

# Remedies for Forced Marriage

## A HANDBOOK FOR LAWYERS

EDITED BY

SARA HOSSAIN AND LYNN WELCHMAN

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### Chapter 3

## LEGAL REMEDIES FOR FORCED MARRIAGE IN BANGLADESH

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### About the Author

Sara Hossain is a barrister practicing in the Supreme Court of Bangladesh, in the areas of constitutional, public interest and family law. She is a partner at the law firm of Dr Kamal Hossain and Associates, and serves pro bono as the Honorary Executive Director of the Bangladesh Legal Aid and Services Trust. She is involved with several human rights organisations, including Ain o Salish Kendra (ASK), the Advisory Committee of the Women’s International Coalition on Gender Justice (WICG) and is a Commissioner of the International Commission of Jurists (ICJ). Sara earlier ran the South Asia Programme at INTERIGHTS from 1997 to 2003, where she with Lynn Welchman led the multi-country study on ‘Honour’ Crimes, and was engaged in advocacy on securing remedies for forced marriage in transnational cases. Sara’s casework on women’s rights before the Supreme Court of Bangladesh has involved public interest litigation on ‘fatwa’ violence, and ‘forced’ veiling, as well as cases on forced marriage and choice in marriage. Her relevant publications include ‘Wayward Girls and Well-Wisher Parents: Habeas Corpus, Women’s Rights to Consent and the Bangladesh Courts’ in Aisha Gill (ed), *Forced Marriage* (Zed, London 2010); (with Bina de Costa) “Redress for Sexual Violence Before the International Crimes Tribunal in Bangladesh: Lessons from History, and Hopes for the Future” in *Criminal Law Forum*, Volume 21, Number 2, 331-359; (co-edited with Lynn Welchman) *“Honour”: Crimes, Paradigms and Violence against Women* (Zed Books, London, 2005)). Sara was educated at Wadham College, Oxford (MA (Hons) 1988), and called to the Bar from Middle Temple. She has received several awards for her work, including from the Lawyers Committee for Human Rights, and been a World Economic Forum Fellow and an Asia 21 Fellow.

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## CHAPTER 3 LEGAL REMEDIES FOR FORCED MARRIAGE IN BANGLADESH

Sara Hossain

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### 1. Introduction

This chapter discusses the legal remedies available in Bangladesh for individuals facing interference with a marriage of choice, or threatened or actual forced marriage, referring to relevant statutes and judgments of superior courts. It reviews the range of remedies available to both adults and minors, examining the existing law and practice. It outlines who can start proceedings, as well as the nature of proceedings that may be commenced. Given that the majority of reported cases concern marriages under Muslim law, the chapter focuses on this area, and only briefly outlines laws applying to marriages under Christian or Hindu laws or special laws.

This chapter first sets out the legal context in Bangladesh. It then outlines the laws on marriage, focusing on the requirements of a valid marriage (in particular consent), the marriage of minors, registration and proof of marriage. It discusses available legal remedies to address cases of interference with choice in marriage or forced marriage. These include constitutional remedies, in particular the writ of habeas corpus, most often used to secure an individual's release or recovery from illegal detention; civil remedies, including matrimonial remedies such as divorce or annulment, and tort actions for damages and injunctions, and criminal law remedies, including prosecution of those responsible for contracting attempted or actual forced marriages, as well as procedures for recovery of victims/survivors. In many situations there may be separate sets of proceedings for the protection of the person concerned. Given possible overlap between the civil, constitutional and criminal laws, it is essential to be aware of developments in each sphere. Finally, the chapter addresses procedural matters of particular relevance to cases with an international dimension, involving Bangladesh nationals who are also nationals or residents of another country.

### 2. Legal Context

In 1947, following the partition of India, the territories now comprising Bangladesh formed one wing of the newly created state of Pakistan. In 1971, after the Liberation War against Pakistan, the independent state of Bangladesh was established. Bangladesh inherited the common law legal system which had been introduced by the British during colonial rule and continued in the Pakistan period. Thus laws applicable today include those continuing from the pre-independence period and new laws enacted since (as amended and updated from time to time).<sup>1</sup>

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\*This chapter has been updated to 2014. Thanks are due to Ishita Dutta for her extensive help in researching this chapter and updating the law.

<sup>1</sup> See Bangladesh (Adaptation of Existing Laws) Order, 1972 (President's Order No. 48 of 1972).

The Constitution of Bangladesh (‘the Constitution’) was promulgated and came into force in 1972. It guarantees a range of fundamental human rights and further provides for fundamental principles of state policy relevant to the right to choice in marriage (see below).

Although the Constitution mandates that any existing laws inconsistent with fundamental rights shall become void (Art. 26), personal laws based on religion continue to govern rights regarding marriage and to perpetuate discrimination both among men and women and among different communities. The resulting limitations on the right to choice in marriage are exacerbated by social practices such as child marriage and early marriage, particularly pervasive in rural areas. In extreme cases, assertions of choice by women (particularly in the case of cross-community marriages) may be opposed by their family members, resulting in legal and social complications.

Such interference with the right to choice in marriage is common among most communities in Bangladesh regardless of ethnicity or religion. However, there is little public recognition of the widespread incidence of this practice, or of its constituting a basic human rights violation.

## **2.1 Legal Provisions**

Issues relating to entry into and dissolution of marriage are governed largely by personal laws, statutory and non-statutory, which are specific to each community.

Muslim marriages and divorces are governed by:

- the Muslim Personal Law (Shariat) Application Act, 1937;
- the Dissolution of Muslim Marriages Act, 1939 (DMMA);
- the Muslim Family Laws Ordinance, 1961 (MFLO);
- the Muslim Family Laws Rules, 1961 (MFLR);
- the Muslim Marriages and Divorces (Registration) Act, 1974 (MMDRA); and
- the Muslim Marriages and Divorces (Registration) Rules, 1974 (MMDRR).

Christian marriages and divorces are governed by:

- the Christian Marriage Act 1872, (CMA) and
- the Divorce Act, 1869.

Hindu marriages are governed by customary laws and by statutes such as:

- the Hindu Marriage Disabilities Removal Act, 1946;
- the Hindu Widow’s Remarriage Act, 1856;
- the Hindu Married Women’s Right to Separate Residence and Maintenance Act, 1946; and
- the Hindu Marriage Registration Act, 2012.

Civil laws applicable to all communities which are relevant in this context include:

- the Special Marriages Act, 1872 (SMA);
- the Majority Act, 1875;

- the Births, Deaths and Marriages Registration Act, 1886;
- the Guardians and Wards Act, 1890 (G&WA);
- the Child Marriage Restraint Act, 1929 (CMRA);
- the Family Courts Ordinance, 1985 (FCO)<sup>2</sup> and
- the Family Courts Rules, 1984 (FCR).

Relevant procedural laws regarding civil matters are contained in the Code of Civil Procedure, 1908.<sup>3</sup>

Criminal laws, applicable to all communities, and of possible relevance in such cases include the Bangladesh Penal Code, 1860 (BPC) and the Suppression of Violence against Women and Children Act, 2000 (Violence against Women Act).

