Latifur Rahman, J.  
Nurul Huque Bhuiyan, J.

Bangladesh  
18 April 1998

P was alleged to have kidnapped his son, a minor, while he was returning from school, and after his former wife divorced him by exercise of her right to delegated divorce (talaq-e-tawfiz). P appealed to the High Court.

The Court in upholding the petition held that:

1. 'After going through the said decisions cited by the learned Advocate for the petitioner, we are of the opinion that correct principle of law has been enunciated in those decisions. In the light of the said decisions it is held that the father petitioner is the legal guardian of the minor child and as such he can not be said to commit the offence of kidnapping under section 363 of the Penal Code by removing the minor child from the custody of the mother and that as legal guardian of the minor child he has in law the constructive custody of the minor child and he can claim that he bonafide believed himself entitled to the custody of the child and is not guilty of kidnapping for

his taking away the child from the keeping of the mother without the consent of the mother.' Para. 7

**NEW ENTRY:**

**Sri Kripa Shindu Hazra v State and Others 30 DLR 103**

High Court, Dhaka  
Badrul Haider Chaudhury J

Bangladesh

The petitioner challenged an order of detention under the Emergency Powers Rules 1975 by way of a writ petition under Article 102 of the Constitution.

In holding the detention to be without lawful authority and directing the release of the detainee the High Court made the following observations with regard to the difference between its jurisdiction under section 491CrPC and its constitutional jurisdiction to give relief in the nature of habeas corpus:

1. The expression "whenever it thinks fit" confers an absolute discretion on the court to exercise its power thereunder or not to do so, having regards to the circumstances of each case. While the words "may" used in the statute was sometimes construed as imposing a duty on the authority concerned on whom a power is conferred to exercise the same if the circumstances necessitated its exercise, the expression "whenever it thinks fit" does not warrant any such limitation on its absolute discretion. Though ordinarily a High Court may safely be relied upon to exercise its powers when liberty of a citizen is illegally violated by any authority the said unlimited discretion certainly enables it in extraordinary circumstances to refuse to come to his rescue. The absolute discretionary jurisdiction conferred under s491 of the Code cannot be put on a par with the jurisdiction conferred under Art326 of the Constitution hedged in by the constitutional limitations. Under s491 of the Code there is neither a right in the person detained to move the High Court for the enforcement of the fundamental right nor there is an absolute obligation on the part of the High Court to give the relief. It is only a discretionary jurisdiction conceived as a check on arbitrary action. para 23
2. In such proceedings the court does not make a roving enquiry nor does it act as an appellate authority. The Court is to see whether reasonable body of persons could have acted on such material because reasonable ground or belief is an important ingredient in ascertaining the existence of bona fides...." para 28

**NEW ENTRY:**

**Anwar Hossain v Momtaz Begum 51 DLR (1999) 444**

High Court Division  
Md. Iftekhar Rasool J

Bangladesh  
16 June 1999

M filed a suit in the family Court against her husband, A, for payment of dower and maintenance. There was no kabin nama. A denied the marriage, and alleged that M was married to another person, and that the suit had been brought out of malice since A was about to take legal action against M's brother his former employee for theft.

The High Court held:

1. Under s. 252 of Mulla's??? Mohammedan Law, it is essential that a marriage between a Muslim male and a Muslim female is contracted on the basis of offer and acceptance in the presence of two male witnesses or one male and one female witness. P 445 Para 7.

2. In the absence of a kabin nama and non-registration of the marriage, the plaintiff-opposite party was required to prove the factum of marriage, which she had not been able to. She had not been able to produce any witnesses who were present at the time of the alleged marriage. Her father and brother have not come forward to testify on her behalf that she was married to A. The witnesses that she produced have stated that they found the parties living together, but mere living together does not prove the marriage. Therefore the plaintiff-opposite party is not entitled to get any dower, prompt, or deferred or any maintenance from the petitioner. Nowadays the obnoxious culture of 'living together' has made its inroad into our society and this is slowly spreading its tentacles undermining our social values and the institution of marriage. This abominable culture of 'living together' in essence means 'living together in adultery' by choice.  
P446 Para 8, 9.

**NEW ENTRY:**

**Kazi Obaidul Huq v State 51 DLR (1999) 25**

High Court Division

Bangladesh  
8 July 1998

An FIR was lodged alleging the kidnapping of the informant's newly married wife, Meherjan, 18/19 years. After her recovery from a nearby village, she stated that she had been forcibly married to one Azizul. The police submitted a charge sheet (under sections 366A, 380, 34 and 109 of the Penal Code and sections 4(b) and (c) of the 1983 Ordinance) against Azizul and the petitioner, a Kazi, who had solemnised and registered the said forced marriage.

The Court, quashing the case against the petitioner Kazi, noted that:

1. "A nikah registrar is a public servant within the terms of section 21 of the Penal Code and section 2 of the Criminal Law Amendment Act 1958, given that he is licensed by the government and cannot resign his office w/o leave of the Government."

**NEW ENTRY:**

**Nurul Islam v. State 23 DLR 127**

High Court  
Nurul Islam J

Bangladesh

The petitioner was accused of having abducted the victim, allegedly a minor, at around 8.00 p.m, when she went to the tank behind her dwelling house for post-dinner ablutions and then went to the latrine to release herself. The Sessions Court convicted him under section 366 Penal Code, against which he appealed to the High Court.

In allowing the appeal, the Court held that:

1. "...For the purpose of proving the said offence under this section it is imperative for the prosecution to prove not only the act of kidnapping or abducting but also the fact that the said act was done with an intention that the women may be compelled or knowing it to be likely that she would be compelled to marry any person against her will..." para 9(b)
2. "... Where the prosecution fails to prove on evidence that the said intent of the accused that the women, even if she is below 16 years of age, will be compelled to marry any person against her

- will, there cannot be any conviction of the accused for such an act of kidnapping or abducting under s366 of the Pakistan Penal Code..." para 9(c)
3. "...Even if it would have been found that the girl was minor being below 16 years of age, there could not be any conviction of an accused under s366 of PPC in the facts and on record, because of the fact that girl gave positive evidence that nothing was done by the accused against her will and that she was consenting party to the marriage with the accused... para 9d
  4. "In the case under s366 of P.P.C. if no direct evidence can be found as to the actual intention of the abductor or kidnapper the said intention shall have to be inferred from the circumstances of the particular case." para 5

**NEW ENTRY:**

**Safiqul Islam v the State and another 46 DLR (1994) 700**

High Court Division  
AKM Sadeque and KM Hasan JJ.

Bangladesh  
15 August 1994

The Petitioner married the Respondent by registered kabin nama. He later served a notice of divorce on her. R filed a case in the Family Court for restoration of conjugal rights. The Family Court adjourned the case with the direction that the parties should try to come to a compromise. When P demanded 3 lakh taka for taking her back, R made a complaint under s. 4 of the Dowry Prohibition Act 1980.

The High Court held:

1. Under Muslim Personal Law a divorce becomes irrevocable when made in writing, so the object of s. 7 MFLO 1961 is to prevent hasty dissolution of marriage by unilateral pronouncement of talaq by the husband, without an attempt being made to bring about reconciliation between the parties. P701 Para 11
2. A divorce under the Ordinance is not the unilateral act of a person but involves a public authority in the matter. It precludes a divorce or talaq from being effective for a period of ninety days from the date of receipt of the notice by the Chairman. The marital status of the parties will not in any way change during that period, and they will continue to be husband and wife. P702 Para 12
3. s. 7 MFLO 1961 shows that the 90 days reconciliation period is to start from the date of receipt of the notice by the Chairman and not from the date on which it was written. P702 Para 13
4. Although the notice of talaq was dated and signed, there was nothing to show when it had been served on the Chairman by the petitioner. In the event, the question of whether or not divorce had taken place needed to be resolved in the light of the facts, which was a matter for the trial court to decide. P702 Paras 14 and 16.
5. Moreover it can be argued that as there was intervention by the civil Court there was no legal divorce. P702 Para 17
6. Lastly, the present application under s. 561 A of the Cr. P. C. was nothing but a second revisional application and therefore not maintainable in law. P702 Para 17

**NEW ENTRY:**

**Abdul Jalil v Sharon Laily Begum 55 DLR (AD)(1998) 55**

Appellate Division (Civil)  
ATM Afzal CJ  
Mustafa Kamal J  
Md. Abdur Rouf J, and BB Roy Choudhury J

Bangladesh  
30 March 1997

The Respondent S a British citizen was married to the Appellant A in England, after which she became a full-time house-wife raising their four children. S alleged that she was informed by her husband A that he had entered Britain illegally, and instructed to apply to the UK Immigration Authorities for leave to remain in the UK as her husband; after he received British residency, their relationship deteriorated with A often subjecting S to physical and mental abuse; Nine years after the marriage A brought S and the four children to Bangladesh took their British passports and obtained Bangladeshi passports for the children; A rented a house for the family where they stayed during his absence, and subjected her to physical abuse when she pleaded with him for returning to their home in England with the children. Two and half years after their return to Bangladesh, A removed the children and took them to his parental home with the, then sent a notice of divorce to S under s. 7 MFLO 1961, and ordered her and her father to leave the house. S filed a suit in the High Court of Justice (Family Division) in England and the children were made wards of the Court and directed to be returned to the jurisdiction of the Court. S then filed a writ petition in the High Court of Bangladesh under Article 102 (2) (b) (i) of the Constitution alleging that the children were being held illegally. A filed affidavits-in-opposition, generally denying the allegations, and contesting the maintainability of the suit. A alleged that S had boy-friends, led an immoral life, and failed to look after the children properly, in connection with which he had filed general diaries with the police. She was thus not suitable to look after the children, and he had already filed an application under s. 25(1) Guardian and Wards Act read with s. 5 Family Courts Ordinance with the Family Court. A also filed a supplementary affidavit-in-opposition alleging that the petitioner S's mother was a Christian British national living in Britain, and divorced from her husband who lived in Bangladesh with his own family. The mother lived on social security and thus S had no financial support either in Bangladesh or in the UK. Further, the children should not be allowed to grow up in an un-Islamic and alien culture, and thus it was contrary to the economic welfare and social and cultural welfare of the children to hand them over to the custody of the mother. The High Court declined to adjudge on the issue of disputed facts, but held that three of the children, being under 7 years of age, were entitled to the custody of the mother, and the eldest, being over 7 years of age, was entitled to the custody of the father. Both A and S appealed against the Rules where it affected their respective interests, in the Appellate Division.

In dismissing the appeals without costs, and giving judgment the Court held:

1. It a proceeding like this, it is not the rights of the parties, but the rights of the child which are at issue. (quoting the UN Declaration of the Rights of the Child 1959, and s. 17 of the Guardian and Wards Act). P59 Paras 21 and 22
2. A Court's power to determine the entitlement of a party to Hizanat is not limited to mere observance of the age rule. It is now well settled after Abu Baker Siddique V SMA Bakar 38 DLR (AD) 106, that the term 'welfare' must be read in the largest possible sense as meaning that every circumstance must be taken into consideration. The moral and religious welfare of the child must be considered as well as its physical well-being. P60 Paras 23 and 24.
3. The petitions filed in the High Court by S were maintainable despite the fact that it was the jurisdiction of the Family Court to decide on matters of custody. The suits were maintainable because the minor children had been removed from the custody of the mother by the unilateral act of the father, although the mother was not disqualified from such custody, and therefore the aggrieved mother had the right to move the Court under Article 102 of the Constitution. P62 Para 33
4. The father is therefore directed by an interim order to hand over the custody of the three minor children under 7 years of age over to the mother pending the disposal of the suit in the Family

Court, and not to remove them from the jurisdiction of the Court without the leave of the Court. The eldest boy who was 12, was to remain in the custody of the father. P62 Para 36 and 37.

5. The father will have the right to visit the children at a conveniently agreed time, place, and period on not more than 3 occasions in a week. The mother will have the right to visit the eldest child on similar terms. The Family Court is directed to dispose of the matter within 6 months. P 63 Paras 41 and 42.

**NEW ENTRY:**

**Prafulla Kamal v Government of Bangladesh 28 DLR 123**

High Court, Dhaka  
Shahabuddin Ahmed J

Bangladesh

The petitioner claimed that his daughter, the victim girl, a minor, was taken to Tangail by an ex-student who promised to take her to the cinema, but instead handed her over to the accused who subsequently married her by force. On coming to learn this, P lodged an FIR and registered a case under s366 of the Penal Code. The police arrested the accused and the victim girl. At the trial, the accused claimed that the girl was a major and that she had voluntarily married him, giving evidence of a medical certificate from a Radiologist which showed her age as being over 18. P produced copies of his daughter's passport and school certificate which showed her as being 13 years old.

The Magistrate heard both the parties, examined the documents and granted bail to the girl allowing her to go wherever she liked. P challenged this order before the Session Judge by revisional application and obtained stay of the order. P then filed this application under s491 Cr.P.C and obtained a Rule; on his prayer the girl was transferred from Tangail Sub-Jail to Dhaka Central Jail so that she could be free from outside influence.

In making the Rule absolute, and directing the release of the girl from detention at once, the High Court held that:

1. An expert's opinion may be considered by the Court in forming its own opinion on the issue before it. Section 45 of the Evidence Act does not say that the opinion of an expert is binding upon the Court. The evidence of an expert is considered in order to enable the Court to come to a satisfactory conclusion. An expert giving his opinion must give reasons in support of his opinion and if the Court thinks that the reasons are not cogent or that there is other authentic evidence on the point and that evidence is in conflict with the opinion of the expert then the Court is quite competent to prefer that evidence to the expert's evidence.
2. The petitioner's statement has been corroborated by at least three official documents, the School Certificate, the Passport and the Declaration. Entries as to age of the detinue in these documents having been made long before the incident in question, they can be reasonably be expected to be true. But in view of the wide divergence between the age as indicated by the Medical Board and that appearing from other evidence we directed that the detinue should be produced before us. Accordingly she was produced before us in Court on 19.01.1976. We have seen her, but her appearance does not show her to be 19 years of age. The age as given by the Medical Board does not fit with her appearance. She looks very tender aged and though it is not possible for us to determine her exact age from her appearance, we think that she could not be 16 years. To us she appears to be below 16 years and as such she is minor. When we asked her whether she is willing to return to her father's custody she refused. But the minor's refusal is not material so far her custody is concerned. The father is certainly the best well-wisher of his daughter and in her own interest she should go into her father's custody. Para 15

**Adam Ali Khalifa, Abdul Karim Khalifa and Others vs. The Crown 2 DLR (1951) 213**

Ellis and Ibrahim, JJ.  
High Court

Pakistan (East-Bangladesh)  
10-11 May 1950

K – below the age of 16 years – resided in her paternal aunts house following the death of both her parents. Adam Ali Khalifa (AAB) bought a petition in the criminal court against K’s aunt and other family members alleging K had been abducted from him. He stated that he had married K through Rustum Ali Khalifa (RAK), who as K’s paternal cousin, acted as her *Ukil*. The court ordered the production of K, who was accompanied by her aunt and other relatives, and bound over to return. On her return journey to the court K was taken by AAK. K’s aunt and other relatives carried on to institute the present case before the High Court. AAK’s criminal case of abduction against K’s aunt and others resulted in acquittal. AAK further alleged that he had obtained a comprise decree in a suit of restitution of conjugal rights he allegedly instituted against K. AAK alleges that the comprise decree was based on a solemana; K’s pleader testified that AAK did bring a prepared and pre-signed solemana which K recorded her thumbprint on in his presence. However he could not confirm that this had been filed nor whether a comprise decree was issued. During the committal stages of the High Court proceedings AAK was ordered to produce K who was returned to her aunt. K fully refutes AAK’s cases.