Relevant procedural laws regarding criminal cases are contained in the Code of Criminal Procedure, 1898 (CrPC) and the Evidence Act, 1908.

International instruments ratified by Bangladesh and relevant to the right to choice in marriage include the International Convention on Slavery, 1926; the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, 1964; the International Covenant on Civil and Political Rights, 1966 (ICCPR); the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR); the Convention on the Elimination of all Forms of Discrimination against Women, 1981 (CEDAW); the Convention against Torture and other Forms of Cruel, Inhuman and Degrading Treatment or Punishment 1989 (CAT), and the Convention on the Rights of the Child, 1990 (CRC).<sup>4</sup>

In the Chittagong Hill Tracts, comprising three districts, Bandarban, Khagrachari and Rangamati, the family laws particular to the indigenous people living in these areas are applicable; traditional justice systems operate here, and the Family Courts Ordinance does not currently extend to these districts.<sup>5</sup>

## 2.2 Court Structure

The Supreme Court comprises of the Appellate Division and the High Court Division. The Appellate Division being the apex court, its decisions are binding on all courts across the country. It has both appellate and advisory jurisdictions. The High Court in Dhaka hears original constitutional matters (and certain other original matters) as well as civil and criminal appeals and revisions. All authorities, executive and judicial, are required to act in aid of the Supreme Court.<sup>6</sup> Both the Appellate and High Court Division have powers of contempt.<sup>7</sup>

<sup>2</sup> Any person, irrespective of faith, may file a suit before the Family Court: see *Nirmal Kanti Das v Sreemati Biva Rani* 47 DLR(1995)(HCD) 514, *Meher Nigar v Mojibur Rahman*, 47 DLR (1995) (HCD) 18, *Pochon Rikssi Das v Khuku Rani Das and others* 50 DLR (1998) (HCD) 47 and *Ganesh Chandra Das v Arati Acharjya* 54 DLR (2002)(HCD) 348.

<sup>3</sup> See also the Supreme Court of Bangladesh (High Court Division) Rules, 1973 (amended to 2012).

<sup>4</sup> Bangladesh has entered reservations to the key international human rights treaties, including CEDAW (Articles 2 and 16(1) (f)).

<sup>5</sup> See Section 1(2) Family Courts Ordinance, 1985 (FCO).

<sup>6</sup> Art. 112, Constitution of Bangladesh, 1972.

<sup>7</sup> Art. 109, Constitution of Bangladesh, 1972.

The Subordinate Courts within each of the 64 Districts are subject to the control and supervision of the High Court.<sup>8</sup> The Civil Courts, in descending order of hierarchy, include the Courts of the District Judge, the Additional Judge, the Joint District Judge, and the Assistant Judge (the last also functions as a Family Court).<sup>9</sup> The Criminal Courts, again in descending order, include the Courts of the Sessions Judge, Additional Sessions Judge, Assistant Sessions Judge, Metropolitan Magistrate, Magistrate of the First Class, Magistrate of the Second Class and Magistrate of the Third Class. The Sessions or Additional Sessions Judge also functions in certain districts as the Special Tribunal on Violence against Women and Children.

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<sup>8</sup>The 64 districts comprise of 490 thanas, which are in turn comprised of 4490 unions. There are a total of six administrative divisions (Barisal, Chittagong, Dhaka, Jessore, Rajshahi and Sylhet).

<sup>9</sup> Section 4, Family Courts Ordinance 1985. Note that the Family Court's jurisdiction extends to all communities *Nirmal Kanti Das v Srimati Biva Rani* 47 DLR(1995)(HCD) 514 and *Meher Nigar v Mujibur Rahman* 47 DLR(1995)(HCD)18.



### 3. LAWS ON MARRIAGE

This section first discusses the status of marriage and then outlines the requirements for a valid marriage including the consent of the parties, the scope for marriage of minors and registration and proof of marriage. It considers, in turn, the personal laws applicable to Muslims, Hindus and Christians and then the key provisions of the Special Marriage Act, 1872 (SMA).

Various personal laws provide for different ages of majority for the purpose of marriage; for example, Muslim law provides the age of majority to be puberty, which is presumed to be fifteen for girls,<sup>10</sup> while Hindu law as applicable in Bangladesh allows for the marriage of girls at any age with their guardian's consent (however adults associated with such marriages may be punishable by law).

#### 3.1 Muslim Law

In determining issues relating to entry into marriage, the Muslim Family Laws Ordinance (MFLO), 1961 and the general principles of Muslim personal law apply where either or both parties are Bangladeshi Muslims, and even if the marriage is contracted outside Bangladesh.<sup>11</sup>

**3.1.1 Status of Marriage:** Under general Muslim law, marriages are defined as valid, irregular or void, depending on the applicable school of law. For example, under the Hanafi School, marriages are classified as valid, irregular or void, while under Shia law, marriages are classified only as valid or void. The definition of an irregular marriage differs among the various schools.

- Valid Marriage – a valid marriage imposes mutual rights and responsibilities on both parties regarding the enjoyment of conjugal relations and inheritance, guardianship and custody of children, makes the husband responsible for providing dower and maintenance to the wife, and confirms the legitimacy of any children born within the marriage.
- Irregular Marriage – an irregular marriage is one which suffers from a temporary infirmity, and may be terminated by either party before or after consummation. It has no legal effect before consummation and limited effects after consummation, establishing the wife's right to dower and the legitimacy of children, but not to inheritance or maintenance. Examples of irregular marriages include those where:
  - there are no witnesses (except under Shia law, which does not require witnesses);<sup>12</sup>
  - in certain circumstances, the wife is within her *iddat* period after her husband's death ( four months and one day);

<sup>10</sup> Mullah, para 251, and *Bakshi v Bashir Ahmed* PLD 1970 SC 323 at 324 cited in Sara Hossain “‘Wayward Girls’ and ‘Well-Wisher Parents’: Habeas Corpus, Women’s Rights to Personal Liberty, Consent to Marriage and the Bangladeshi Courts” in Aisha Gill and Sundari Anitha (Eds.) *Forced Marriage: Introducing a Social Justice and Human Rights Perspective*, Zed Books Ltd, London: 2011.

<sup>11</sup> See Section 2, Muslim Personal Law (Shariat) Application Act 1937 and Section 1(2) MFLO.

<sup>12</sup> In some cases the Courts have refused to recognize marriages with no witnesses. On witnesses, see Hidayatullah and Hidayatullah (Eds.), *Mullah’s Mohammadan Law*, N.M. Tripathi Ltd, Bombay:1990 (19<sup>th</sup> Edn.) (‘Mullah’), at paras 252 (Shia) and 254 (generally).

- the wife is a non-Muslim and a non-*kitabia* (not a person of a revealed religion, i.e. Judaism or Christianity);<sup>13</sup>
- there is some ‘unlawful conjunction’, that is where a man marries two women who are so related to each other by blood, marriage or fosterage that they could not have married each other lawfully (for example, two sisters) if one were a man; or<sup>14</sup>
- the man marries for a fifth time while already married to four women.

An irregular marriage may become valid on removal of the temporary infirmity, except (and this is also subject to varying interpretations) one concluded without necessary witnesses.

- **Void Marriage** – A void marriage is treated as no marriage in the eyes of the law, and creates no civil rights and obligations between the parties, with the children being treated as illegitimate. Examples of void marriages include those where:
  - the consent of either party, being a sane adult, is not given fully and freely, and is obtained by force or fraud;
  - the ‘wife’ is within her *iddat* period following divorce (ninety days);<sup>15</sup>
  - the parties are within ‘prohibited degrees’ to each other on grounds of consanguinity, affinity or fosterage;<sup>16</sup>
  - the ‘wife’ is a Muslim but the ‘husband’ is a non-Muslim; or
  - the ‘wife’ is already married.

The categorization of marriages as irregular or void as set out above may differ according to the opinion of different jurists.

**3.1.2 Requirements of a Valid Marriage:** Under Muslim law, marriage (*nikah*) is a contract,<sup>17</sup> and the requirements for its validity comprise:

- a) a declaration or offer of marriage by or on behalf of one party and acceptance by or on behalf of the other party, both expressed at one sitting;<sup>18</sup>
- b) the presence of adult, sane and Muslim witnesses;<sup>19</sup>

<sup>13</sup> See Mullah, *supra* at para 259.

<sup>14</sup> See Cassandra Balchin (Ed.) *A Handbook on Family Law in Pakistan*, Shirkat Gah and Women Living Under Muslim Laws, Shirkat Gah: Lahore, 1997 at pp. 38-39.

<sup>15</sup> *Syed Ali Newaz Gardezi v Lt. Col. Md. Yusuf* 15 DLR (1963) (SC) 9.

<sup>16</sup> Marriages prohibited on the ground of consanguinity (blood relationship) include those between a man and his mother, grandmother, daughter, grand-daughter, sister, niece or grand-niece, and aunt or great-aunt, however highsoever or lowsoever as appropriate. Marriages prohibited on the ground of affinity (through marriage) include those between a man and his wife’s mother or grandmother or her daughter or grand-daughter, or the wife of his father or grandfather, and the wife of his son’s son or daughter’s son: see Balchin, *ibid*, at p. 37, fn. 10-11.

<sup>17</sup> *Khodeja Begum v Sadeq Sarkar* 50 DLR (1998)(HCD) 181 at 184 para 20.

<sup>18</sup> *Dr. A.L.M. Abdulla v. Rokeya Khatoon and another* 21 DLR (1969)(HCD) 213, *Chan Mia v Rupnagar* 51 DLR (1999)(HCD) 292 at 294 paras 15 and 16.

<sup>19</sup> In Bangladesh, no statute specifies the qualifications of witnesses to a Muslim marriage. But see Mullah at para 252, *Dr. A.L.M. Abdulla v. Rokeya Khatoon, supra*, and *Momtaz Begum v Anowar Hossain* 2011(40) CLC AD (which mentions two male witnesses or one male and two female witnesses).

- c) free and full consent of both parties if sane adults (note that minors may be married by their guardians, see Section 3.1.3 below).<sup>20</sup>
- d) the capacity of the parties to marry, the relevant factors here concerning age, gender, mental capacity, religion, relationship to each other and marital status.
- Age: Under Muslim personal law as applied in Bangladesh, the age of majority for purposes of marriage is puberty.<sup>21</sup> Thus males and females who have reached puberty may marry of their own free will. However, those below puberty may be married off by their parents or guardians (see below, and the impact of a legal minimum age of marriage, eg the Child Marriage Restraint Act 1929).
  - Gender: One party must be male and another female.
  - Mental Capacity: Both parties must be of sound mind; however a person who is not of sound mind may be given in marriage by their guardian (see Section 3.1.3 below).
  - Religion: Both parties must be Muslims, or the woman may be a *kitabiah*. Marriage of a Muslim man to a *non-kitabiah* may be treated as irregular. In contrast, marriage of a Muslim woman to a non-Muslim man, even a *kitabiah*, is not recognised in Muslim law and will be void (but see para 3.1.1).
  - Prohibited Degrees: The parties must not be within prohibited relationships to each other (see above, para 3.1.1).
  - Marital Status: The husband may have one or more subsisting marriages, given that a Muslim man is entitled to be married polygamously to up to four women, but the wife must not have a previous subsisting marriage.<sup>22</sup>
- e) an agreement by the husband to pay dower (*mehr*), a sum of money payable to the wife on the marriage being contracted or in part thereafter.<sup>23</sup>

**3.1.3 Consent:** Under Muslim law, a marriage in which an adult sane party does not consent or where their consent is obtained under coercion or fraud is no marriage in law.<sup>24</sup>

The standard form marriage contract or *kabin-nama* (see below at 3.1.5) requires the bride to affix her signature or her thumb impression; this underscores the importance of

<sup>20</sup> See Mullah at para 251.

<sup>21</sup> Puberty is presumed to have been reached at the age of fifteen: see Mullah at para 251, Explanation; see also *Bakshi v Bashir Ahmed* PLD 1970 SC 323.

<sup>22</sup> The law allows but curtails the Muslim man's right to polygamy by requiring him to comply with certain procedures (Section 6, MFLO). See also *Makbul Ali v Monwara Begum* 39 DLR(1987)(HCD) 181, *Ayesha Sultana v Shahjahan Ali* 38 DLR(1986)(HCD)140, and *Abul Basher v Nurun Nabi* 39 DLR(1987)(HCD) 333.

<sup>23</sup> If there are no particulars regarding dower in the *nikahnama* or marriage contract, the entire amount is payable on demand: Section 10, MFLO, 1961. See *Atiqul Haque Chowdhury v Shahana Rahim* 47 DLR(1995) (HCD) 301.

<sup>24</sup>Mullah, supra para 251.

the bride's consent being made explicit. In contrast, the groom's consent may be signified either by himself or his representative.

In practice, a woman's right to consent is rarely fully exercised. In most cases, her consent is assumed through silence or gestures. In extreme cases, violence or coercion may be used to extract consent. Further, minors or persons lacking mental capacity may be married off by their guardians, as elaborated in the next section.

**3.1.4 Marriage of minors:** In addition to Muslim personal law, the Majority Act, 1875 and the Child Marriage Restraint Act ,(CMRA) are relevant to the marriage of minors.<sup>25</sup>

**a) Age of majority for marriage:** While the general rule is that every person domiciled in Bangladesh is deemed to be a major on becoming eighteen,<sup>26</sup> an exception provides that a person may be considered a major for the purposes of marriage under their respective personal law.<sup>27</sup>

Traditionally, under Muslim law, the age of majority for marriage is deemed to be puberty, presumed at the age of fifteen in the absence of evidence to the contrary.<sup>28</sup> However, the Child Marriage Restraint Act, (CMRA) penalises a child marriage, that is any marriage in which the groom is aged below 21 and the bride below 18.<sup>29</sup> Importantly while this law penalises such marriages it does not render them invalid. Thus, anyone involved in a child marriage (excluding the child/ the minor party) may face penalties, but the marriage itself will be valid.