In convicting the defendants, the High Court held:

1. The petitioners (AAK and AKK) argued that under Muslim law the maternal aunt is the preferential guardian of a minor. Therefore as the petitioners took K at the insistence and in assertion of the right of the maternal aunt, they did not commit an offence under section 366 of the Penal Code, but rather committed an offence under section 361 of the Penal Code. In upholding the lower Courts dismissal of this line of argument, the High Court stated that firstly there was no evidence that the woman in question was K’s maternal aunt.
2. The petitioners next argued that K was married to AAK thus the charge of kidnapping under section 366 was not sustainable, as this section requires kidnap with the intent to compel the victim to marry against her will. However, in upholding the lower Courts dismissal of the marriage, the High Court found:
  - i) Although AAK stated there was a kabbinnama, no such document has been produced.
  - ii) The mullah and witnesses that would have been involved in the solemnisation of the marriage had not been examined.
  - iii) The alleged comprise decree in the suit for restitution of conjugal rights has not been produced.
3. The petitioners next claimed because RAK was K’s paternal cousin, he therefore had the right under Muslim Law to contract K’s marriage whilst she was a minor. As RAK had contracted the marriage between AAK and K, there could be no charge under section 366. As minor has no authority to contract her marriage, the word will in section 366 [i.e., ‘she may be compelled...to marry ...against her will’], refers not to the minor’s will but to that of her guardian. The High Court dismissed this argument as ‘without substance’ [p.378].
  - i) Firstly, it ‘is not necessary under this section that the girl should be kidnapped with the intent of contracting a valid marriage. If the girl is kidnapped with the intention of compelling her to go through a form of marriage whether valid or not; the case would come within the mischief of the section.’ [p.378]
  - ii) Secondly, the paternal cousin’s right to contract marriage for a minor Muslim girl is subject to the girls right of repudiation (the option of puberty). Muslim law confers guardianship of marriage on the paternal cousin in certain circumstances, but it excludes him from the guardianship of her person because he is within the prohibited decree. The paternal cousin has no right to kidnap the minor girl from the custody of the guardian of her person.

Given that K was no subjected to the kind of ill treatment to which kidnapped girls are usually subjected, AAK and AKK were sentenced to rigorous imprisonment for one year and nine months, respectively.

**Ayesha Khanam v Major Sabbir Ahmed 46 DLR (1994) 399**

High Court Division  
Anwarul Hoque Chowdhury and  
KM Hasan JJ.

Bangladesh  
13 December 1992

The Petitioner, AK, sought to divorce the Respondent, sending a notice of divorce to the Chairman of WHAT under s. 7 MFLO 1961. R then threatened to kidnap their 3 year old son, if she did not withdraw the notice, and ultimately abducted him from outside his school. P filed an application for habeas corpus under Article 102(2)(b)(i) of the Constitution.

In granting custody to the mother, subject to review if she should remarry, the High Court observed:

1. The High Court may be moved for writ of habeas corpus under Article 102(2)(b)(i) of the Constitution, not only be persons aggrieved, but by any person. Further, the writ applies in respect of a private detention committed after the abduction of an individual, just as it applies against an executive order. P401 Para 8
2. Such a petition would lie without requiring the petitioner to exhaust his or her remedies before the Family Court, under the Guardians and Wards Act, or any criminal court. In a situation like this, it is only habeas corpus which would give her the most speedy and efficacious remedy. P401 Para 9
3. The lawful custody of the male child, being under 7 years of age, belonged to the mother, in the light of the personal law of the parties, which was the Hanafi school. P402 Para 15.
4. The personal law and the welfare doctrine were in this case not in conflict regarding the matter of child custody. However, even if they were in conflict, the welfare doctrine would have precedence. P402 Para 15
5. Accordingly, the mother was to have custody of the child till he is seven, with the proviso that the question of custody is to be reviewed if she is to remarry. The father is to have access to his child, and the right to take him to different places once in a week. P402 Paras 17 and 19.

**NEW ENTRY:**

**Ayesha Khanam & Ors vs. Major Sabir Ahmed & Ors 1993 BLD (HCD) 186**

Anwarul Hoque Choudhury, J.  
High Court

Bangladesh  
11 December 1993

AK sought a writ of *habeas corpus* under article 102(2)(b) of the Constitution of Bangladesh, in respect of the return of her child (C) who she claimed was abducted by MSA (the child's father) following her (valid) divorce from him.

In granting the writ of *habeas corpus*, the High Court held:

1. The Court was competent to rule on a request for habeas corpus which involved the custody of a child, where deciding such an issue would set the child free from unlawful detention (in doing so the Court referred to several Indian decisions: Goher Begum vs. Suggi AIR 1960(SC) 93 and Intiaz Banu's case AIR 1979(Allahabad) 25).

2. Further, 'when dealing with matters referable to the custody of a child, the established legal position is that the welfare of the child is of prime consideration' (para 13 p.190)
3. In the present case, it was ruled that under the Muslim personal laws applicable to the parents, the mother is the natural guardian of a minor boy until he reaches seven years of age.
4. In conclusion, the Court found that there was no conflict between the doctrine of the welfare of the child and the personal laws, and therefore by giving C to the custody of the mother (until C reaches 7 years), C will be deemed to have been set at liberty from unlawful detention, in accordance with article 102(2)(b) of the Constitution of Bangladesh.

The Court further deemed that it was within its power to ensure that the father had access to the child, settling on one day a week in the present case. It also warned the mother that should she remarry the question of custody would be reviewed.

**NEW ENTRY:**

**Monindra Kumar Malaker v. The State and others**

High Court, Dhaka  
 Latifur Rahman, J  
 Md. Mozammel Hoque, J.

Bangladesh  
 16 August 1989

MKM brought the case against the defendants alleging that Nawshed Bepari, Wahab Bepari and others of bad character had kidnapped his daughter, Uma Rani, a minor. However, Uma Rani claimed that she was a major who had embraced Islam and married Nawshed of her own accord and there was no force or inducement upon her from anybody.

In dismissing the case, the Court held that:

1. (Relying upon the decisions in *Abbas Bahara and another v. Emperor* 1933 (Cal) 362; *Nurul Islam v. State* 23 DLR (Dac) 126 and *Talukdar Abdul Aziz v The State* 35 DLR 127; Paras 35 to 39), for sustaining a charge of kidnapping a woman for unlawful purposes, the alleged victim must be between 16 and 18. If she is above 16 but below 18 and if there is no force used it will not be an offence under the Penal Code or the Ordinance for deterrent punishment.

**Chan Mia v Rupnagar 51 DLR (1999) 292**

Kazi AT Monowaruddin J  
 High Court

Bangladesh  
 3 March 1998

H (the plaintiff) indecently assaulted W (the defendant) – a worker in his household – following which the local community insisted he marry her. H and W married in the presence of a mullah and witnesses. She continued to be abused by his family members, and was forced out by her in laws after she conceived and they failed to force her to have an abortion. Upon leaving, W filed suit for restitution, dower and maintenance in 1993. The court of first instance gave judgment in favour of W, which was upheld by the District Court. H appealed to the High Court.

In dismissing H's appeal, the Court held:

1. Consortium (co-habitation) is an importance obligation of marriage, thus if either spouse refuses to live with the other, the other is entitled to sue for restitution and fulfilment of his/her marital duties and obligations.

2. Restitution is a reciprocal right, and thus is not discriminatory or contrary to the Constitution [This finding conflicts with *Khodeja Begum v Md. Sadeq Sarkar* (1998) BLD 31/50 LDR 181, where it was noted that "law of restitution...is a violation of social justice as enunciated in the Preamble of the Constitution and under Article 27 for Protection of the law". (paras 20-23)]
3. However, the court should not pass a decree of restitution where the relationship of adjustment between H and W is lost, or it is otherwise inequitable, impractical or impossible to implement. In this case, if H refuses to live together, he is to pay a sum of Taka 5000 for her maintenance.
4. Further, registration is not essential in order to prove the validity of the marriage, and nor is a written *kabinnama*, if the marriage is otherwise valid.

**NEW ENTRY:**

**Amulya Chandra Modak v State 35 DLR (1983) 160**

High Court Division  
Md. Habibur Rahman and Mustafa Kamal JJ.

Bangladesh  
10 Jan 1983

The Appellant asked a young female neighbour to live at his house to look after his ailing mother. Without his parents' knowledge, he promised to marry her ceremonially at a later stage, and started co-habiting with her. When she became pregnant, and his parents refused to approve of their marriage, he refused to marry her. The woman's father filed a complaint with the Magistrate, and A was convicted under s. 493 Penal Code. A appealed denying the marriage.

In allowing the appeal and acquitting the appellant, the Court held that:

1. Even if the story of garland exchange was true, the two essentials of Hindu marriage were (1) invocation before the sacred fire, and (2) saptapadi. It is also customary among Bangladeshi Hindus that some relations on both sides are present and the bride anoints and dresses herself for the occasion. A young woman of 17-18 years was expected to know these and that there could not be a valid Hindu marriage without the invocation before fire and saptapadi, and therefore the accused cannot be held to have led her to believe that she was lawfully married to him. P 164 Para 9.
2. In the circumstances it is likely that the couple had had voluntary sexual intercourse in their youthful exuberance, and that the woman realising the serious consequences of her folly, introduced the story of exchange of garlands, and started the case against the appellant to put pressure on him to marry her. The prosecution had not been able to prove that by practicing deception the accused appellant created a belief in the mind of the woman that she was lawfully married to him and that in pursuance of that belief she had allowed him to co-habit with her. P 164 Para 11.
3. A mere promise of marriage made by the accused does not warrant a conclusion that a false belief was caused in the mind of the woman that she was lawfully married to the promisor. P 164 Para 10

**NEW ENTRY:**

**Meher Nagar v Mojibur Rahman 47 DLR (1995) 18**

High Court Division  
Badrul Islam Chowdhry and  
Mahfizur Rahman JJ.

Bangladesh  
5 September 1994

The petitioner filed a case with the Magistrate under s. 488 of Cr. P. C. for maintenance for herself and her minor son. On appeal, the Sessions Judge held that with the coming into force of the Family Law Ordinance on 15<sup>th</sup> June 1985, Magistrates were divested of the powers under s. 488 Cr. P. C. to pass any order for maintenance as because the jurisdiction to entertain and dispose of a prayer for maintenance vested exclusively in the Family Court.

The High Court held that:

1. The provisions of the Family Courts Ordinance 1985 are applicable to not only members of the Muslim community, but to other communities which constitute the populace of Bangladesh. P20 Para 9
2. The provisions of the West Pakistan Family Court Act 1964 and the principles of law denying concurrent jurisdiction of the Magistrate and the Family Court regarding maintenance as established by the case-law under that Act cannot be applied in our country, as there are substantial differences in the provisions. P 21 Para 12
3. The provisions of the Family Courts Ordinance 1985 have not taken away the power of a Magistrate to order for maintenance under s. 488 CrPC. P 21 Para 13.

**NEW ENTRY:**

**Rahimnassa and another v Ashraf Mia 25 DLR (1973) 167**

High Court Division  
D.C. Bhattacharya and M.N. Huda JJ

Bangladesh  
9 January 1973

The Petitioners, the paternal grandmother and uncle of a minor, appealed against the judgment and order of the District Court, appointing the minor's step mother as her guardian under s10 of the Guardians and Wards Act 1890.

In dismissing the appeal, the High Court held:

1. The grandmother, Rahimnassa, was unfit by reason of age (94 years) to be appointed the guardian of the minor. The paternal uncles were trying to take benefit of the property of the minor, and as such it was not safe to appoint them guardian of the person or property of the minor. P169 Para 6.
2. In the light of s. 17 of the Guardians and Wards Act 1980, the welfare of the minor is the dominant consideration for a Court when appointing a guardian, and this should be ascertained consistently with the personal law of the minor. According to Mohammedan law, the custody of a minor boy over 7 years of age in the absence of his father belongs to the paternal relations in a given order, and paternal uncles occupy a certain place in that order. P170 Para 9,10.
3. However, that did not imply that so long as there was a relation alive in the order of the relations entitled, nobody else could be appointed guardian. If such a relation is found to be unfit from the standpoint of the minor's welfare, after considering the matters mentioned in s. 17(2) and (3) of the Act, the Court can certainly appoint any other person, even a stranger, if such a person satisfies the necessary tests regarding the welfare of the minor. P170 Para 10.
4. Having regard to the relationship that has developed between the minor and his step-mother, and the facts and circumstances of the case, including the fact that the minor was in this case intelligent enough to show a preference which was in favour of the step-mother, (P 170 Para 12), the Court was of opinion that the step-mother was the best of all the well-wishers and had the

welfare of the minor most at her heart. As such, she was the most suitable person to be appointed the guardian of the minor. P 173 Para 18.

**NEW ENTRY:**

**Mizanur Rahman v Surma Khatun 50 DLR (1998) 559**

High Court Division  
Md Hamidul Haque J

Bangladesh  
18 May 1998

The Petitioner was convicted under s. 6(5) of the MFLO 1961 and sentenced to one year's rigorous imprisonment for having married a second wife without the permission of the Arbitration Council. The Petitioner appealed on the ground that there was no Union Parishad and as such, no Arbitration Council for filing an application

In directing the trial Court to secure the arrest of the prisoner, the High Court held:

1. There is no evidence to show that there was no Union Parishad and Chairman when the accused took the second wife. Further, that argument was not placed before the trial Court or the appellate Court on this point. Since that is a point of law based on a fact that was not raised before, it may not be raised for the first time in a revisional application. P 560 Para 4.
2. The appeal in the lower Court was an appeal against the judgment and order of conviction and sentence passed by the trial Court, not an appeal against enhancement of sentence. Thus the lower appellate Court had no power to enhance the sentence passed by the trial Court by imposition of fine. Thus that portion of the order is illegal and without jurisdiction, and should be set aside. P561 Para 5.

**NEW ENTRY:**

**Abdus Sobhan Sarkar v Md. Abdul Ghani & Others 25 DLR (1973) 227**

High Court Division  
A.M. Sayem and A. Quasim JJ.

Bangladesh  
17 June 1971

The respondent, AG, filed a complaint before the Magistrate under s. 561A CrPC to the effect that the petitioner had married S, his lawfully married wife, her during the subsistence of their marriage. The petitioner claimed that S had divorced AG in exercise of her delegated power in the kabin-nama, and filed the kabin nama, talak nama and a certified copy of an alleged decision of an Arbitration Council granted under the hand and seal of the Chairman. The Magistrate rejected the petition without reference to the documents. The petitioner challenged this order before the High Court.

The Court held:

1. While a party has to 'apply' to the Chairman for matters dealt with in sections 6 and 9 of MFLO 1960, section 7 requires only a notice of talaq to be given to the Chairman. P229 para 9
2. Section 7 MFLO requires the Arbitration Council neither to decide nor to determine anything upon such notice, though section 6 requires the Arbitration Council to 'decide' a husband's application for permission to contract another marriage during the subsistence of an existing marriage and record reasons for its decision and section 9 requires the Arbitration Council to 'determine' the matter upon an application by a wife for maintenance. P229 para 9.