Although persons aged below puberty as well as those considered to be mentally immature/incapacitated<sup>30</sup> lack the capacity to marry of their own choice, they may be given in marriage by their guardians (see immediately below).

**b) Consent for marriage of minor:** The natural and legal guardian for marriage of a minor is their father, if alive, followed successively by paternal relations, including the grandfather, the brother and other male relations, and in default, the mother, or other maternal relations, such as the maternal uncle or aunt. The father does not require a Court order to act as the guardian of his minor children. Any other person wishing to be appointed or declared as a guardian of a minor may apply to the Family Court which, in making such an appointment or declaration, is required to be guided by what appears to be for the welfare of the minor, consistent with the personal law to which the minor is subject.<sup>31</sup>

<sup>25</sup> It may be noted here that the CRC defines the age of majority as eighteen, and CEDAW expressly prohibits child marriage.

<sup>26</sup> Section 3, Majority Act, 1875.

<sup>27</sup> Section 2, Majority Act, 1875 provides as follows: '*Nothing herein contained shall affect: (a) the capacity of any person in any of the following matter (namely) marriage, dower, divorce and adoption*'.

<sup>28</sup> See Mullah, supra, para 251, and *Bakshi v Bashir Ahmed* PLD 1970 SC 323 at 324 ff.

<sup>29</sup> Section 2(a), CMRA as amended by the MFLO 1961 and Ordinance 38 of 1984. The CMRA initially defined a child marriage as one where the bride and groom are below 14 and 18 respectively, but following amendments, it now provides that a child marriage is one where the bride and groom are below 18 and 21 in each case'.

<sup>30</sup> See Mullah, supra, at para 271 and *Bibi Khatoon v Faiz and another* PLD 1967 Lah 670 (on mental incapacity).

<sup>31</sup> Section 7, Guardians and Wards Act 1890. See also *Rashiduddin v Dr. Quamrunnahar* 30 DLR 208 and *Rahimnassa and another v Ashraf Mia* 25 DLR (1973)(HCD) 167 at para 18. .

**c) Status of marriage of a minor:**

If a girl is married off by her father or other guardian before reaching puberty, the marriage is valid. However such a marriage is voidable, and may be repudiated after she turns 18 and before she is 19, by exercising the ‘option of puberty’ (see Section 5 below).<sup>32</sup> In case of males, the right to repudiate such a marriage continues until the marriage is ratified expressly or impliedly, for example by payment of dower or by cohabitation.<sup>33</sup> Thus, unless and until repudiated, a marriage in which a minor is married off by their guardian is valid. However, it may involve criminal penalties for those responsible (see Section 6 below).

**3.1.5 Registration of marriage:** A marriage contracted by a Bangladeshi Muslim must be registered in accordance with the terms of the Muslim Marriages and Divorces (Registration) Act.<sup>34</sup>

**a) The *nikahnama* (marriage registration form):** A *nikahnama* (commonly referred to as a *kabin-nama*) is a document which contains the marriage contract. A prescribed form of *kabin-nama* has been provided by law, and this is available from the local Nikah Registrar’s Office (see Annex XX).<sup>35</sup> It includes separate columns for entry of the:

- date and place of solemnization of marriage,
- date of registration,
- names, fathers’ names, ages and addresses of the parties,
- status of the wife (virgin/ divorcee/widow),
- names of witnesses, and of person solemnising the marriage,
- amount of dower,
- details of whether the groom’s right of divorce has been delegated to the wife,
- details of whether the groom’s right to divorce has been curtailed,
- details of whether the groom is already married and whether he has been given permission to marry polygamously,
- signatures of the bride, the bride/groom or their *vakil* (agent), the witnesses and the solemnizer and
- seal and signature of the Nikah Registrar

In practice, many marriages under Muslim law are still not registered,<sup>36</sup> and are merely recorded on the standard *kabin-nama* form and/or on stamp paper, or made orally.

<sup>32</sup> Section 2(vii), DMMA.

<sup>33</sup> See Mullah supra, at para 274.

<sup>34</sup> Section 3, Muslim Marriages and Divorces Registration Act 1974 (MMDRA). This Act consolidates previous laws on registration of Muslim marriages, omitting sections 3 and 5, MFLO 1961 (regarding mandatory registration of all Muslim marriages), including by repealing the Bengal Mohammedan Marriages and Divorces Registration Act, 1876 (regarding voluntary registration of such marriages). See also *Atiqul Huque Chowdhury v Shahana Rahim* 47 DLR(1995) (HCD) 301 (purpose of the 1974 Act was to consolidate registration of Muslim marriages and divorces).

<sup>35</sup> See MFLO, Form II and now MMDRA Rules 8,10,11,12.

<sup>36</sup> There is significant regional variation in the registration of marriages, ranging from around 20% of all marriages under Muslim law registered in one district compared to 93% in another: see Shahnaz Huda,

## b) Process of Registration

Marriages in Bangladesh: Any marriage solemnised by the Nikah Registrar (Marriage Registrar) must be registered at once.<sup>37</sup>

Every Nikah registrar is a public servant licensed by the Government, and operating under the superintendence and control of the Registrar, and the general superintendence of the Inspector General of Registration.<sup>38</sup>

If the Nikah Registrar solemnises the marriage within his area of operation, he is responsible for ensuring that it is registered.<sup>39</sup> He must first examine the parties, or any two witnesses to the solemnisation of the marriage, to satisfy himself ‘as to the effecting of the marriage by them’.<sup>40</sup> If the woman observes purdah, then her duly authorised *vakil* (agent) may be examined in her place.

If any other person solemnises the marriage, the bridegroom must report it within 30 days to the concerned Nikah Registrar (for the purposes of registration who shall register it ‘at once’).<sup>41</sup> In recent years, the higher judiciary has issued a series of judgments to combat child marriages. Upholding governmental action cancelling the licence of a Nikah Registrar for registering child marriages, the High Court Division of the Supreme Court of Bangladesh observed that it was mandatory for Nikah Registrars to ascertain the age of the bride and the groom before solemnization of marriage to stop child marriages.<sup>42</sup>

Any person contravening section 5 MMDRA is liable to a maximum of two years imprisonment, or a fine of up to Taka 3000.

The groom’s family are responsible for paying the registration fees, which are prescribed as between Taka 30 to Taka 3000.<sup>43</sup> On receiving payment, the Nikah Registrar should issue a receipt.

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*Registration of Marriage and Divorce*, Bangladesh Legal Aid and Services Trust: Dhaka, 1999 at p. 12-14, and 46.

<sup>37</sup> Section 5, MMDRA and Rule 22, MMDR.

<sup>38</sup> See the MMDRA and the accompanying Rules 1975, in particular Section 4 (Nikah Registrars licence), Section 10 (superintendence and control) Rule 5 (procedure for selection) and Rule 6 (qualifications). All Nikah Registrars appointed under the MFLO before the commencement of the MMDRA were deemed to be licensed under the subsequent Act (s17, MMDA). With regard to qualifications, Nikah Registrars are no longer required to possess knowledge of Muslim law or the MFLO (See SRO No. 12-L/94 published in the Bangladesh Gazette Extraordinary 19 January 1993). See *Kazi Obaidul Huq v State* 51 DLR (1999) (HCD) 25 at 27 para 9.

<sup>39</sup> See Rule 18 (fees) and Rule 19 (procedure before registration of marriage), MMDR 1975.

<sup>40</sup> Section 7, MMDRA, read with Rule 19(1) MMDR.

<sup>41</sup> Section 5, MMDRA, read with Rule 19(2) MMDR as amended by Act 9 of 2005.

<sup>42</sup> *Md. Abul Hosain v Government of Bangladesh & Ors* 2011 BLD (HCD) 31

<sup>43</sup> Rule 18, MMDR (amended up to 1998): the rate of fees is Taka 5 for every Taka 1000 of dower or part thereof, up to a maximum of Taka 3000. In addition, a fee of Taka 10 (see SRO dated 1.3.1982) and traveling allowance of Taka 1 per mile may be charged if registration is done on commission (e.g. at the wife’s home, as is customary).

Marriages outside Bangladesh: If a marriage is solemnized outside Bangladesh by a Bangladeshi Muslim, then it must first be registered in a prescribed form with the Consular Office of the Bangladesh Mission in the country concerned. The *kabin-nama* should then be attested by the Mission and sent, together with the registration fee, to the Nikah Registrar for the area of either the bride's permanent residence (or if she is a non-Bangladeshi, the groom's residence).<sup>44</sup>

On registering the *kabin-nama*, the Nikah Registrar is required to keep the original intact in the register, and to provide attested duplicate and triplicate copies free of charge to the bride and groom respectively.<sup>45</sup> A fourth copy is sent to the respective local government office (the City Corporation/*Paurashava* (Municipality) or Union *Parishad* (Union Council), in urban and rural areas respectively) for its records.<sup>46</sup>

Each local government office maintains a permanent record of, and an index of entries in, every Nikah Register. The index contains the names, places of residence and father's name of each party to a marriage, and the dates of solemnization and registration of the marriage.

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<sup>44</sup> Rules 12 and 13, MFLR.

<sup>45</sup> Section 9, MMDRA.

<sup>46</sup> Section 2, FCO.

c) **Consequences of non-registration;** Non-registration will not render a marriage invalid.<sup>47</sup> Similarly, merely registering a marriage, which is otherwise invalid, will also not make it valid. Any person responsible for the failure to register, including any person who solemnises the marriage but fails to report it for registration, may be liable to imprisonment or a fine.<sup>48</sup> A prosecution against a Nikah Registrar requires prior sanction from the Government.<sup>49</sup>

However, an unregistered marriage, in the absence of other evidence, may create doubts about its very existence.<sup>50</sup> For example, where the parties dispute the existence of a marriage, non-registration may create difficulties for the person asserting the marriage. In addition, the absence of the *kabin-nama* may make it more difficult for a person to pursue any claim which requires proof of marriage (for example a woman seeking to exercise her power of delegated divorce, stipulated in her marriage contract, or a woman held in safe custody for whom a registered *kabin-nama* would be supporting evidence to counter her family's claim that she is an unmarried minor).

**3.1.6 Proof of marriage:** The *kabin-nama* provides prima facie proof of the fact of marriage (though not its validity in law).<sup>51</sup> If it is lost or otherwise unavailable, any person may obtain a copy of an entry in the Register on payment of the prescribed fee at the Office of the Nikah Registrar.<sup>52</sup> In practice, however, if anyone other than the parties wishes to obtain a copy, it may be advisable to obtain a power of attorney from the party concerned authorising the collection of the *kabin-nama* on their behalf. Alternatively, any person may inspect the index of entries noted in the Register<sup>53</sup> maintained either at the Office of the Nikah Registrar or the Registrar.<sup>54</sup>

<sup>47</sup> *Dr. ALM Abdullah v Rokeya Khatoon, supra, Chan Mia v Rupnagar, supra* at 294 para 17 (registration not required), differing with *Khodeja Begum v Sadiq Sarkar* 50 DLR (1998)(HCD)181 (oral evidence insufficient to prove marriage if the *kabin-nama* has not been proved).

<sup>48</sup> Section 5 (2), MMDRA provides that any person who solemnises a marriage but fails to report it for registration to the Nikah Registrar may be subjected to imprisonment or a fine.

<sup>49</sup> See *Kazi Obaidul Haque v State* 51 DLR (1999) (HCD) 25.

<sup>50</sup> *Dr. ALM Abdulla v. Rokeya Khatoon, supra; Khodeja Begum v Sadeq Sarkar supra* at 184 para 15 (oral evidence will not prove evidence in absence of signatures of parties on *nikahnama*), and *Anwar Hossain v Momtaz Begum, supra* at 446. Also on validity of *kabin-nama* see *Shafiqul Huq v Mina Begum* 54 DLR (2002)(HCD) 481.

<sup>51</sup> *Dr. ALM Abdulla v Rokeya Khatoon, supra.*

<sup>52</sup> In 2005, a certified copy of a *nikahnama* could be obtained for Taka 5 (ordinary) or Taka 10 (urgent), and of any entry in a register for Taka 1 for each page; a register could be inspected for Taka 1 per year's register (see Rule 18(4), MMDR )

<sup>53</sup> Section 13 MMDRA provides that the index contains the names, places of residence and names of the fathers of the parties to a marriage, the date of solemnization of the marriage and the date of its registration.

<sup>54</sup> The Nikah Registrar is required to hand over the Register once it is complete, or if he leaves the District or ceases to hold a licence (Section 12, MMDRA). Also, though the Registers are required to be preserved for ever (Rule 32 MMDR), many are not available, having been destroyed during the Liberation War in 1971 or in natural disasters.

In the absence of a *kabin-nama*, marriage may be presumed from the fact of prolonged and continued cohabitation,<sup>55</sup> particularly if accompanied by acknowledgement of the paternity of children, or acknowledgement of the wife by the husband. Proof of the marriage having occurred and of cohabitation or acknowledgment may be obtained from those present at the marriage, neighbours, relatives or others. Photographs and video recordings would also be useful. In practice, obtaining such proof often involves delay, expense and inconvenience.

## 3.2 Christian Law

**3.2.1 Status of Marriage:** A Christian marriage is a sacrament. Such a marriage may be valid, irregular or void.

**3.2.2 Requirements of a Valid Marriage:** Under the Christian Marriage Act, 1876 (CMA), the requirements for validity of a marriage are the following:<sup>56</sup>

- Notice in writing and in the prescribed form from or on behalf of one party to the concerned Minister of Religion/Registrar, including the name, profession and address of each party, the time lived at that address, and the place of solemnizing the marriage;
- Personal appearance by at least one party before the Minister of Religion/Registrar;
- A declaration of belief that there is no lawful obstacle to the said marriage, that the parties are not within prohibited degrees and confirming that persons required to give consent have given such consent, or that no-one authorised to give such consent is resident in Bangladesh;
- The free and full consent of the parties;
- Solemnization by a person (e.g. a Minister of Religion or Marriage Registrar) duly licensed for this purpose;
- The presence of at least two witnesses other than the Minister;
- The capacity of parties to marry, the relevant factors here concerning age, gender, mental capacity, religion, relationship to each other and marital status:
  - Age: Under the CMA, the age of majority for purposes of marriage is sixteen years for males and fourteen years for females.
  - Gender: One party must be male and another female.
  - Mental Capacity: Both parties must be of sound mind.
  - Religion: One party must be a Christian.
  - Prohibited Degrees: The parties must not be within prohibited relationships to each other.<sup>57</sup>
  - Marital Status: Neither party should have a previous subsisting marriage.