3. Although s. 7(4) MFLO provides that within thirty days of the receipt of written notice of pronouncement of a talaq the Chairman is required to constitute an Arbitration Council which is to take all steps necessary for reconciliation, nothing has been said in the Act about what will happen if the Chairman does not constitute an Arbitration Council for the purpose of such reconciliation, or the Arbitration Council fails to take steps to effect the reconciliation. Failure of the Chairman to constitute an Arbitration Council, or if the Arbitration Council so constituted does not take any steps to bring about reconciliation is thus inconsequential. P229 para 9
4. Once written notice of the pronouncement of a talaq in terms of s. 7(1) MFLO is delivered to the Chairman, the talaq if otherwise valid, will be effective on the expiry of ninety days of the delivery of such notice. Thus, the Arbitration Council has no function except to take steps to bring about reconciliation between the parties. It also has no power to accord approval to the alleged divorce, or to permit the applicant to take a second husband, and thus the certified copy of the Arbitration Council's decision purporting to approve her alleged divorce can be of no assistance to the petitioner. P229 paras 9, 10.

**NEW ENTRY:**

**Abu Baker Siddique v S.M.A. Bakar and Others 38 DLR(1986) (AD) 106**

Supreme Court

F.K.M.A Munim C.J.

Badrul Haider Chowdhury and

Shahabuddin Ahmed JJ.

Bangladesh

3 December 1985

The Appellant filed an application under s. 25 of the Guardian and Wards Act 1890 for custody of his 8 year old son, after dissolution of his marriage. The Respondent mother was working abroad and the child was living with her relations and indicated a preference to continuing to do so. The Appellant's suit was dismissed by the trial court and on appeal to the District Court. He appealed to the SC.

In dismissing the appeal, and holding that the paramount consideration being the child's welfare, he should remain in the custody of the mother, the Court held that:

1. The Mohammedan rule of hizanat that the mother is entitled to the custody of a son under 7 years of age, and that the father is entitled to his custody thereafter, belongs to the Hanafi school and has no claim to immutability since it is found neither in the Quran nor in the Sunnah. P114 Para 21
2. Further, rules of hizanat or custody differ from school to school showing no consensus between the jurists and leaving room for difference of opinion. P 113 Para 18
3. Further, courts of the Indian sub-continent have been reluctant to give automatic effect to the rules of hizanat enunciated by Islamic jurists, and they did not limit themselves to the mere observance of the age rule, but took into account the welfare of the minor. P111 Para 10.
4. Under the Guardians and Wards Act 1890, the Court is to be satisfied that the welfare of a child requires the appointment of a certain guardian, as well as having regard to the personal law applicable, which in this case, is the rule of hizanat as propounded by the Hanafi school. P 114 Para 23
5. However, deviation from the above rule of hizanat is permissible in the facts and circumstances of the case (which included boy's preference for his mother's relations, the fact that he was suffering from a peculiar illness, and the mother was best-suited to take care of him, being herself a medical practitioner, and competent to send her son abroad for surgery). P 114 Para 23

**NEW ENTRY:**

**Ayesha Sultana v Shahjahan Ali 38 DLR (1986) 140**

High Court Division  
Latifur Rahman and  
Amin-ur-Rahman Khan JJ.

Bangladesh  
17 March 1986

The Appellant filed a complaint with the Magistrate that the Respondent, S, her husband had remarried without taking any permission from her or the Arbitration Council. S preferred an appeal in the Sessions Court. The Court held that since all local councils and Municipal Committees were dissolved by P.O. 7 of 1972 and since the prosecution could not produce any document to show that at the time of the second marriage of the accused the Arbitration Council or its Chairman was in existence, the question of taking permission did not arise. The respondent appealed.

In allowing the appeal, and setting aside the order of acquittal, the Court held that:

1. Although the Bangladesh Local Councils and Municipal Committees (Dissolution and Administration) Ord. P.O. 7 of 1972 dissolved the Local Council and Municipal Committees the Government appointed the Administrators of Union Panchayet, Shahaar Committees and Pourashavas to perform all the functions as provided under the MFLO 1961. P144 Para 14.
2. This information was published by an extraordinary gazette notification. So there was existence of Arbitration Council as contemplated under s. 2(b) (d) of MFLO 1961. P144 Paras 15, 16.
3. Since the accused respondent failed to obtain any permission from the Arbitration Council, he committed an offence under s. 6(5) (b) MFLO 1961.  
P 144 Para 16.

**India**

**NEW ENTRY:**

**Buffatan Bibi and Another v. Sheikh Abdul Salim AIR 1950 Calcutta 304**

High Court, Calcutta  
Lahiri J.

India  
2 March 1950

The appellant (BB), the wife of the respondent (R), left him and went to live in her father's house. R claimed that he and BB had lived happily until she fled the house on her father's advice. BB instituted a case for maintenance which was dismissed. R then instituted a suit for restoration of conjugal rights. BB contested the suit by stating that she was no longer R's wife as under the terms of the *kabinnama* she had validly divorced herself from him; she also alleged that R had subjected her to cruelty and ill treatment.

The court of first instance dismissed R's suit for restitution, finding him responsible for assault, cruelty and ill-treatment against BB. However, this decision was reversed on appeal on the ground that BB had failed to prove the allegations of ill treatment and cruelty, and that the *kabinnama* allowing her to leave the husband and reside outside the matrimonial home was void.

In upholding the appeal, the High Court held that:

1. 'It is quite clear that a Muhammadan husband has the right to delegate his power of divorce to his wife' [para 3, p.305]. Further, in agreement with the case of *Abbas Ali vs. Nazemunnessa Begum* 43 CWN 1059, Division Bench of Calcutta High Court, a prenuptial agreement such as the one in

- the present case 'is not opposed to public policy and is enforceable under the Mahomedan law'. (para 3 p.305)
2. The payment of maintenance was not dependent upon proving cruelty and ill-treatment. Any such view of the wife's rights would not be in conformity with the conditions of the *kabinnama*.
  3. In determining whether A's separation from R was within the terms of the *kabinnama* – on account of disagreement – the Court dismissed the views of the court below that the wife either was taken by her father, or disliked her husband and wanted a younger man, or that she was under the complete control of her father who wanted to marry her to another man. It was held that 'the appreciation of the evidence in the present case by the Court of Appeal below has been vitiated by the misconception of the legal rights of the defendant 1 under the *kabinnama*' [para 3 p.305].

**Tapan Ranjan Das v Smt. Jolly Das [1990] AIR Calcutta 353**

High Court, Calcutta  
G. N. Ray and P. K. Banerjee, JJ

India  
15 March 1990

The plaintiff respondent, JD, made an application under section 25(iii) of the Special Marriage Act 1954 to the Additional District Judge, for a declaration of nullity of marriage to the appellant, TRD, who had been her music instructor.

The Additional District Judge declared the marriage between JD and the appellant, TRD, null and void upholding her claims that TRD had exercised fraud and through coercion and inducement, had made her sign blank forms, which he had told her were required to obtain an audition for a radio programme, although in fact they were marriage registration forms.

The Calcutta High Court allowed TRD's appeal on the following grounds:

1. Incidental music assistance/instruction provided by the appellant to the respondent, who was usually taught by another teacher, did not amount to the establishment of a fiduciary relationship between the two. Furthermore, there was no cogent and convincing evidence to establish that the appellant in his role as the respondent's teacher exerted any undue influence on her in effecting registration of the marriage.
2. With respect to the ground of alleged fraud and misrepresentation exercised by the appellant on the respondent in getting her to sign the marriage forms, the contradictory pleadings and evidence demonstrated to the contrary. It was proved that the parties had known each other for a long time, that they decided to marry voluntarily and that the marriage was registered at their instance and arranged between them. Such a marriage could not be declared to be a nullity on the ground of fraud.

**Gian Devi v State of Uttar Pradesh [1976] 3 SCC 234**

Supreme Court  
Khanna J.

India  
27 August 1974

The petitioner, GD, sought court protection from the Judicial Magistrate, Sonapat, in respect of her father and the man to whom her father had married her, after her father removed her from the house of Ganga Seran, with whom she had developed an intimate relationship. Cases had been filed against Ganga Saran and two others under ss 363, 366 and 376 of the Indian Penal Code, regarding allegations of abduction and rape. The Magistrate directed that the petitioner be detained at a Nari Niketan. The petitioner filed a habeas corpus petition in the Punjab and Haryana High Court, which was dismissed on the ground that the

Court had no jurisdiction to entertain it. She then filed another habeas corpus petition before the Delhi High Court, which was dismissed on the ground that she was still a minor and therefore had no standing.

The petitioner then filed a fundamental rights petition under Article 32 of the Constitution before the Supreme Court, against the Superintendent of Nari Niketan, the Judicial Magistrate of Sonapat and the State of Haryana, as well as her father and the man to whom she was allegedly to have been married. In response to the Court's enquiry, she stated she did not want to be detained in the Nari Niketan and that she wanted to go with Ganga Seran, with whom she had concluded a valid marriage.

In allowing the petition, the Supreme Court held:

1. Having attained eighteen years of age, the petitioner was sui juris and thus no restrictions could be placed upon the person with whom she chooses to stay, whether it is the person to whom she claims to be married or the person to whom her father is alleged to have married her.
2. Further, no restriction may be imposed with regard to where the petitioner would stay. The Court or the relatives of the petitioner cannot substitute their opinion or preference for that of the petitioner in such a matter.
3. Since the petitioner had stated unequivocally that she did not want to stay in a Nari Niketan, her detention therein could not be held in accordance with the law.

**NEW ENTRY:**

**Elizabeth Dinshaw v. Arvand M. Dinshaw and Another (1987) 1 SCC 42**

Supreme Court

V. Balakrishna Eradi and G.L. Oza, JJ.

India

11 November 1986

The Petitioner, a US citizen, sought issuance of a writ of *habeas corpus* regarding the custody of her minor son, whom she alleged had been abducted from the US to India by her former husband, the Respondent. P had obtained a divorce and an order for care, custody and control of the minor from a US Court. Prior to this petition, P moved a US Court with concerned jurisdiction when she learnt that her son didn't return to day care after his father's visit and the Court issued an arrest warrant against R. As R was already in India the warrant could not be executed. P then made repeated efforts through the American Consulate General at Bombay to trace the whereabouts of her son but didn't succeed.

In allowing the petition and granting custody of the minor to P, the Supreme Court held:

1. That, (relying on the judgment of Cross, J. in *Re H. (Infants)* (1966) 1 All ER 886) it is the duty of the courts in all countries to see that a parent doing wrong by removing children out of the country does not gain any advantage by his or her wrongdoing. A court should pay regard to the orders of the proper foreign court unless it is satisfied beyond reasonable doubt that to do so would inflict serious harm on the child. (para 9)
2. However quite independently of this consideration, any questions regarding custody of a minor child should be 'decided not on consideration of the legal rights but on the sole and predominant criterion of what would best serve the interest and welfare of the minor.' (para 8)
3. That the custody of the child was returned to P in view of the facts that she had genuine love and affection for the child and could be safely trusted to look after him, educate him and attend in ever possible way to his proper upbringing; that the child was still accustomed and acclimatized to the conditions and environment obtaining in the place of his origin in the USA and that the child's presence in India was the result of an illegal act of abduction and the father who was guilty of the said act could not claim any advantage and that the conduct of the father

had not been such as to inspire confidence that he was a fit and suitable person to be entrusted with the custody and guardianship of the minor son. (Paras 8 and 11)

**NEW ENTRY:**

**Githa Hariharan and Another v. Reserve Bank of India and Another (1999) 2 SCC 228**

Supreme Court  
Anand CJ and Srinivasan J.

India  
17 February 1999

The two appellants, Gita Hariharan (GH) and Vandana Shiva (VS), contended that section 6(a) of the Hindu Minority and Guardianship Act 1956 (HMGA) violates the equality clauses of the Constitution (articles 14 and 15) inasmuch as it relegates the mother of a minor to an inferior position on the grounds of sex alone since her right as a natural guardian of her minor child is cognisable only “after” the father.

In GH's case, GH and her husband had expressly decided that GH would act as guardian of their minor son for the purpose of investments made with the minor's money. The Reserve Bank of India (RBI), relying upon s6(a) HMGA, argued that the mother was not the natural guardian of the minor, and required confirmation of this change in status from the father or through the ruling of a competent body.

In the case of VS, her husband sought sole custody of their minor son on their divorce. VS filed an application for maintenance for herself and the minor. H wrote repeatedly to VS and the minor's school stating that he was the minor's natural guardian and that no decisions regarding the son could be made by anyone else. VS filed a writ challenging the constitutionality of s.6(a) HMGA claiming that H was apathetic towards the son and that he was only interested in claiming his right of natural guardianship.

Upholding the right to the petitioner mothers to act as natural guardians during the lifetime of the father in stated circumstances, the Supreme Court held:

1. Interpreting s6(a) HMGA as allowing the mother to act as the natural guardian of the minor only after the lifetime of the father and not during his lifetime despite his concurrence violates gender equality and should be struck down as unconstitutional. However, it is presumed that the legislature did not pass the HMGA intending to transgress the Constitution. The word “after” need not mean “after the lifetime” but in the context of s. 6(a) ‘it means “in the absence of”, the word “absence” therein referring to the father's absence from the care of the minor's property or person for whatever reason’ (para 10).
2. Therefore, ‘in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written)’ and the minor is in the care and custody of the mother and not in the father's for reason of incapacity, the mother can act as natural guardian for the minor and all her actions are valid even within the lifetime of the father (para 16).
3. Moreover, this interpretation is not only constitutional but gives effect to the principles contained in CEDAW and the Beijing Declaration directing States parties to take all appropriate measures to prevent discrimination against women.

In the case of GH the RBI was not right in insisting upon signed documentation by the father or court. However, given the number of transactions this decision effects, the judgment operates prospectively. In the case of VS, the District Court was ordered to decide the custody and guardianship of the minor in light of the Supreme Court's judgment.

**NEW ENTRY:**

**Mohd. Ikram Hussain v. State of U.P. AIR 1964 SC 1625**

Supreme Court  
M. Hidayatullah and K. C. Das Gupta, JJ

India  
9 October 1963

M sought a writ of *habeas corpus* for the release of a woman whom he claimed was held in unlawful detention by her father MIH (the petitioner in this case). M further alleged that they were married in accordance with Vedic rites following her conversion from Hinduism to Islam, and that she ran away from her father's home and was living with him until the police entered the house and took her away and arrested him and charged him with abduction and rape. Upon his release on bail, he sought a writ of *habeas corpus*. The father however, disputed the marriage, alleging instead that after his daughter left the family home without his knowledge, M and another person, took her to their house and raped her and kept her in illegal confinement. This version of events was confirmed by the woman's written statement to the police and to the court.

The High Court issued a writ of *habeas corpus* directing MIH to produce the daughter before the Court. When he failed to do so, the Court held him in contempt and sentenced him to two months imprisonment. MIH appealed to the SC arguing *inter alia* that 1) a writ of *habeas corpus* could not be issued against a private person. He stated that he had not been able to produce his daughter because she had been sent to stay with relatives but had run away, and he had not informed the police for fear of the scandal and humiliation.

In dismissing the appeal, the Supreme Court noted that:

1. A writ of *habeas corpus* applies where a person is held in unlawful detention whether by a private person or the State.
2. The order of commitment for contempt presented no difficulty because where an order for *habeas corpus* is disobeyed there is no bar to punishing the contemnor by attachment and imprisonment.
3. Seeking a writ for *habeas corpus* in such circumstances is unusual as a husband can use s.100 of the Code of Criminal Procedure or the civil law remedy of restitution of conjugal rights. In both such remedies all issues of fact can be tried. However, a writ of *habeas corpus* is *festinum remedium* and the power can only be exercised in clear cases. It would be inappropriate to issue a writ of *habeas corpus* where the petitioner is himself charged with a criminal offence in respect of the very person for whose custody he is demanding a writ be issued. In the present case there was a criminal prosecution pending against M. therefore the High Court would have done better to fully satisfy itself about the validity of the marriage and age of the girl in question. *Habeas corpus* proceedings do not prevent a court from ordering an inquiry into facts.

**NEW ENTRY:**

**Jani v. Mohd. Khan AIR 1970 Jammu & Kashmir 154**

High Court  
Mian Jalal-ud-Din, J.

India  
25 March 1970

An agreement between the respondent, MK, and his wife (A) provided that she would be entitled to divorce him if he disobeyed his father-in-law or failed to render services to him. A alleged breach of the agreement thereby allowing her to divorce R, who in turn instituted a suit for restitution of conjugal rights. The courts below upheld R's suit.

In dismissing A's appeal, the High Court held:

1. That the agreement allowing the wife to divorce the husband if he disobeyed the father-in-law is invalid because it is opposed to public policy and that such conditions are not 'wholesome and conducive to the best spirit underlying marriage. A *Khana Damad* is not to work as a servant in the house of his in-laws...breach of [the agreement conditions]...cannot be said to operate as divorce' [para 6 p.155].

**Mohinuddin v Khatijabi [1939] AIR Bombay 489**

High Court, Bombay  
Lokur J.

India  
14 June 1939

The plaintiff, M, sought the restitution of conjugal rights by the defendant, K. Both parties belonged to the Shafi sect of Sunni Muslims, K, an adult virgin at the time of marriage, contended that her marriage to M was invalid as it had been performed against her wishes and without her consent, and that M was therefore not entitled to claim restitution of conjugal rights.

The lower courts upheld her contention and dismissed the plaintiff's suit. The issue before the High Court was whether the marriage was valid according to the law applicable to Shafi Muslims.

In dismissing M's appeal, the Court held that:

Under Muslim law, marriage is a contract and thus marriage celebrated under compulsion cannot be regarded as valid. The Court relied on *Hussan Kutti v Jainabha* (1928) 15 AIR Mad 1285, where the High Court of Madras had held that an adult virgin's consent was an essential requirement of a valid marriage according to the law applicable to Shafi Muslims.

**Babui Panmato v Ram Agya Singh [1968] AIR Patna 190**

High Court, Patna  
G. N. Prasad J.

India  
18 February 1967

The appellant, BP, claimed that upon her becoming *sui juris*, her father represented to her mother, who acted an agent to her marriage, that a proposed bridegroom was was a young man, although in fact he was over 60 years old. BP, believing her parents' representation, consented to the marriage. She later sought the annulment of her marriage under section 12 (1) (c) of the Hindu Marriage Act 1955.

In allowing the appeal, the Court held that:

1. Although no direct misrepresentation was made to the appellant, the purpose of the talk between her parents was to secure her consent to marriage. By making false statements about the bridegroom's age to her mother, who in the circumstances was acting as her daughter's agent; the appellant's father had suppressed the true facts and made a false representation.
2. Moreover, the appellant's father actively concealed a fact within his knowledge, and acted contrary to the duty he owed to his daughter in view of their relationship. Believing the representation to be true, the appellant raised no objection and hence her consent was obtained by fraudulent misrepresentation.
3. For s. 12(1) of the HMA to apply, it is not necessary to prove that consent was obtained by force or fraud at the time of the marriage, i.e. the ceremony itself. Rather, the section only requires that consent has been obtained by force or fraud before the marriage was solemnised. Thus the present case falls within the ambit of s.12(1) as the fraud occurred prior to the solemnisation.

**NEW ENTRY:**

**Om Prakash v. State (Delhi Administration) and Others (1992) Supp. (3) SCC 48**

Supreme Court  
Ranganath Misra CJ and Kuldip Singh JJ.

India  
24 October 1991

The Petitioner sought a writ for the return of his missing daughter. The lower court being satisfied that its previous orders were not being complied with directed the Commissioner of Police, Delhi, to personally look into the matter. It appeared that the Commissioner had not been made aware of the Court's direction for several weeks, during which time the girl in question had been found and returned home.

In disposing of the writ petition, the Supreme Court held that:

When an order is made by the court, particularly in the presence of the counsel for the State, two aspects must be taken notice of:

1. It becomes the obligation of the State's counsel to communicate the direction immediately if there is an order involving urgency in the matter of compliance; and
2. The order of the court must be taken in a serious way by everyone and particularly the public officers, and there had been a failure in this case in this second aspect.

**NEW ENTRY:**

**Nilima Priyadarshini v. State of Bihar (1987) Supp. SCC 732**

Supreme Court  
M. P. Thakkar and B. C. Ray, JJ.

India  
27 March 1987

The petitioner made an application by letter that she was being kept in illegal confinement against her will. (This letter was received by the Court Registry in January 1987, but was not placed before the Court until March 1987, two and a half months later.) In relation to this the Court stated: 'It is making a mockery of the judicial process if a matter where a woman complains of illegal confinement is not treated as important enough to be placed before the court "forthwith"...it is a matter of great distress that matters of urgency like the present one are not posted for hearing.' In relation to this time delay the Court suggested that the matter be placed before the Chief Justice of India to take suitable action against the officials responsible for not bringing the matter to the Court's attention sooner.

As the letter was received through the post there were doubts regarding its authenticity. However, the Court determined that it must 'act immediately on the assumption that it is an authentic letter and the allegations are prima facie true, mindful as we are that it may be otherwise and it may not be authentic'. (para 2 p.733)

The Supreme Court held:

1. That the Court official against whom the complaint was made should bring the Petitioner immediately before the Additional Chief Judicial Magistrate, Jamshedpur, Bihar.
2. The State of Bihar was directed to ensure compliance through its police officers.
3. The Additional Chief Magistrate was directed to ascertain the true facts from the Petitioner in his chamber with only his stenographer or Court Master present so that she could express herself without fear.

4. If the Additional Chief Magistrate was satisfied that the Petitioner was being held against her will he was to set her free and provide her with a police escort to a place she wished to go to.

**NEW ENTRY:**

**Smt. Surinder Kaur Sadhu v. Harbax Singh Sandhu and Another (1984) 3 SCC 698**

Supreme Court  
Y.V. Chandrachud, C.J.

India  
11 April, 1984

The Appellant-Wife, SKS, and the Respondent 1 married in India and then moved to England where they had a son. In England, R was convicted and sentenced to a term for three years for negotiating with a hit-man for getting his wife (the Appellant) killed. R was alleged to have removed their son from the house in England and brought him to India. A filed a criminal appeal before the Supreme Court seeking custody of the minor son. A had earlier obtained an order from the High Court of Justice (Family Division), England, making the child a ward of court and directing R to hand over his custody to her. In India A filed a petition under Section 97 of the Code of Criminal Procedure asking for the custody of her son, and praying for a search to be conducted and for him to be produced in Court in order for appropriate orders. However the Magistrate dismissed her petition, leaving the question of custody of the child to be decided in an appropriate proceeding. A then filed a writ petition for *habeas corpus* before the High Court of Punjab and Haryana, seeking the child's production and custody. The High Court made an effort for reconciliation between the spouses but did not succeed. It then dismissed the petition on the grounds of, *inter alia*, A's relatively inferior status in England (that of a foreigner, a factory worker and a wife living separately from the husband) and her lack of any relatives in England (thus subjecting the child to live in lonely and dismal surroundings in England) as compared to R's relative wealth and his having a home where the child would grow in an atmosphere of self-confidence and self-respect.

In allowing A's appeal, and overturning the High Court's decision, the Supreme Court held:

1. That although under Section 6 of the Hindu Minority and Guardianship Act, 1956 the father is the natural guardian of a minor son, that provision cannot supersede the paramount consideration as to what is conducive to the welfare of the minor. (para 9)
2. That the "traumatic experience of a conviction on a criminal charge" is not a factor in favour of the father, especially when his conduct following immediately upon his release on probation shows that the experience has not chastened him. R is a man without a character who offered solicitation to commission of his wife's murder and affluence of R's parents could not be regarded as a circumstance. At any rate it cannot be said that it will be less for the welfare of the minor if he lived with the mother, whose income, if not considerable large, is not so low as not to enable her to take responsible care of her son. (Paras 8 and 9)
3. The Court also held that in the presence of the fact that the child is a British citizen and that the matrimonial home of the spouses was in England, the English Court had the jurisdiction to decide the question of his custody. The Court relied on *International Shoe Company v State of Washington*, 90 L Ed (1945), where it was held that it is the Court's duty and function to protect the wife against the burden of litigating in an inconvenient forum which she and her husband had left voluntarily.

**NEW ENTRY:**

**Panninti Venkataramana and Another v. State AIR 1977 A.P. 43**

High Court, Andhra Pradesh  
B.J. Divan C.J.

India  
9 August 1976

The respondent-wife had filed a criminal complaint against her husband (first Petitioner) and others before a First Class Magistrate alleging that her husband had committed an offence punishable under section 494 of the IPC on the grounds that at the time of the marriage he was 13 years of age and she was 9 years of age.

The petitioner was convicted by the First Class Magistrate and sentenced to rigorous punishment for six months. The appellate court also confirmed the conviction but modified the sentence. P then appealed to the High Court, claiming that a marriage which is in contravention of Section 5(iii) of the Hindu Marriage Act, 1955 is void *ab initio* and is no marriage in the eyes of law and hence his action in marrying a girl did not amount to an offence punishable under section 494 IPC.

The Court dismissed the petition and held:

1. That, overruling *P.A. Saramma v. G.Ganapatulu AIR 1975 AP 193* any marriage solemnized in contravention of Section 5(iii) of the HMA, 1955 is neither void nor voidable. (para 23)
2. The only consequences of such a marriage are that the persons concerned are liable for punishment under Section 18 and further, that if the requirements of Section 13(2)(iv), as inserted by the Marriage Laws (Amendment) Act, 1976, are satisfied that her marriage was solemnized before she attained the age of 15 years and she has repudiated the marriage after attaining that age but before attaining the age of 18 years, then, at the instance of the bride, a decree for divorce may be granted.
3. The scheme of the Act is that the violation of any one of the six conditions in Section 5 does not render the marriage null and void but it is only the violation of clauses (i) (iv) and (v) which renders the marriage null and void by virtue of Section 11 of HMA. Also violation of clause (ii) renders the marriage voidable and violation of clause (vi) *ipso facto* does not render the marriage voidable, but it is only when the consent of the guardian is obtained by force or fraud, that the marriage becomes voidable (as per Section 12 of HMA) (paras 5, 7 and 8).

## **Pakistan**

### **Dr. A. L. M. Abdulla v. Rokeya Khatoon and another PLD 1969 Dacca 47**

High Court, Dacca  
Abu Md. Abdulla, J

11 December 1967

The appellant claimed that he and the respondent were validly married at the residence of her relatives in the presence of witnesses, and since then stayed at her mother's house. He stated that the marriage was not registered but the respondent had sworn an affidavit before a Magistrate stating that she had been married. He further claimed that when he refused to meet a demand for money by the respondent's mother, she asked him to leave the house and did not allow him to meet the respondent, whom she was now trying to marry her off to a wealthy man. He filed a suit for restitution of conjugal rights and for an injunction to restrain the respondent from marrying any other person. Both the respondent and her mother denied that she had ever been married to the petitioner. The Munsif decreed the suit in favour of the appellant, but the Subordinate Judge's Court overturned this decision. The appellant then appealed to the High Court.

In dismissing the appeal, the Court held that:

1. The essential of valid Muslim marriage is that there should be a proposal made by or on behalf of one of the parties of the marriage and an acceptance of the proposal by or on behalf of the other in presence of and hearing of two male or one male and two female witnesses who must be sane and

- adult Muslims. The proposal and acceptance must both be expressed at one meeting.' [Page 50 para A]
2. 'This section [section 5 MFLO, 1961] makes it absolutely necessary that the marriage solemnised under the Muslim Law shall be registered. The solemnisation of the marriage if validly effected might not be affected for non-registration of the marriage. But the non-registration of the marriage causes a doubt on the solemnisation of the marriage.' [Page 51 para B]
  3. 'There are cases where marriage is presumed from prolonged and continued cohabitation. But according to the plaintiff's own case the duration of cohabitation is only for a period less than a year and one cannot draw the presumption as to a valid marriage even if the entire evidence of the plaintiff on this point is accepted.' [Page 52 para C]

**Bashir Ahmad v. Usman alias Chara and others 1995 P Cr L J 1909**

High Court, Lahore  
Muhammad Aqil Mirza, J

Pakistan  
30 April 1995

The petitioner filed a habeas corpus petition under s 491 CrPC for recovery of his daughter S, 16 years old, from the illegal custody of M. M and S's grandfather K stated that S was married to M in an exchange marriage in which M's sister was married to the first respondent, K's brother (S's great uncle). M produced in evidence an original *nikahnama* and a certified copy obtained from the Union Council, which showed discrepant entries regarding the dower amount and mode of payment. The petitioner and S both denied that a marriage existed; when produced in court, S stated that she was kept by M against her will and that she wished to stay with her parents.

In allowing the father's petition, the Court set the woman at liberty to live with whomever she pleased, and directed that the question of the validity of the marriage contract be raised before the Family Court if the parties were so advised. It held:

1. '*Prima facie* the *Nikahnama* has been interpolated and these entries have been subsequently added. The Assistant Director, Local Government, District Pakpattan shall hold inquiry with regard to the suspected interpolation and take necessary action in the matter. He shall submit report within the next six weeks to the Deputy Registrar (Judicial) of this Court.' (P. 190, para 2)
2. 'It must be stated that the dower or consideration for marriage is an essential ingredient of a valid marriage in Islam. The original *nikahnama* and the entries thereof do tend to presume that no dower amount was fixed, as it was an exchange marriage. An exchange marriage may be a consideration for the parents of the spouse but in order to constitute a valid marriage the dower amount or any other valid consideration in lieu of the marriage has to be fixed, offered and accepted by the spouses.. Marriage of a relative of a spouse with some other, is by itself not a valid consideration for his or her own marriage.' (P. 1910, para 3)
3. The detinue has stated that she is 15 years of age and she has entered her 16<sup>th</sup> year. From her looks she also appears to be 16 years of age. Therefore if the marriage took place [as claimed by M]...then at the time of her marriage [S] was about 12/13 years of age. It is a case of child marriage. The District Collector shall ensure that the *Nikah* Registrar is put to task for registering a child marriage. With regard to the validity of marriage for want of dower or minority of the girl, parties may raise the dispute before the Family Court, if so advised.' (P.1910 para B)

**Sher Ahmed v. Mst. Zubaida Bibi and Others NLR 1984 SCJ 182**

Supreme Court  
N. H. Shah, J.

Pakistan  
2 October 1983

The respondent filed a suit for jactitation of marriage, or, in the alternative, for the dissolution of her marriage to the petitioner on the ground of exercising her option of puberty. The Court of First Instance dismissed her suit, holding that she had not been a minor at the time of marriage, the marriage had been consummated and she had failed to repudiate the marriage before reaching the age of 18. On appeal, however, the Additional District Judge (ADJ) found in favour of the respondent, on the grounds that the alleged marriage had not been registered under section 5 Muslim Family Laws Ordinance 1961, and she had validly repudiated the marriage. The husband's writ under Art.199 of the Constitution, challenging the ADJ's order, was dismissed by the High Court. He then appealed to the Supreme Court.