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<sup>55</sup> However, see *Dr. ALM Abdulla v Rokeya Khatoon supra* (where one year's cohabitation was held insufficient proof), and more recently, see the observation in *Anwar Hossain v Momtaz Begum* 51 DLR (1999)(HCD) 444 (where the 'obnoxious practice' of 'mere living together' in the absence of witnesses present at the marriage or family members was held insufficient to prove marriage). See also *Ashrafal Alam v State* 57 DLR (2005)(HCD) 718.

<sup>56</sup> Section 4, CMA.

<sup>57</sup> Section 88, CMA.

**3.2.3 Marriage of Minors:** Under the CMA, the age of majority for purposes of marriage is sixteen years for males and fourteen years for females. However minors may be given in marriage by their lawful guardian (the father, or if dead, any other lawful guardian or the mother). In such cases, the minor party must appear in person before the Minister of Religion, and notice of the marriage must earlier have been given by the guardian.

**3.2.4 Registration of Marriage:** Under the CMA, registration of marriages is compulsory, with the church authorities or the Marriage Registrar as appropriate.<sup>58</sup> The CMA does not deal with consequences of non-registration on validity of the marriage.

**3.2.5 Proof of Marriage:** The marriage registration certificate (whether from the Church or the Registrar) provides prima facie proof of marriage.<sup>59</sup> Any person may search a Marriage Register maintained by the concerned Church or Marriage Registrar, or the office of the Registrar General of Births, Deaths and Marriages as appropriate, and obtain a certified copy of any entry therein.<sup>60</sup>

### 3.3 Hindu Law

**3.3.1 Status of Marriage:** Under Hindu law, marriage is a holy union and is considered indissoluble.

**3.3.2 Requirements of a Valid Marriage:** The requirements of a valid marriage include:

- invocation before the sacred fire;
- the *saptapadi* (the taking of seven steps by the bridegroom and bride around the sacred fire);and<sup>61</sup>
- the capacity of parties to marry, the relevant factors here concerning age, gender, mental capacity, religion, relationship to each other and marital status.
  - Age: Under Hindu law, there is no minimum age of marriage, and so marriage between minors is valid;
  - Gender: One party must be male and another female;
  - Mental Capacity: Both parties must be of sound mind;
  - Religion: Both parties must be Hindus;
  - Prohibited Degrees: The parties must not be within prohibited relationships to each other<sup>62</sup>;
  - Marital Status: The bride should not have a previous subsisting marriage.

<sup>58</sup> Section 27, CMA.

<sup>59</sup> Section 80, CMA.

<sup>60</sup> Section 79, CMA.

<sup>61</sup> *Amulya Chandra Modak v State* 35 DLR (1983)(HCD) pg. 160 at 164 para 9; but see *Utpal Kanti Das v Monju Rani Das* 50 DLR (1998) (AD) 47 at 48 para 8 (marriage presumed valid even in absence of proof of these ceremonies).

<sup>62</sup> Mridul Kanti Rakshit, *The Principles of Hindu Law: (Personal Law of Hindus in Bangladesh and Pakistan)*, 1985, 3rd Ed. at 115 para 25.

**3.3.3 Marriage of Minors:** Under Hindu law as enforced in Bangladesh, minors may be given in marriage by their guardian (the father, or if he is dead or has abandoned the family, the mother).

**3.3.4 Registration of Marriage:** The Hindu Marriage Registration Act was passed in 2012 creating an optional process for Hindus in Bangladesh to register their marriages.

**3.3.5 Proof of Marriage:** A marriage may be presumed to be valid in law if the celebration of the marriage has been established. Such proof includes sworn affidavits from persons present at the marriage ceremony or aware that the parties have lived together as man and wife, or sworn affidavits by the parties to confirm the marriage. It also includes acknowledgment of the woman's children by the man concerned, or the married appearance of the wife (the wearing of conch-shell bangles or the use of vermilion on her forehead, customary among married Hindu women).<sup>63</sup>

### 3.4 Special Marriage Act, 1872

The Special Marriage Act (SMA) enables individuals to contract marriages across communities, and under a common civil law.

**3.4.1 Requirements of a Valid Marriage:** Under the SMA, the requirements of a valid marriage are as follows:

- a) Notice in writing by one party to the Special Marriage Registrar within the district where the party has resided for at least fourteen days;
- b) A declaration on a prescribed form by the parties stating that they accept each other as husband/wife, signed by the parties and three witnesses (and, if any party is aged below 21 years, their father or guardian);
- c) The presence of the Registrar and three witnesses;
- d) The full and free consent of both parties; and
- e) The capacity of the parties to marry, the relevant criteria concerning age, gender, mental capacity, religion, relationship to each other and marital status:
  - Age: Under the SMA, the minimum age of marriage is eighteen for a male, and fourteen if female; however, if any party is aged below 21, they must obtain the prior consent of their father or guardian;
  - Gender: One party must be male and another female;
  - Mental Capacity: Both parties must be of sound mind;
  - Religion: Either party must be a Hindu, Sikh, Buddhist or Jain, or a person who does not profess the Christian, Hindu, Muslim, Jewish, Buddhist, Sikh or Jain faiths (thus including persons of these faiths who renounce their respective religions);<sup>64</sup>

<sup>63</sup> *Utpal Kanti Das v Monju Rani Das* 50 DLR (1998) (AD) 47 at 50 para 18.

<sup>64</sup> See *Muhammad Mustafizur Rahman Khan v Rina Khan* 3 PLD 1967 Dacca 652 (marriage declared null and void where parties later deny having renounced their Muslim and Christian faiths at time of marriage).

- Prohibited Degrees: The parties must not be related to each other within prohibited degrees. <sup>65</sup>
- Marital Status: Neither party may have a previous subsisting marriage. <sup>66</sup>

A marriage may be solemnized after fourteen days notice to the Registrar. However, if anyone objects to the marriage, and files suit in any Court, then solemnisation can take place only after a favourable decision from the Court. <sup>67</sup>

**3.4.2 Marriage of Minors:** Under the SMA, the minimum age for marriage is 18 for males and fourteen for females. However, as noted above, any person aged less than 21 may marry only with the consent of their father or guardian.