In dismissing the appeal, the Supreme Court held that non-registration of the marriage went to prove the argument that there was no valid marriage.

**Mauj Ali v. Syed Safdar Hussain Shah and another 1970 SCMR 437**

Supreme Court  
Sajjad Ahmad and Wahiduddin Ahmad, JJ

Pakistan  
8 April 1970

The petitioner lodged an FIR under ss 363/366 of the PPC alleging that the first respondent had abducted his daughter, Mst. Musarrat (M). The first respondent claimed that M was a major, being aged 18 years, and had entered into marriage with him of her free will, and the petitioner who disapproved of the marriage had then taken her away to the house of Ch. Akbar Khan. The respondent therefore filed an application before the High Court for her recovery under s 491 CrPC and the Court allowed the girl to go with her husband.

The Court held that:

1. As it was not disputed that M has attained the age of puberty and that she had married the respondent of her own will, such a marriage is valid according to the Muhammadan Law.
2. The contention that marriage, being in contravention of the Child Marriage Restraint Act, 1929, should not have been recognised by the lower court, was rejected.
3. The Court upheld the order of the High Court allowing M to go with her husband. (para A)

**Mst. Bakshi v. Bashir Ahmad and another PLD 1970 Supreme Court 323**

Supreme Court  
M.R. Khan and Wahiduddin Ahmad JJ

Pakistan  
14 May 1970

The appellant's husband died soon after the birth of their daughter, N, and she remarried. When she was aged over fifteen, N left the appellant's house and married the respondent. The appellant lodged an F.I.R. alleging that the respondent had kidnapped N. The police recovered N from a house where she had been kept by the respondent, and handed her over to the appellant's husband. The respondent filed a petition under s. 491 Cr. P.C. before the High Court seeking the N's release from the unlawful custody of the appellant's husband; the appellant was not a party to this petition. When N appeared before the Court, she stated that she had married the respondent of her own free will and the marriage had been registered under the MFLO. A medical examination determined her age as being between 16 and 17 years. The Court set her at liberty. The appellant then appealed against this judgment.

In dismissing the appeal, and noting that its observations would not effect the criminal case of kidnapping against the respondent, the Supreme Court held as follows:

1. 'According to the Muslim Personal Law, a girl professing Islam who has attained the age of 15 years shall be presumed to have attained puberty. As the girl had attained more than 15 years of age before her marriage, the mother had no more right of custody of the person of the girl. In fact, the mother, on account of her having married a stranger, lost her right of custody of the person of [her daughter] under the Muslim Personal Law.' (P 324, para A)
2. 'It is true that the [Child Marriage Restraint Act of 1929] does not permit the marriage of a girl below the age of 16 years, but if any girl below the age of 16 years marries in violation of that law, the marriage itself does not become invalid on that score, although the adult husband contracting the marriage or the persons who have solemnized the marriage may be held criminally liable.' (P.325, para B)

**Mst. Amina Begum v. Ghulam Nabi and others PLD 1974 Lahore 78**

High Court, Lahore  
Aftab Hussain, J.

Pakistan  
9 July 1973

The plaintiff-respondent filed a suit for a declaration that he and the petitioner were lawfully married, and for a permanent injunction restraining her from contracting marriage with any other person during the subsistence of their marriage. The petitioner filed an application under s151 of CPC read with s5 of the Family Courts Act for dismissal of the suit on the ground that the Civil Court had no jurisdiction in the matter, as only the Family Courts could take cognisance of suits for jactitation of marriage. The Court dismissed her application, holding that a suit for jactitation is one where the plaintiff wants to silence the defendant regarding the false pretence of marriage, whereas this suit is the opposite, and the plaintiff seeks a declaration that the parties are actually married. The petitioner then filed this petition before the High Court. The issue before the Court was whether the respondent's suit was a suit for jactitation of marriage and as such within the cognisance of the Family Courts.

The Court, allowing the petition, held that the Civil Judge had exercised a jurisdiction not vested in him by law and thus set aside the order of the Civil Court and directed the respondent to present the plaint before the proper [Family] Court. It further observed that:

1. The expression "jactitation of marriage" as defined in Wilson's Anglo-Mohammadan Law means a suit for a declaration that the defendant is not the wife or husband of the plaintiff. [citing Halsbury's Laws of England (3<sup>rd</sup> Edn) Vol 12, p 225 para 418, and *Mir Asmat Ali v Mahmudul Nisa* ILR 20 All. 96] ..These quotations...lay down the form of a suit for jactitation of marriage. The question, however, is whether this form is exhaustive of the above suits and whether the expression 'jactitation of marriage' has been used in the Schedule to the Family Courts Act as referring to a suit of this form. I am of the view that this form is not exhaustive. [citing *Goldstone v Goldstone* (1922) 127 LTR 32]...jactitation is a false pretence of being married. It is not material whether the false pretence was made by the plaintiff or the defendant. What is relevant is that the boaster or pretender may be put to silence with the intervention of the Court (Para A, p. 80)
2. Jactitation of marriage cannot be confined to a suit for declaration that there was no marriage. (para B, p. 81)
3. On principle there appears to be no difference between a case where a party aggrieved by a false claim or the other party invokes the jurisdiction of the Court. I do not see any reason why a suit for jactitation will not include a suit for declaration by a person falsely posing that he is the spouse of defendant. ...any declaration as to the status where one party alleges marriage and the other denies, it will amount to a decree for jactitation of marriage. (Para. C, p. 82).

**Mst. Sahi Bi v. Khalid Hussain and others. 1973 SCMR 577**

Supreme Court  
Waheeduddin Ahmad, J

Pakistan  
9 May 1973

The appellant alleged that her daughter, IB, had returned to live with her following cruel treatment by the respondent, IB's husband. IB was later forcibly taken by the respondent from her parent's house, confined at his house, maltreated and not even allowed to meet her mother. The appellant moved an application under s491 Cr. P. C. seeking the release of IB, who was claimed to be *sui juris*, from confinement by the respondent against her will. On behalf of the respondent, it was argued that IB was seeking separation from him to join her paramour and that the appellant was assisting her daughter in this respect, and that the Court could not 'give its blessings to lead a life of immorality'. The High Court ordered IB to be produced before it and after recording her statements and those of other witnesses, handed over her custody to the respondent. IB was forced by the police to accompany the respondent. The appellant appealed against the order of the High Court.

The Court allowed the appeal and set IB at liberty. It held:

1. 'After hearing the learned counsel for both the parties, we are satisfied that under the Mohammadan Law, a *sui juris* woman cannot be forced to live with her husband against her wishes. Quranic injunction is against it. According to the Mohammadan Law, if there is a disagreement between the husband and the wife, the wife is entitled to live separately from her husband.' (P. 579, para A). [Case Referred to: Muhammad Rafique v. Muhammad Ghafoor PLD 1972 SC 6].
2. 'The observation of the learned Single Judge of the High Court that if [B] is set at liberty she will lead [an] immoral life is irrelevant for the decision of the case under section 491 Cr. P. C. Under section 491, Cr. P. C., if a *sui juris* detenu is unwilling to go with her husband or guardian the Court cannot compel her to go with them. She must be set at liberty and allowed to move freely'
3. 'The case of a paramour invoking the jurisdiction of the High Court under section 491 Cr. P. C. on a different footing and it is open to the High Court not to exercise its discretion in a case brought by such person.' Page 580. [Cases Referred to: Fateh Sher v. Sarang PLD 1971 Lahore 128 & Shaukat Ali v. Altaf Hussain 1972 SCMR 398]

**Mst. Khurshid Bibi v. Baboo Muhammad Amin PLD 1967 Supreme Court 97**

Supreme Court  
Muhammad Yaqub Ali and S.A. Mahmood, JJ

Pakistan  
12 October 1966

The appellant, Mst. Khurshid Bibi, brought a suit for dissolution of her marriage with the respondent, Muhammad Amin, in a Civil Court. The respondent filed a counter-suit for restitution of conjugal rights. The Senior Civil Judge dismissed the appellant's suit but decreed in R's favour. The appellant then brought a suit before the Court of Civil Judge for a declaration that she had been divorced by the respondent, or in the alternative for dissolution of marriage by way of *khula*, claiming that reconciliation between them was impossible, and asserting her willingness to forgo her dower money in return for her release from the matrimonial tie. The Court held *inter alia* that the appellant was entitled to divorce on the principle of *khula*.

On appeal, however the District Judge reversed the view of Trial Court with regard to *khula*. This order was affirmed in the second appeal, at the High Court. Further leave to appeal to the Supreme Court was granted to consider whether the wife is entitled, as of right, to claim *khula*, despite the unwillingness of the husband to release her from the matrimonial tie, if she satisfies the Court that there is no possibility of their living together, consistently with their conjugal duties and obligations.

The Court allowed the appeal, holding that there was no possibility of the parties residing together in amity and goodwill, A was entitled to separation from her husband, by *khula*. However the case was remitted to the Trial Court to determine the terms on which the decree should be granted. It further held:

1. Endorsing the observations of *Mst. Balqis Fatima v. Najmul Ikram Qureshi* PLD 1959 Lah. 566, under Muslim Law, the wife is entitled to *khula*, as of right, if she satisfies the conscience of the Court that it will otherwise mean forcing her into a harmful relation. The wife is entitled to dissolution of her marriage, on restoration of what she received in consideration of marriage, if the Judge apprehends that the parties will not observe the “limits of God”. The latter limitation is important and it is only in these cases where a harmonious married state, as envisaged by Islam, will not be possible, that such a decree for *khula* be granted. If the rift between the parties is a serious one and there is danger of the wife transgressing Islamic injunctions in case the dissolution is not ordered, then there would be plain necessity for *khula*. This conclusion was arrived at, after a review of the Qur’anic injunctions on the subject, the relevant Ahadith, previous case-law and the opinions of jurists and commentators of the Qur’an. (pp. 99 and 111)
2. It was observed that the phrase “limits of Allah”, according to majority of legists [sic], is intended to refer to the injunctions regarding the performance of conjugal obligations while living together. (para G, p.115)
3. It was observed that incurable aversion to the husband on the part of the wife would be sufficient justification for *khula*. *Shah Wali Ullah of Delhi in Al-Musawwa-min-Ahadith-al-Muatta*, Vol. II, p. 160, goes to the length of saying that “even if she obtains *khul*’ without any reason (apart from personal dislike) it is lawful but not approved. The reason is that the Prophet and the Companions never inquired from her the reason for her (seeking) *khul*.” (para H, p.116)
4. The Court reviewed the controversy regarding whether *khula* is equated with *talaq*, or it is a form of dissolution of marriage in a category of its own. It was observed that *khula* is separation and not *talaq*, as the right of the husband to take back the wife after *khula*, does not exist, as it does in the case of *talaq-I-rajā’i* and the period of *Iddat* is different in the two cases. ( Para I, p.116).
5. Two situations are contemplated by the writers regarding *khula*: (i) where *khula* takes place as a result of the mutual consent of the spouses, technically called *mubara’t*. In such a case no reference to the Qazi is necessary; (ii) where the husband disputes the right of the wife to obtain separation by *khula*, in such cases some third party has to decide the matter and, consequently, the dispute will have to be adjudicated upon by the Qazi, with or without assistance of the Hakams. (para M, p.117)
6. With regard to the issue of on what terms a decree of *khula* should be granted to the wife, the Court observed that though, according to the *Hedaya*, it is abominable on the part of the husband to have more than the dower itself in a case of separation by *khula*, yet if he insists, it is legally permissible for him to demand something more than the dower, and to the extent that he might have been out of pocket in respect of gifts, given to the wife on marriage, he may in law demand restitution. (para V, p.121) It is necessary for the Court to ascertain in a case of *khula* what benefits have been conferred on the wife by the husband as a consideration of the marriage. And it is in the discretion of the Court to fix the amount of compensation. (para JJ, p. 149)

**Mst. Farrukh Naheed Hashmi v. Syed Shah Ibrar Qadri 1994 P. Cr. L. J. 1361**

High Court  
Khalil-ul-Rehman Khan, Khalil-ur-Rehman Ramday, JJ

Pakistan  
30 November 1993

The petitioner (‘the mother’) was married to the respondent (‘the father’) in 1985 in Pakistan. They then went to live in Canada, where they had two daughters out of their marriage. In 1993, a Canadian Court granted them a divorce; the mother was also granted physical and legal custody of the daughters, while the

father was granted visiting rights. The father brought the girls to Pakistan. The mother filed criminal charges against the father in the Canadian Courts and obtained warrants for his arrest for violation of the Court's order. The matter was then referred to the Counsel-General of Pakistan in Canada who requested the Ministry of Interior in Pakistan to inform it of the procedure to be adopted. The mother was told that it would not be possible for her to obtain custody of the children through the Canadian courts in the said circumstances and that she had to obtain custody through the Pakistani Courts. The mother then filed a petition under s. 491 CrPC seeking custody of the girls.

It was brought to the notice of the Court that the petition under consideration was not competent as a similar petition had already been filed and dismissed by the Court earlier. The facts relating to this allegation were that the father had filed proceedings under s.25 of the Guardian and Wards Act for guardianship and custody of the girls, but this was withdrawn due to technical defects with permission to file a fresh application. During the pendency of these proceedings, the mother's brother filed a petition on her behalf under s.491 CrPC in the High Court. This petition was dismissed on the grounds that the proceedings pending before the Guardian Judge were sufficient to determine question of custody.

In allowing the petitioner's appeal, the Court restored custody of their daughters to her, observing that the father's actions smacked of *malafide* and he had filed the case before the Guardian Judge only until the dismissal of the earlier petition filed by the mother's brother after which he had withdrawn the application. The Court further observed that successive applications under s.491 CrPC were not barred if they were made out on fresh grounds. The Canadian Court's judgment restoring the right of custody to the mother was held not to be against Shari'a as it recognised the right of *hizanat* of the mother in respect of minor girls.

1. 'Moreover the decision of an application under section 491, CrPC is not a judgement, so the question of bar of s.369 CrPC does not arise and even reconsideration of a matter on successive applications is not barred if a case is made out on fresh grounds. Again where question of liberty of a citizen or of legality of the custody is involved the Court cannot refuse to perform the duty merely on technical grounds.' P1369 para B
2. 'The plea that the Canadian judgement is contrary to the principles of Shari'a pertaining to custody of minor children has also no merit. Shari'a recognises right of *hizanat* of the mother in respect of minor girls and the welfare of the minors lies in granting custody of the minor daughters to their mother unless she is shown to have disqualified herself by her own conduct.' P.1370 para E.

**Mst Humaira v Malik Moazzam Ghayas Khokhar & Ors[1999] 2 CHRLD 273**

High Court, Lahore  
Justice Tassaduq Hossain Jilani

Pakistan  
18 February 1999

Humaira, who was on pre-arrest bail, was arrested and beaten by the police whilst attempting to leave Pakistan with Mehmood Butt. She had previously been pursued to Karachi from Punjab and arrested there whilst attempting to flee her home. Her family claimed that she was the wife of M. Khokhar and they had pursued a number of strategies using the police to find and detain her. However, Humaira argued that her alleged marriage to M.Khokhar was a sham, formed under duress and at a later date than her actual marriage to Mehmood and therefore the former marriage was void. Thus, the petitioner, Humaira, claimed that the case registered against her under s 16 Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979, based on statements of M.Khokhar and her brother, which were false and mala fide, should be quashed.

In quashing the registered cases against Humaira, fining and jailing the police officer and ordering an investigation of the police officials connected with the case, it was held that:

1. It is a settled proposition of law that in Islam a sui juris woman can contract nikah (marriage) of her own free will and a *nikah* performed under coercion is not valid in law.
2. Where consent to a marriage is in dispute and a *nikah nama*, which is being challenged, is owned by a man and a woman who claim to be husband and wife, then the presumption of truth attaches to the *nikah nama* acknowledged by both spouses and not by the intervener.
3. The alleged *nikah* with M.Khokhar has a number of aspects which prima facie create doubt in its authenticity of being first or having been performed with Humaira's consent. As the petitioner and Mehmood Butt have owned their *nikah*, a presumption of valid marriage would arise in their favour in view of s 268(c) of Mohammadan Law.
4. This is in accordance with Arts 4 and 25 of the Constitution, which guarantee that everybody shall be treated in accordance with the law and Art 35, which provides that the state shall protect marriage and the family.
5. The precedent case law shows that this court has ample powers in its Constitutional jurisdiction to interfere where there is material on record to show that a police investigation demonstrates either malice in law or fact. In the present case there is strong credence to the allegations of mala fide levelled against the police and state functionaries.
6. (6) The state functionaries became partners in a feudal vendetta notwithstanding the mandate of their office as the guardian of the equal protections of the lives, liberties and honour of the citizens. Further, the police officials obstructed the process of justice and committed a gross contempt of court in attempting to cover up their actual role in H's two arrests.
7. (7) By lying to the court, obstructing the process of justice when arresting Humaira despite her being on pre-arrest bail, the acting police officer is sentenced under s 3 of the Contempt of Courts Act to imprisonment for three months and a fine of Rs 5,000.

**Mrs. Marina Jatoi v. Nuruddin K. Jatoi and the State PLD 1967 Supreme Court 580**

Supreme Court

A.R.Cornelius CJ, S.A. Rahman, Fazle-Akbar,  
Hamood ur Rahman, Muhammad Yaqub Ali, JJ

Pakistan  
3 June 1966

The appellant, a Christian Spanish woman, married the respondent, a Muslim Pakistani man, in England in accordance with the English Marriage Act 1949. They lived together and had a son. The respondent returned to Pakistan without providing any means of maintenance for the appellant and their son, and contracted a second marriage in Pakistan. He sent a letter of divorce to the appellant from Pakistan. The wife filed for custody and maintenance in the English courts and obtained a decree in her favour, which was transmitted to Pakistan and registered under the Maintenance Orders Enforcement Act 1921. Not having received any maintenance, the appellant went to Pakistan to enforce the maintenance order. The respondent sent her another notice of *talaq* in writing, endorsing a copy to the Chairman of the local Union Council according to s7 MFLO. He applied to the District Magistrate for the maintenance order against him to be rescinded on the ground that he had divorced the appellant. The District Magistrate dismissed the application and the respondent then appealed to the High Court, which gave effect to his plea. The wife appealed against this decision. Several issues arose, including one regarding the validity of the pronouncement of *talaq* in case of a marriage contracted under foreign law.

The Supreme Court held:

1. Under the rules of Private International Law, the *lex loci celebrationis*, as such has nothing to do with the question of divorce which is a matter solely for the law that happens to be the *lex*

- domicilii of the parties at the time of the suit. This may very well be different from the law that governed the solemnisation of the marriage. P. 599, para C
2. It would not, therefore, seem to be correct that a marriage performed before a Registrar in England must necessarily import the essential of monogamy. P. 601, para D
  3. The point has to be considered in the light of the law of Pakistan which is the law of the domicile of the husband. The question was raised whether the marriage solemnised in England before a Registrar could at all be assimilated to the position of a Muslim marriage so as to attack the provisions of the Muslim law regarding dissolution. P. 601, para E
  4. In respect of the form, the Hanafi Muslim Law ...only requires that there should be a declaration and acceptance of marriage by the couple, at one and the same meeting, in the presence of witnesses. ..The Muslim law prescribes no specific ceremony for the performance of a marriage and no religious rites are necessary for contracting the marriage. ..the marriage of the parties solemnized before a Registrar in England, according to the procedure laid down in the Marriage Act, 1949, conforming as it does to the above requirements, would be recognised as valid, under Muslim law. P. 600-1, paras F and G
  5. So far as the Muslim husband is concerned, the Muslim Personal Law on the subject of marriage would clearly be applicable to him. In the absence of special custom or usage to the contrary, according to section 3 of the Punjab Laws Act, 1872, the law applicable to a Muslim, in respect of questions relating to his marriage, would be the Muslim Personal Law. Again, the Family Laws Ordinance 1961, applied to all Muslim citizens in Pakistan wherever they may be. If a Muslim husband is married to a Christian woman in a form recognised by Muslim law, or to a non-citizen Muslim woman, there is no reason why section 7 of this Ordinance, should not apply, if he wants to divorce his wife by talaq. P. 602 , para I
  6. ...even the latest judicial trend in England favours the principle that if the law of the domicile permits a dissolution of marriage solemnised in England by the pronouncement of talaq, the divorce may be recognised as valid, under the rules of Private International Law. P. 603, para K
  7. 'In the instant case too, the right of the Muslim husband to grant a divorce to his wife, in respect of the marriage recognised by Muslim Law, does not appear to have been taken away by any statute current in Pakistan. In the circumstances I have reached the conclusion that the talaq given by the respondent became effective.' P607 para A & B

**Zafar Khan v. Muhammad Ashraf Bhatti and another PLD 1975 Lahore 234**

Lahore High Court  
Sardar Muhammad Iqbal, CJ

Pakistan  
18 July 1974

The petitioner claimed that he had married S, 15 years old, and a dancing girl, after she ran away from her parent's home fearing that they would marry her to someone else. Their marriage had been reported in the press, and S, in fear of her father, filed an application against him under s.107 CrPC. The father complained to the police that his fifteen-year-old daughter had been kidnapped, and an FIR was recorded under s363/366 PPC against the petitioner. The petitioner obtained bail, but S was taken into custody. When produced before the Magistrate, S gave a s164 statement affirming that she had married the petitioner of her own free will. S was examined by a radiologist and found to be just above fifteen years old. The Magistrate directed that S be placed in the Darul Aman. The petitioner appealed against the Magistrate's order, alleging that S was being held unlawfully in the Darul Aman.

In allowing the appeal, and holding that the Magistrate's order to confine S in the Darul Aman was without lawful authority, the Court held:

1. 'It is provided in the Child Marriage Restraint Act 1929, that whosoever contracts a marriage with the female below the age of 16 years he will be guilty. It, however, does not lay down that the marriage so performed is invalid, nor has it ever been held that such a marriage is void ab initio.' If a person takes away a girl below the age of sixteen from the lawful custody of her guardian without his consent, he is guilty of kidnapping, and the consent of the girl and the intention of the accused in such an event have no relevancy. There is no punishment provided for the female in these Statutes. '(P.235, para A)
2. 'The Muslim Law of marriages, dower and divorce is applicable in all cases where the parties are Muslims. Under the Muslim Law the competence of a girl to enter into a contract of marriage is dependent on the attainment of puberty. Puberty is presumed at the age of fifteen.' [Cases relied on: *Mst. Ghulam Sakina v Falak Sher* PLD 1949 Lah. 75; *Behram Khan v Mst. Akhter Begum* PLD 1952 Lah. 548; *Allah Diwaya v Mst. Kammon Mai* PLD 1957 Lah. 651] ] (P.235, para B)
3. It was not based on the [Dissolution of Muslim Marriages Act 1939] that the age of puberty was presumed at fifteen but was for the reason that it was the view of all the Muslim jurists that a girl is presumed to attain puberty at the age of fifteen unless it is proved to the contrary. The aforementioned provisions in the Muslim Family Laws Ordinance [amending s.2 of the DMMA to make the option of puberty available to girls given in marriage by their guardians before attaining the age of sixteen, rather than fifteen years] only enables a girl to exercise the option of puberty when she attains the age of sixteen. It does not lay down that she attains puberty at that age. (P. 237)
4. '[S] was more than fifteen when she contracted marriage with the petitioner. She had attained puberty and was, therefore, competent to contract marriage. She had abandoned her guardian with no intent to return. No restraint could be placed on her movements. The order of the Magistrate directing that she should be lodged in the Darul Aman was, therefore, without lawful authority.' (P.237, para C)

**Bibi Khatoon v. Faiz Muhammad and Muhammad Rafique PLD 1976 Lahore 670**

High Court  
M. S. H. Qureshi, J

Pakistan  
9 December 1975

The petitioner filed a habeas corpus petition under s.491 CrPC for the recovery of her daughters, MB and RB, from the first and second respondent, their respective husbands. She claimed that the respondents had kidnapped her daughters, forcibly married them, taken their land from them by coercion, and been violent to them. The respondents denied these allegations, asserting that the petitioner led an immoral life and only wanted her daughters back in order to grab their land, and arguing that their return would not further their welfare. The detainees were brought to the High Court. MB was unable to make coherent or logical answers, and on medical examination, she was found to be about 18/30 years old with a mental age of about 8/10 years. RB admitted that she had been married to one of the respondents, but said it was without her consent, and stated she wanted to return to her mother due to her husband's cruelty. Although she said she was 12, the medical examination placed her age at 16/17 years old. RB further stated (but later retracted her statement) that her mother was present at the wedding but had protested the marriage.

The Court noted that the marriages appeared to have been contracted with the petitioner's consent, since she had been present at the wedding, and taken no further action for 2 1/2 years, until the filing of this petition. In respect of MB, it held that the petitioner's claim to her custody must be heard before the family Court, as MB was to be treated as a minor, due to her immature mental age, although physically she was aged 18/20. It directed that MB be kept at the Darul Aman for one month for the mother to petition the appropriate Court, or failing that be returned to the custody of her husband, one of the respondents. In respect of RB, it directed that she be set at liberty, holding that (in respect of whether a married Muslim woman aged 16/17 years can be allowed to leave the custody of her husband in accordance with her wishes):

1. 'It...cannot be said that the High Court, even in a proper cases, is not to exercise its discretionary powers to extend relief to a married women who is being improperly detained' (P. 674, para 8).
2. The Court rejected the respondent's assertion that they were the lawful guardians of the girls, who were both minors, under the terms of the Guardian and Wards Act 1890, read with the Majority Act 1875, according to which a person is a minor until they reach the age of 18. It further held that Muslim Law, not the Majority Act was determinative of the question of majority for the purposes of marriage, and that majority for the purposes of marriage among Muslims is presumed to be at 15 years old. Relying on *Muhammad Rafique v. Muhammad Ghafoor* PLD 1972 SC 6, which holds that where a person is a major the Court can set them at liberty, the Court then set RB at liberty.

**Qaisar Mahamood v. Muhammad Shafi PLD 1998 Lahore 72**

High Court, Lahore  
Khalil-ur-Rehman Ramday, J.

Pakistan  
23 June 1997

The petitioner filed a petition under Art. 199 of the Constitution of Pakistan, seeking to quash an FIR regarding his alleged commission of offences under ss.10 and 11 of the Zina (Enforcement of Hudood) Ordinance 1979, inter alia on the grounds that i) no such offences could have been committed since he was married to the alleged victim, and ii) the FIR was itself an outcome of malice towards the petitioner's family, who had all been implicated, and also seeking leave to call witnesses to the alleged marriage to give evidence.

The Court found that the *Nikahnama* produced by the petitioner to support his assertion of marriage was suspicious because certain sections were inconsistent, and others incomplete, for example, there were no names, signatures or thumbprints of witnesses to the marriage, although the presence of at least two witnesses is a requirement for a valid marriage under Muslim law. The Court called in evidence the *Nikah* Registrar concerned, as well as the original register. The register showed the same inconsistencies, and the Registrar could offer no explanation except to apologise.

The Court ordered the judgment and original of the *nikahnama* to be sent to the Deputy Commissioner for the area concerned to decide what action to take against the *Nikah* Registrar, including considering his dismissal in accordance with the law. It dismissed the petition, and held:

1. The Court has always been reluctant, in the exercise of its extraordinary Constitutional Jurisdiction, to get involved in a fact-finding exercises which would involve recording of evidence or examining witnesses, and permitting their cross-examination. Needless to mention here that since the case is under investigation, it would be open to the accused persons to put up their plea of marriage before the I.O who is competent to examine the question and then to reach some conclusion. Embarking upon such an exercise would mean pre-empting the powers lawfully vested in the Investigating Officer and in the trial Courts, adopting of which role has never been approved by the Supreme Court. [Cases relied on: Emperor v. Khawaja Nazir Ahmed AIR 1945 PC 18; Malik Shaukat Ali Dogar etc v. Ghulam Qasim Khan Khakwani etc PLD 1994 SC 281; Ghulam Muhammad v. Muzamal Khan PLD 1967 SC 317; Shanaz Begum v. Hon'ble Judges of the High Court of Sindh and Balochistan and another PLD 1971 SC 677; Wali Muhammad alias Walia v. Haq Nawaz and others 1971 SCMR 717; and Malik Ghulam Ahmad v. Haji Muhammad Yousaf and others PLD 1976 SC 271]. (p. 75, para 6)
2. A petition under article 199 of the Constitution of Pakistan is competent only if it is established that no adequate remedy is available to an aggrieved person' (para 7 p.75). With respect to an accused person seeking quashment of an FIR, it could not be said that he was without adequate remedy. [The remedies were detailed as including a remedy before the I.O., and then before the higher police officers, who also have the powers of the officer in charge of the police station under

s.551 CrPC, then before a Magistrate under s.63 CrPC and rule 24.7 Police Rules 1934, who may cancel the FIR if satisfied that the facts and circumstances warrant such action, and then a Magistrate seized of the matter under s190 CrPC who may refuse to take cognizance and discharge the accused, and finally remedies before the trial court, including pleading for non-framing of the charge and then for acquittal]. (P. 76, para 7)

3. 'Relief under Article 199 of the Constitution of Pakistan...is discretionary...a petitioner ...must therefore show that he had come to Court with clean hands or that he had not indulged in any conduct which had sullied his hands or had done anything which was against the established social or moral norms of the society' (para.8 p.76). [Referring to his previous judgment in Hafiz Waheed v. Muhammad Arshad PLD 1997 Lahore 301, the judge noted that] 'persons involved in the kind of marriage which is presently in issue before the court were not entitled to any relief in equity' (P. 76, para.8).

### **Said Mahmood and another v. The State PLD 1995 Federal Shariat Court 1**

Federal Shariat Court  
Nazir Ahmad Bhatti, CJ and Fida Muhammad Khan J

Pakistan  
15 March 1995

M filed a complaint with the police alleging that her daughter, A, the second appellant, had been kidnapped by the first appellant, and that she was already married to one Shahinshah who was currently in jail. The police arrested both appellants and recorded an FIR under the Offence of Zina (Enforcement of Hudood Ordinance, 1979, (Hudood Ordinance) against the appellants, M and two others. During investigation, the appellants both made confessional statements: he stated that they had lived together, and she stated that the accused had wanted to sell her, and on being unable to do so, the second appellant had subjected her to sexual intercourse. A was medically examined and found to have had sexual intercourse. The accused were all charged under ss 148/149 PPC and the two appellants were also charged under section 5 of the Hudood Ordinance, and the others under ss13 and 14 of the Hudood Ordinance. The Sessions Judge acquitted all the accused except the two appellants whom he convicted of *zina*, on the basis of their confessions, under s10(2) of the Hudood Ordinance, and sentenced them to undergo rigorous imprisonment for five years and fifteen stripes each, and to pay a fine. They filed an appeal against their conviction and sentence to the Federal Shariat Court (FSC). Shahinshah, claiming to be A's lawful husband, also filed a petition for enhancing the sentence of the first and second appellants and against the acquittal of the other three appellants.