**3.4.3 Registration of Marriage:** Under the SMA, registration of marriages is compulsory. The parties and witnesses are required to sign a prescribed form which is to be completed and signed by the Registrar. <sup>68</sup>

**3.4.4 Proof of Marriage:** The marriage registration certificate is sufficient proof of the marriage. Any person may inspect an entry in the Register Book or obtain a certified extract of the same on application and payment of a prescribed fee. <sup>69</sup>

## 4. CONSTITUTIONAL GUARANTEES AND REMEDIES

### 4.1 Fundamental Rights and Principles of State Policy

The Constitution of Bangladesh guarantees a range of fundamental rights relevant in cases of interference with choice in marriage. Specifically, it guarantees the right of all persons (not only citizens) to be treated in accordance with law (Art. 31), to life and liberty (Art. 32). and to safeguards on arrest and detention (Art. 33) speedy trial (Art. 35) and protection from cruel, inhuman and degrading treatment or punishment (Art. 35(5)). It also guarantees the rights of all citizens to equality before the law (Art. 27), equality of men and women in the state and public sphere (Art. 28(2)), <sup>70</sup> and for the adoption of special measures by the state for advancement of women and children (Art. 28(4)); and prohibits discrimination on the grounds of race, religion, caste or sex (Art. 28). It further guarantees the rights of citizens to freedom of movement (Art. 36) and protection of the home (Art. 43).

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<sup>65</sup> Section 2, SMA.

<sup>66</sup> The law allows the Muslim man to marry polygamously but constrains this right by requiring him to comply with certain procedures (Section 6, MFLO). See also *Makbul Ali v Monwara Begum* 39 DLR(1987)(HCD) 181, *Ayesha Sultana v Shahjahan Ali* 38 DLR 140, and *Abul Basher v Nurun Nabi* 39 DLR (1987) (HCD) 333.

<sup>67</sup> Sections 7 and 8, SMA.

<sup>68</sup> Section 13, SMA.

<sup>69</sup> Section 14, SMA.

<sup>70</sup> While there has as yet been no clear judicial decision or observation on whether forced marriage involves violations of fundamental rights, the High Court noted ‘the mutuality and reciprocity between the respective rights of the husband and wife’ (in *Nelly Zaman v Giasuddin Khan* 34 DLR (1982)(HCD) 221 while holding a husband’s unilateral plea of forcible restitution of conjugal rights ‘to be violative of accepted State and Public Principle and Policy’ by reference to Article 28(2).

The Constitution also provides for Fundamental Principles of State Policy, which though not directly enforceable by the Courts, may act as a guide to interpretation of the law.<sup>71</sup> These include the principles of economic and social justice, participation of women in all spheres of national life and respect for the dignity and worth of human persons.<sup>72</sup>

The right to enforce fundamental rights by way of a writ petition filed before the High Court Division of the Supreme Court under Article 102(1) of the Constitution is itself a fundamental right (Art.44(1)). Further, specific directions including habeas corpus (to ascertain if a person is being held in custody without lawful authority or in an unlawful manner) may be obtained by a writ petition filed under Article 102(2) of the Constitution.

#### **Fundamental Rights Relevant to the Right to Marry**

- Article 27: All citizens are equal before the law and are entitled to equal protection of the law.
- Article 28: (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.  
(2) Women shall have equal rights with men in all spheres of the State and of public life...  
(4) Nothing in this article shall prevent the State from making special provision in favour of women and children or for the advancement of any backward section of citizens.
- Article 31: To enjoy the protection of law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.
- Article 32: No person shall be deprived of life or personal liberty save in accordance with law.

#### **4. 2 Constitutional petitions under Article 102**

Petitions may be filed before the High Court Division under Article 102 of the Constitution:

- seeking any appropriate direction or order for enforcement of fundamental rights (Article 102 (1)).
- seeking directions in the nature of *mandamus*, *prohibition* and *certiorari* upon persons performing functions in connection with affairs of the Republic or local authorities to do what they are required by law to do, or to refrain from taking certain action, or declaring that any act or proceeding is without lawful authority and of no legal effect or challenging the authority of any person to hold any office (Article 102(2) (a) and b(ii)).
- seeking directions in the nature of habeas corpus, namely that any person in private or state custody be brought before it so that it can satisfy itself that such

<sup>71</sup> Art. 8, Constitution; *Kudrat-E- Elahi v Bangladesh* 44 DLR(1992) (AD)319.

<sup>72</sup> See Art. 8, 10 and 11, Constitution of Bangladesh.

person is not being held ‘without lawful authority or in an unlawful manner’ (Article 102(2)(b)(i)).

It is important to note certain restrictions on filing such writs. First, writs under Article 102(1) and 102(2) (a) may only be moved on behalf of ‘a person aggrieved’. In contrast writs for habeas corpus under Article 102(2) (b)(i) may be moved by any person. The Courts have allowed *habeas corpus* petitions to be brought by organisations.<sup>73</sup> Second, orders under Article 102(2) may only be issued where the Court is satisfied that no other ‘equally adequate or efficacious’ remedy is provided by law. So the Court may pass such orders in habeas corpus petitions where it is satisfied that other remedies, for example for search under the Code of Criminal Procedure (see below) are not ‘equally adequate or efficacious’.

Exceptionally, the Courts have also directed that state agencies pay compensation, or take disciplinary action against offending officers, where violations of fundamental rights have been established. It remains to be seen whether such orders may be obtained where state authorities are found to have violated the right to life or liberty by failing to prevent a forced marriage or interfering with a marriage of choice.

The High Court also asked governmental authorities including the Ministry of Law, Justice and Parliamentary Affairs and the Ministry of Women and Children’s Affairs to explain why Nikah Registrars should not be directed to register marriages on the basis of national identity cards and to digitize the marriage and divorce registration systems to prevent child marriages and polygamy.<sup>74</sup>

### 4.3 Habeas Corpus Petitions

A *habeas corpus* petition under Art. 102 of the Constitution enables the Court to determine whether any person is being held in custody without lawful authority or in an unlawful manner (whether by private persons or state officials), by ordering their production in court, recording their statement and inquiring into the circumstances in which they are being held.<sup>75</sup>

Such petitions have been used to release women who have been confined in order to be forced into marriage,<sup>76</sup> placed in ‘safe custody’<sup>77</sup> after having married without their family’s knowledge or approval,<sup>78</sup> or forced into marriage and being compelled to live

<sup>73</sup> *Rokeya Kabir v Bangladesh* 52 DLR(200)(HCD) 234 (re a choice marriage case); *Ayesha Khanam v Major Sabbir Ahmed* 13 BLD (1993) (HCD) 186.

<sup>74</sup> *BNWLA v Bangladesh*, Writ Petition No. 4781 of 2012.

<sup>75</sup> Such petitions may be brought against private persons: *ibid* and *Abdul Jalil v Sharon Laily Begum Jalil* 50 DLR (1998) (AD) 55.

<sup>76</sup> *Gwenda Mary Williams v Ansar Miah and others* 25 BLD (HCD) 2005 at 119; see ASK et al, Home Office Working Group: Information Gathering Exercise on Forced Marriages at [www.soas.ac.uk/honourcrimes/FMsubmission.htm](http://www.soas.ac.uk/honourcrimes/FMsubmission.htm).

<sup>77</sup> Safe custody covers detention in jails, certified institutes, government approved homes and shelters. Orders for safe custody may be made under Section 31 of the Violence Against Women Act and Sections 55 & 56 of the Children Act. For further discussion see Sara Hossain ‘Wayward Girls’, *supra*.