The new facts that emerged before the FSC were that the first appellant's mother had married her off to Shahinshah, having been engaged to him when aged about 8/9 years, while she was still a minor and after her father had died. The marriage was never consummated and Shahinshah was sent to jail in connection with a criminal offence. The first appellant married the second appellant of her own choice soon after she attained puberty. Her mother then made a false allegation that she had been kidnapped by the second appellant, and both of them, when subjected to torture and ill-treatment while in police custody, made confessional statements that led to their conviction under the Hudood Ordinance.

The Court found that the appellants had committed no offence under the Hudood Ordinance, being married to each other, and set aside the conviction and sentence, and directed that they be set at liberty if not wanted in connection with any other offence. It also determined the petition by Shahinshah to be infructuous. It held:

1. 'It shall be seen that under the Islamic Law a wife whose nikah had taken place during her minority has the right to repudiate it after attaining puberty provided her marriage has not been consummated but the wife must exercise this right immediately after attaining puberty and if there is any delay on her part then she loses this right. While under the [Dissolution of Muslim Marriages Act 1939] such wife has a right to repudiate the marriage before attaining the age of 18 years. Thus the most important questions which required consideration are whether the appellant [A] had validly exercised her right of option of puberty; and secondly, in what manner such right

had to take effect.[A] was about 15/16 years of age when she contracted a second marriage with her co-appellant...which would clearly establish that she attained puberty in those very days and second marriage tantamounted [sic.] to repudiation of her first marriage. So [A] validly exercised her right of option of puberty' (P.5, Para A/B)

2. '...[T]here are many judgments of the superior Courts of this country where both in criminal and civil proceedings it was held that without getting approval of Qazi with regard to the repudiation of the first marriage, the contracting of a second marriage by such a Muslim wife in fact tantamounted [sic] to repudiation of the first marriage and since this right had to be essentially exercised by the wife and the approval of the Qazi was only to authenticate it, mere exercise of this right by the wife was a perfect repudiation of first marriage and there was no need to get it confirmed by the Qazi. Since there is neither any Verse of the Holy Qu'ran nor any Hadith of the Holy Prophet (p.b.u.h.), the fact of the wife having contracted a second marriage without getting approval of the Qazi in respect of repudiation of her first marriage did no [sic] offence against any Injunction of Islam and was perfectly justified...' (P.6)
3. 'The unanimous opinion of the Courts was that no judicial approval was necessary for having exercised the right of option of puberty by a wife and the first marriage subsequently stood dissolved when the wife contracted second marriage after attaining puberty. The essence of the matter is the actual repudiation of marriage by the woman immediately on attaining puberty.' [Cases relied on: PLD 1976 Lah 516; 1983 PCrLJ 55 and PLD 1950 Lah 203] (P.6 para C)

#### **Tariq Mahmood v. Mst Zarda Begum and another 1995 CLC 1102 (Shariat Court)**

Shariat Court  
Muhammad Riaz Akhtar Chaudhary, J

Pakistan  
26 December 1994

The appellant-petitioner (the husband) filed a suit for restitution of conjugal rights, alleging that several years after he and the respondent (the wife) had been married, living initially in Pakistan and then England, she had married respondent no.2 without obtaining a divorce from him, thus contracting a marriage that was null and void. The wife argued that both she and the husband were British nationals and lived in England, where a divorce had been finalised between them by a Court, and after hearing both sides, and that this decision was enforceable between them and constituted a valid divorce. The question that arose was whether a foreign decree could be conclusive between parties now residing in Pakistan.

The Court dismissed the husband's application for restitution of conjugal rights, and held:

1. 'It has been rightly observed ... that under section 13 of the C.P.C. judgement of a foreign country is conclusive as to the matter directly adjudicated upon between the parties in such foreign Court, but a judgment of a foreign country cannot be conclusive between the parties if it comes within the exception contained in section 13 of the C.P.C.' (P. 1111, para. C).

#### **Humaira Mehmood v State PLD 1999 Lah 495**

High Court, Lahore  
Tassaduq Hussain Jilani, J

Pakistan  
February 1999

The petitioner, 30 years old, married MB of her own free will but without the consent of her parents. She obtained pre-arrest bail from the Lahore High Court, and fled to Karachi, in Sindh Province, being afraid that her family would take action against her. Despite these actions, her family pursued her, with her brother obtaining assistance from the respondent police officers to abduct her from a shelter home in Karachi and return her to Punjab, where her father, a sitting Member of the Provincial Assembly for the then ruling party, then beat her, had her detained at a government hospital in Lahore, and forced her to marry the first respondent, MK. The respondents claimed that the petitioner and MK had been married

prior to her alleged marriage to MB, and that the petitioner had committed an offence under the Hudood laws. MK also registered a criminal case under section 16 of the Zina (Enforcement of Hudood) Ordinance 1979 claiming that about two months earlier she had been abducted from a shopping complex in Lahore by MB and his family, and that she had stolen money and jewellery before leaving the house.

The petitioner filed a petition under Art 199 of the Constitution claiming that the criminal case should be quashed on the ground that her alleged marriage to the first respondent was void because it had occurred under duress and at a later date than her marriage to MB.

The Court also considered claims made in a separate writ petition filed by a human rights activist for the production of the petitioner before the Court and that two respondent police officers (the Station House Officer and Sub-Inspector) had acted *mala fides* and in contempt of court by arresting the petitioner in disregard of the Court's order.

In allowing the petitions and quashing the criminal case registered against the petitioner, the Court held that:

1. It is a settled proposition of law that in Islam a *sui juris* woman can contract a *Nikah* of her own free will and a *Nikah* performed under coercion is no *Nikah* in law. Instances are not lacking from *Hadith* and Islamic history that the consent of a *sui juris* woman was held to be a sine qua non for a valid marriage in absence of which a marriage was declared void. P.501, para 9
2. The term 'consent' means a conscious expression of one's desire without any external intimidation or coercion. P. 501, para 9
3. In a situation where consent to a marriage is in dispute and a challenge is thrown to a *Nikahnama* which is being owned by a man and a woman who claim to be husband and wife then the presumption of truth attaches to the *Nikah Nama* which is being acknowledged by both the spouses and not by the intervener. Reference to s 268(c) of *Mulla's Mohamman Law and Arif Hussain and Mst Azra Perveen v The State* PLD 1982 FSC 42 P. 502, para 10
4. This Court would not have ordinarily exercised jurisdiction under Article 199 of the Constitution to quash the criminal proceedings initiated pursuant to the registration of the aforesaid case but in face of the bias and the male fide shown by the police officials who handled this case, I am of the view that any restraint at this stage would not only be unjust but would tantamount [sic] to abdication of powers vested in this Court to put a check on the State functionaries who abuse their lawful duty to help a particular individual and promote their personal interests. P. 512, para 17.
5. "Coming to the role of the State functionaries in this case I find that the police officials who handled this case passed orders and acted in a manner which betrayed total disregard of law of the land and mandate of their calling. Articles 4 and 25 of the Constitution of the Republic of Pakistan guarantees that everybody shall be treated strictly in accordance with law. Article 35 of the Constitution provides that the State shall protect the marriage, the family, the mother and the child. As member of the International Comity [sic] of Nations we must respect the International Instruments of Human Rights to which we are a party." [Reference to Article 16 of the Convention on Elimination of All Forms of Discrimination against Women 1979, and Articles 5 and 6 of the Cairo Declaration on Human Rights in Islam 1990] (Para 18, p. 512)
6. "The Police officials are guardians of the lives, liberties and the honour of the citizens. They owe their place in society to the taxes which are paid by the citizens. If these guards become poachers then no society and no State can have even a semblance of human rights and rule of law." (P. 513, para 19)
7. "As Muslims we loudly proclaim our commitment to the lofty ideals of an Islamic ideology. The advent of Islam was a milestone in human civilization. It came at a time when women were treated as serfs and chattel. Instances were not lacking when men used to bury their daughters alive. It

- was Islam which declared equality between a man and a woman. In matters of marriage a woman was given equal right to choose her life partner. After obtaining the age of puberty she could exercise her option and choice. Unfortunately, in our practical lives we are influenced by a host of other prejudices bequeathed by history, tradition and feudalism. ..." (para 21, p.514)
8. "Behind the evangelistic façade there was a certain culture at play. It is that culture which needs to be tamed by law and an objective understanding of the Islamic values. Let us do a little self-accountability and little soul searching both individually and collectively. Let there be no contradiction in our thoughts and actions. Male chauvinism, feudal bias and compulsions of a conceited ego should not be confused with Islamic values. An enlightened approach is called for otherwise an obscurantism in this field may break the social fabric." (para 22, p.515)
  9. The evidence on record prima facie leads to the conclusion that the petitioner's marriage with MB was prior in time and that the later marriage with the first respondent, being performed during the subsistence of the earlier one and without the petitioner's consent, is void in Islam. As both the petitioner and MB have acknowledged their marriage to each other, the presumption of valid marriage arises in their favour in view of. Moreover, no prosecution under *Hudood* law can be initiated without a conclusive finding of the Family Court against the marriage in question.
  10. In the exercise of its constitutional jurisdiction under Art 199 of the Constitution, the High Court may quash criminal proceedings initiated pursuant to a police investigation which is clearly *mala fide* or beyond the jurisdiction of the investigating agency (*Anwar Ahmad Khan v The State & Anor* 1996 SCMR 24, 36 (Pak SC) followed).
  11. By lying to the court and obstructing the process of justice by arresting the petitioner in disregard of the High Court order, the respondent Sub-Inspector committed a gross contempt of court and is convicted and sentenced under s 3 of the Contempt of Courts Act to one month's imprisonment and a fine of Rs 5,000 (on two counts).
  12. The conduct of some of the police officials connected with the case, including the present Investigating Officer, needs scrutiny. The Inspector General of the Punjab Police shall depute an officer not below the rank of Deputy Inspector-General to proceed against them departmentally.
  13. In view of the serious allegations levelled by the petitioner about her beating and detention at the Services Hospital Lahore, the Medical Superintendent of the hospital is directed to inquire into the matter and proceed against the delinquent officials in accordance with the law.

**Ghulam Qadir v. The Judge Family Court, Murree and Another 1988 CLC 113 (Lahore)**

High Court, Lahore  
Gul Zarin Kiani and Rashid Aziz Khan JJ

Pakistan  
27 September 1987

PA, respondent, was married to the appellant and their marriage was formally registered under s.5 Muslim Family Laws Ordinance 1961. The respondent claimed that at the time of marriage she was a minor (14 years old); that the marriage was not ratified; and that she exercised her right of puberty and repudiated the marriage about 2 years after the marriage. She approached the Family Court at Murree for dissolution/annulment. The appellant contested the suit, maintaining that at the time of marriage PA had attained puberty and was aged 18. The appellant then brought a suit for restitution of conjugal rights and this was heard together with the respondent's claim for dissolution. PA asserted that her repudiation of the marriage on the grounds of exercise of option of puberty meant that the marriage contract had ended, and also claimed *khula* divorce. The Family Court Judge found that the PA was a minor at the time of the *nikah*, and granted her a decree of annulment.

As no appeal lay, the appellant then filed an application under Art. 199 of the Constitution of Pakistan but the Single Judge of the High Court dismissed these claims. He then appealed to a Division Bench of the

High Court against the decision of the Single Judge, arguing that the Court had failed to consider s23 of the Family Court Act, and that it should have treated the respondent's birth registration date as conclusive evidence of her age, rather than her school leavers' certificate.

In dismissing the appeal, the Court found that PA was a minor, taking into consideration the evidence of the school leavers' certificate in the absence of any other evidence produced by the petitioner:

1. [For a decision on the points regarding the age of the respondent at the time of marriage, and the effect of section 23 of the Family Courts Act] reference to the principles of Mohammadan law on the subject of marriage is necessary. With regard to capacity of marriage, para-251 of Mohammadan Law by Mulla states that every Mohammadan of sound mind who has attained puberty may enter into a contract of marriage. In the absence of evidence, puberty is presumed to have been attained at the age of fifteen years. [By amendment in s13 Muslim Family Law Ordinance 1961 to s2(viii) of the Dissolution of Muslim Marriages Act 1939, the word "15" is substituted for "16".] This amendment, however, does not lay down that the female attains puberty at that stage only. It simply enables the girl to exercise the option of puberty when she attains the age of 16, years whereas [prior to the amendment a girl given in marriage before the age of 15] could exercise her right of option of puberty after attaining the age of 15 years but before reaching the age of 18 years, provided the marriage was not consummated. [Cases relied on Zafar Khan v. Muhammad Ashram Bhatti and Others PLD 1975 Lahore 234].
2. Section 23 of the Family Court Act 1964 does not either prohibit or preclude a party to prove his correct age and on its basis to claim relief from the Court. A marriage entered into by a female who had not yet attained puberty is not marriage at all in the eyes of law, and was therefore, void. If this be so, section 23 did not bar the right of the respondent to claim that her marriage with the appellant was not legal and that it be regarded as such. [P. 117, para D]
3. A minor female even if given in marriage by her mother who was competent to do so, was still entitled to repudiate the marriage in the exercise of the option of puberty. [p. 117]
4. Entry from birth register would carry weight as against the entries in the records of the educational institution. [P. 115]

**Muhammad Qasim v. Haji Saleh and 3 others PCLJ [vol. XXX 1997] 1014**

High Court  
Hamis Ali Mirxa, J.

Pakistan  
27 February 1996

The petitioner filed a petition in the nature of habeas corpus under Art199 of the Constitution of Pakistan seeking the release of his sister, SK, from the illegal custody of the respondent (her husband). SK stated in court that the respondent had wrongfully confined her and was not permitting her to meet with her family; and requested that she be separated from him and allowed to return to her family. The respondent produced a *nikahnama* to demonstrate that SK was his legally wedded wife.

The Court held that SK being *sui juris* could not be kept or confined against her will, and accordingly it set her at liberty. In reaching this decision, the Court referred to *Muhammad Rafique v. Muhammad Ghafoor* PLD 1972 SC 6 where it was observed (p.8):

1. "The High-Court has two-fold jurisdiction under this section: (i) to deal with a petition within the appellate criminal jurisdiction according to law; and (ii) to set him at liberty if he is illegally or improperly detained. The question which falls for determination, however, is that if the Court finds that the person brought before it was not being illegally or improperly confined or detained, what order can be passed regarding the custody of that person...If the person is a minor, the Court may take over his custody...but if the person is a major, the only jurisdiction which the Court can exercise is to set him at liberty whether illegally or improperly obtained in public or private

custody or not. The Court may “set at liberty” but cannot restore status quo ante against the wishes of the person brought before it.’

**Muhammad Rafique v. Muhammad Ghafoor PLD 1972 Supreme Court 6**

Supreme Court  
Muhammad Yaqub Ali, J

Pakistan  
3 October 1971

The appellant filed a habeas corpus petition in the High Court under s491 CrPC, alleging that S, his near relative, had been abducted and was being held in unlawful custody by the respondent. A bailiff secured S’s presence in Court. When produced in Court, S affirmed the allegation, stating that her father had forcibly obtained her thumb impression on the *nikahnama* by which she was purported to have been given in marriage to the respondent. Her parents appeared in Court and stated that she had married the respondent of her own free will. The High Court held that S and the respondent had been validly married, and directed that S be given into the custody of the respondent, her lawful husband. S protested against the decision and the Court then ordered that she be placed in the Darul Aman for ten days. The Appellant appealed against the order.

The Supreme Court allowed the appeal, setting aside the High Court’s direction to return S to the respondent’s custody. It held as follows:

1. 'On hearing the learned counsel for the parties and taking into consideration the provisions of section 491, 561A of the Code of Criminal Procedure and the Fundamental Right that ‘No person shall be deprived of life or liberty save in accordance with law’, the Court found no warrant in law for the direction given by the learned judge about the custody of [S]. (P.8)
2. The High Court has two-fold jurisdiction under [s491CrPC]: (i) to deal with a person within its appellate criminal jurisdiction according to law; and (ii) to set him at liberty if he is illegally or improperly detained. The question which falls for determination, however, is that if the Court finds that the person brought before it was not being illegally or improperly detained or confined what order can be passed regarding the custody of that person.
3. If the person is a minor, the Court may make over his custody to the guardian which will be dealing with him in accordance with law, but if the person is major, the only jurisdiction which the Court can exercise is to set him at liberty whether illegally or improperly detained in public or private custody or not. The court may ‘set at liberty’ but cannot restore status quo ante against the wishes of the person brought before it. Such a course will lead to the curtailment of liberty for which there is no warrant under section 491 nor can such an order be sustained under section 561-A of the Code as it cannot be said that allowing a person freedom of movement is an abuse of the process of the Court.' (P. 8, para A)

**Altafur Rehman v. Mst. Nusrat Rashid and others 1985 MLD 225 [Karachi]**

High Court, Karachi  
Muhammad Zahoorul Haq, J

Pakistan  
16 May 1984

The petitioner and the respondent were married for ten years, after which they started to live separately as differences developed between them. Both parties claimed that they had tried reconciliation but it has not been possible. The respondent claimed that the petitioner used to abuse and physically torture her and also that he concealed the *factum* of his previous marriage. The respondent filed a suit for dissolution of her marriage and the petitioner filed a suit for restitution of conjugal rights; both suits were consolidated and tried together. The respondent claimed that she had developed a deep sense of hatred against her husband and it was not possible for her to live with him within the limits prescribed by Allah and she was ready to forgo the dower.

The Civil and Family Judge passed a decree whereby the marriage was dissolved on the basis of *khula*. The respondent then filed a constitutional petition challenging the judgment and decree of the Civil Court.

The Court, dismissing the petition, held the following:

Reiterating the observations of Balqis Fatima's case as referred in Khurshid Bibi's case PLD 1967 SC 97, the Court observed that the fact that the parties were living separately for about three years and had filed suit against each other; levelling serious allegations against each other, the police having been involved in their matter, and efforts for reconciliation having badly failed is sufficient and reasonable justification for granting *khula* in this case.

**Sardara v. Khushi Muhammad and others 1973 SCMR 189**

Supreme Court  
Salahuddin Ahmed and Anwarul Haq, JJ

Pakistan  
6 March 1973

KM, the first respondent, acting as a de facto guardian of the detinue (D), gave her in marriage to MD. However, D was divorced by MD and returned to the respondent's house where her father also lived. She was passed by her father to the petitioner Sardara and to the respondents No. 2 and 4 who kept her in illegal detention. The first respondent made an application for her release under section 491 of CrPC to the High Court, and the judge directed the Station House Officer of the relevant police station to recover and produce D in Court. When produced, D partly supported the respondent's allegations, stating that her father had married her to the petitioner against her will and that the latter had kept her in illegal detention. She refused to return to her father or to respondents No. 2 and 4 and expressed her wish to stay with the respondent, whom she claimed was her first cousin. The judge found D to be 20 years old and set her at liberty to accompany whomsoever she wished. The petitioner appealed against this order, claiming that D was his lawful wedded wife and should therefore have been restored to the custody of her husband by the High Court acting accordance with the clear injunctions of the Holy Quran and the Sunnah.

The Supreme Court, dismissing the appeal, held that:

1. The order is perfectly in consonance with the decision of this Court in the case of Muhammad Rafique v. Muhammad Ghafoor (1) PLD 1972 SC 6 [where it was observed that the Court's only jurisdiction in relation to a detinue, who is a major, is to set them at liberty, and that it may not restore the status quo ante against the wishes of the detinue]. P. 190
2. [The detinue claimed that she was married to S against her will]. It is thus evident that not only the factum of the marriage but also the validity of marriage was in question. If S really was her husband, and he bona fide wanted her to be restored to him, he should have approached the Civil Court for restitution of conjugal rights. [Distinguished from Fateh Sher v Sarang PLD 1971 Lah. 128 where the High Court restored the wife to the husband's custody, on the ground that here the detinue contested the validity of the marriage, and further that in Fateh Sher, the Court found that the detinue was a married woman and the application under s. 491CrPC was a collusive affair between her and her paramour. 'Any other course would have resulted in giving the Court's blessings to the immoral activities of two unscrupulous persons who, in Islam, were, liable to extreme penalty, but could also have deprived her of an opportunity to correct herself', p.191, paras A and B.]

**Mst. Irfana Tasneem v. Station House Officer and others PLD 1999 Lahore 479**

High Court, Lahore  
Tassaduq Hussain Jilani, J

Pakistan  
22 June 1999

The first petitioner claimed to have married the second petitioner, her first cousin [or her half-brother, her father's son by another wife], of her own free will. They filed a fundamental rights petition under Art. 199 of the Constitution to quash a criminal case arising from an FIR lodged by N, the third respondent, under sections 365/324/395/427/109 PPC alleging that the first petitioner had been abducted by the second petitioner and others. The FIR alleged that N and the first petitioner had been married some years earlier, and that while they were going to the village to meet relatives, they were fired upon by the second petitioner and others, who then dragged the first petitioner out of the car and kidnapped her. It further claimed that the second petitioner wanted to marry the first petitioner in order to grab her land, and that he wanted to kill her. The first petitioner appeared before the Court and stated that N was not her husband but her paternal cousin, and that she had married the second petitioner of her own free will after her father had died and her mother had remarried. Her mother also appeared and admitted that the first petitioner had married the second petitioner of her own free will, and that her *nikah* had been earlier performed with N during her minority, but no *rukhsati* had taken place. The SP Sargodha submitted comments stating that investigations showed that the *nikah* of the first petitioner had been performed with N during her childhood, that after attaining the age of puberty, she was fully aware that she was married to him, and that she eloped with the second petitioner following a love affair and an ante-dated *nikahnama* was then 'managed' to 'save her skin from the clutches of the law', and since the story in the FIR appears concocted, she should be prosecuted under section 10(2) of Ordinance VII of the Hudood Ordinance 1979.

The Court declared that the petition was infructuous to the extent that the police officials had found that the FIR was concocted and the prosecution did not intend proceeding on the basis of the FIR, and held that the petitioner's *nikah* with N during her minority stood repudiated by her in exercise of her option of puberty. It further held:

1. [Given statements that the *nikah* of the girl was performed in her minority, that no *rukhsati* has taken place, that there was no consummation and that she contracted *Nikah* with another man after attaining majority], can the police be permitted to become arbiters of the conflicting 'Nikahs', and allowed to prosecute the petitioners under Hudood Laws? Can it be allowed to pre-empt the verdict of the Civil/Family Court. The questions which have come for consideration in this instant case are not unique and have been commented by the superior Courts. The issue is symptomatic of a culture where the *Nikah* of a girl is performed in minority on account of a variety of compulsions. It is either on account of 'watta satta' or family pressures. Since a minor is not a free agent and mature enough to express her consent ie an essential element of *Nikah*, the woman has been granted a right in Islam to exercise her option when she attains the age of puberty. And it is by now a settled proposition of law, that a girl can exercise her option of puberty even without the intervention of the Court. [Relying on *Muhammad Bakh v. Crown and others PLD 1950 Lah. 203* and *Ala-ud-Din v. Mst. Farkhanda Akhtar PLD 1953 Lah. 131*]. (paras 9-10, pp. 483, 484)
2. As held in *PLD 1976 Lah. 516* [and also relying on *PLD 1995 FSC1*], a second *Nikah* after attaining majority would be a valid repudiation of the earlier *Nikah* performed during her minority. (para B, p. 484).
3. Coming to the question as to what particular age and in what manner the option is to be exercised, it is to be noted that in law no exact age or time is prescribed. There is no specific mode of its exercise either. However, the preponderance of opinion is that it should be before the girl attains the age of 18 years. [Relying on *Mst. Sardar Bano v. Saifulla Khan PLD 1969 Lah. 108*]. (para C, p. 485).
4. Absence of *rukhsati* and consummation considered in the light of [the first petitioner and her mother's] statement in Court *prima facie* tantamount [sic] to repudiation of the earlier *Nikah* which is further endorsed by her subsequent *Nikah* with petitioner no. 2 (para D, p. 486).

5. If a major woman and a man acknowledge a Nikah, the presumption of truth is attached to it and the onus lies on the person challenging the Nikah to disprove it. (para E, p.486)
6. The prosecution under section 10(2) of the Hudood Ordinance cannot be initiated without a conclusive finding of the Family/Civil Court qua the registered Nikah which is being acknowledged by the petitioner and oral Nikah, which is being claimed by respondent no. 3. Prima facie the so-called Nikah of petitioner no. 1 performed with respondent no. 3 during her minority stands repudiated by petitioner no. 1 in exercise of her option of puberty which repudiation has further been endorsed by her registered Nikah with petitioner no. 2 to which presumption of truth is attached. (para I, p. 487)

**Hafiz Abdul Waheed v Asma Jehangir and another PLD 1997 Lahore 301**

High Court, Lahore

Ihsan-ul-Haq Chaudhry, Malik Muhammad Qayyum and  
Khalil-ur-Rehman Ramday JJ

Pakistan

10 March 1997

Saima Waheed secretly married her brother's tutor without the consent of her father, the petitioner. A month after the alleged marriage, she left the family home and went to live in 'Dastak' (a women's refuge), managed by the first respondent. The petitioner, Saima's father, commenced proceedings in the High Court claiming that, in accordance with the Holy Quran and Hadith, the *Nikah* was not valid because he had not given his consent as her *Wali* (guardian). The petitioner submitted that a previous Federal Shariat Court ruling that adult Muslim women be allowed to marry without the consent of their *Wali* was not binding as it was delivered in the exercise of the court's appellate jurisdiction. He also contended that children are under an obligation to obey their parents and that marriage in Islam is not a civil contract. The respondents argued that marriage between men and women can be performed validly without the intervention of a *Wali* and that restraints on the movements of women against their will violated their fundamental rights under the Constitution. Several other connected petitions, together with an application by Saima Waheed for habeas corpus, were referred to the court for common judgment. The Muslim Family Laws Ordinance, 1961 prescribes a proforma for *Nikah* and makes its registration compulsory (s 5). It also provides for the appointment of the bride's *Wakil* (Nikahnama, Serial No. 7, column I) although the term is not defined in the Ordinance. The Federal Shariat Court is constitutionally empowered to examine legal provisions which appear repugnant to Islam (Art 203-D) and has *suo motu* revisional powers in respect of a case decided by the Criminal Court under the enforcement of Hudood (Art 203-DD). It also has 'such other jurisdiction as may be conferred on it by or under any law' (Art 203-DD(3)). Subject to Arts 203-D and F, decisions of the Federal Shariat Court in the exercise of its jurisdiction under Ch 3-A of Pt VII of the Constitution are binding on the High Courts (Art 203-GG).

In dismissing the application and declaring the marriage valid (Ihsan-ul-Haq Chaudhry J dissenting), it was *inter alia* held that:

Per Ihsan-ul-Haq Chaudhry and Khalil-ur-Rehman Ramday JJ:

1. The consent of the man and woman who are getting married is an indispensable condition for the validity of a marriage and a *Wali* has no right to grant such a consent on behalf of the woman without her approval. (para N, p.343)

Per Malik Muhammad Qayyum J:

2. There is no principle upon which it can be held that the *Nikah* of a sui juris Muslim woman without the consent of her *Wali* is invalid (Muhammad Imtiaz & Anor v The State (above) applied). The nature of the marriage and the manner in which it has been performed may be a relevant consideration, however, for granting or withholding relief in a matter in which the courts are called upon to exercise their discretion. (p. 358)

Per Khalil-ur-Rehman Ramday J:

3. The marriages in question are not invalid. Invalidating a marriage entails serious and even penal consequences, not only for the wife and the husband but also for any innocent children born out of such a union. Such a declaration should not, therefore, be given unless material of an unimpeachable and conclusive character is available. Moreover, the authenticity of the Hadith law relied upon by the petitioner is not incontrovertible: the fact that there is a division amongst different schools of thought, jurists and scholars on the issue of whether an adult women can validly marry without the consent of her Wali brings into question the soundness of Hadith law. (paras LL, MM p.381)
4. Authority is also available in Islam that, in the case of a dispute between a Wali and a child concerning the choice of a spouse, the child may approach a court of law to have the dispute resolved without having breached social or religious values. (para TT, p.382)
5. Since the marriage between Ms Saima Waheed and Arshad Ahmad is not invalid and she is living in 'Dastak' of her own free will, she cannot be said to be in illegal custody. She is, therefore, at liberty to reside wherever she pleases. (para. AAA, p. 382, 383)

**Muhammad Ishaq Yaqoob v. Umrao Charlie and another 1987 CLC 410 [Karachi]**

High Court, Karachi  
Abdul Qadeer Chaudhry, Actg. CJ

Pakistan  
5 October 1986

The respondent, a Pakistan national, while in the USA for higher studies, married KD, a US national, in a civil ceremony before a Judge of the Municipal Court in the US, and later filed a suit for dissolution of this marriage before the Family Court in Karachi. She claimed that the parties had agreed at the time of marriage to retain their religion, and be subject to their own personal laws. The Family Court ordered dissolution of the marriage, which order became final as no one challenged it. The petitioner then filed this petition under Art. 203 of the Constitution to have that judgment declared unlawful, on the ground that it could not be dissolved under the Dissolution of Muslim Marriage Act 1939 read with the Family Courts Act 1964, as it had not been performed under Muslim Shariat law.

The Court, dismissing the petition and upholding the order of the Family Court order of 1967, held that:

1. According to Hanafia doctrine, contract of marriage between a Muslim woman and non-Muslim Ahl-e-Kitab man is unlawful and ab initio void. Such marriage does not create any civil right and obligation between the parties. The illegality of such a marriage commences from the date of contract. [Relying on Syed Amir Ali's Mahommedan Law Volume II, Seventh Edition (1976) at p. 314, which states that like 'most other systems, the Musalman Law discountenances a marriage between a Moslem woman and a man professing another religion...Under the Shiah law the issue of a marriage between a Moslemah and non-Moslem are illegitimate, for the union is regarded as nugatory ab initio. In the Hanafi system, as we have seen, there is a great difference of opinion regarding the status of the children. According to the Muhit and apparently the Bahr-ur-Ralk and the tahtwai, the union is treated as an invalid marriage, for the man may at any time abandon his own religion and accept the Faith of Islam, and thus remove the bar to matrimony with a Moslem woman.' [p. 411]