<sup>78</sup> *Rehana Begum v. Bangladesh* 50 DLR (1998)(HCD) 557.

with the ‘husband’ against their will.<sup>79</sup>

Such petitions may be filed as a writ petition under Article 102 of the Constitution, as noted above, or more commonly, as a criminal miscellaneous petition under Section 491 of the Code of Criminal Procedure (CrPC) 1898 (see section 4.3.1 below).

**4.3.1 Habeas corpus under Art. 102 of the Constitution or Sec. 491 CrPC?** There is little difference between these two procedures. In practice, the use of Section 491 CrPC petitions in matters of private custody appears to be more frequent, possibly due to the relatively lower costs involved, and the familiarity of practitioners with the procedures.

However, writ (constitutional) petitions may be preferred as they potentially allow for a wider range of directions and orders to be made by the Court, and also impose a duty on the Court to grant relief. To date the only relief provided in such petitions concerning detention by private parties has been to set at liberty the detinue. But a wider range of remedies may be for example for compensation or disciplinary action against any state officials involved, as noted above.<sup>80</sup> Arguably, directions could be sought to state authorities to pay compensation to individuals subjected to detention or ill-treatment in the course of ‘judicial custody’ found to be without lawful authority. Other remedies could be sought based on the experience of neighbouring jurisdictions (For example, Pakistan Courts have given directions on writ petitions concerning forced marriage to quash false prosecutions involving the petitioner, to the police to stop harassing the petitioner, to Nikah Registrars not to register a marriage where consent is allegedly obtained by force or fraud,<sup>81</sup> and to take disciplinary action against responsible officials.

**4.3.2. Why is a habeas corpus petition the most appropriate legal remedy?**

In cases regarding interference with choice in marriage, a *habeas corpus* petition is particularly useful as it provides a means to ensure recovery of a person from confinement by ensuring that they are produced before the Court, and also enables the Court to examine them in person and confirm the facts and circumstances involved.

For example, in cases where a woman/girl has been held for, or following, a forced marriage, it is often difficult to locate her to obtain information regarding her marital status and whether she is being confined against her will, particularly where she is unable to leave her family’s home. In other cases, she may be held in ‘judicial custody’ following allegations by her family that she has been abducted for forced marriage and have little access to any independent visitor. In these situations, a habeas corpus petition may be used to obtain an order for the allegedly confined woman to be produced before the Court.

<sup>79</sup> *Kazi Obaidul Huq v State* 51 DLR (1999) 25.

<sup>80</sup> *Bilkis Akhter v Secretary Ministry of Home Affairs* 2 BLC (1997) (HCD) 257; *Shahnawaz v Bangladesh* 50 DLR(1998) (HCD) 633 and *Mohammad Ali v Bangladesh* 23 BLD (2003) (HCD) 389 (re unlawful search).

<sup>81</sup> Since Nikah Registrars are public servants (see *Kazi Obaidul Haque v State* 51 DLR (1999)(HCD) 25 and have a duty to satisfy themselves that a person has given their consent to marriage, they may be held accountable for their failure to do so.

Once she is produced, the Court can determine the circumstances of her ‘illegal confinement’ – whether with her husband, or in ‘judicial custody’ -- primarily by recording her statement. If any persons (usually the husband, parents or any other family members) claim that she has already been married, the Court may test that claim by requiring submission of supporting documents such as a *kabin-nama*, along with affidavits of any witnesses and the Nikah Registrar.<sup>82</sup> The detinue can respond to such a claim: if she states clearly that she is being held against her will, irrespective of whether there was a marriage or not, and she is an adult, the Court will invariably direct her release. This process is likely to clarify key issues, which will ultimately determine the outcome of the case, such as the

- age of the woman/girl
- her ‘marital status’ ,
- the name and identity of the person(s) holding her in their custody and the legitimacy of their claim to do so.

Based on these factors the Court will then determine whether she is an adult and accordingly set her at liberty or, if she is found to be a minor, give her custody to her parents or if she refuses to go to them, direct that she remain in judicial custody or some other form of protective custody for a specified period.

In cases where the detinue claims to be married, and there is some uncertainty regarding her age, the High Court will not make a final determination on this issue, but only make a prima facie determination regarding the claim of marriage and then dispose of the petition, allowing the parties to resolve the factual issues on the basis of evidence in the Court below.

**4.3.3 Petitioner:** ‘Any person’ may file a habeas corpus petition under Article 102(2) of the Constitution. This includes the detained person themselves, or any relation, friend, or other concerned person or organisation (even someone outside the country) who is aware that that person is being confined or held against their will. The Court may scrutinise the standing of the petitioner.

In practice, the Court is concerned that the petitioner should be someone who knows the detinue or is familiar with the facts and circumstances of the matter. In the case of detenues alleged to be minors, the petitioner is usually their lawful guardian or someone concerned with their welfare.<sup>83</sup> In marriage cases, the petitioner is often the detained woman herself, or, if she is confined and not able to approach the Court, someone claiming to act on her behalf, including a relative or friend, or legal aid or women’s rights organization, or even the lawfully married husband. In many such cases, the parents may

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<sup>82</sup> It is important to remember that in the writ jurisdiction under Art. 102, the Court cannot enter into any detailed examination of questions of fact, and will generally only consider materials available on affidavit.

<sup>83</sup> *Azizul Huq v. East Pakistan* 3 PLD (1968) (Dac) pg. 728; see also Mahmudul Islam, *Constitutional Law of Bangladesh*, Mullick Brothers: Dhaka, 2012 (3<sup>rd</sup> Edn), at 762. In Section 491 petitions, the Court has held that an application cannot be rejected on the ground of standing if full particulars regarding the detinue and detention are there: *Zilaluddin v Bangladesh* (2002) 54 DLR 625. In contrast, see a recent decision holding that standing is more restricted under Article 102 (which goes against many earlier decisions), *Abdul Majid Sarker v State* 55 DLR (2003) 1.

also file petitions – at cross purposes to the detinue -- claiming the detinue is a minor and should be placed in their custody, rather than set at liberty (If the petitioner is outside Bangladesh, s/he may authorize any individual (usually a lawyer or representative of an NGO) to file a petition on her behalf by issuing a power of attorney for this purpose.)<sup>84</sup>

There are instances where the Court has passed orders for production in court and release of any person either *suo motu* (of its own motion) or on the basis of a letter.<sup>85</sup> Such orders have been passed in habeas corpus petitions relating to state detention, and could arguably also be passed in cases of private detention for forced marriage.

**4.3.4 Respondents:** In cases regarding choice in marriage, the respondents to the petition will be the persons allegedly detaining the victim against her will, usually family members of the victim, including the father, mother or other relatives. If the detinue is held in ‘judicial custody’ in any government or private shelter home, or any other institution, the authorities concerned could also be made respondents.<sup>86</sup>

**4.3.5 Forum:** A writ for enforcement of fundamental rights, or a *habeas corpus* petition under Article 102 of the Constitution (and a petition for directions in the nature of *habeas corpus* under Section 491 CrPC may be filed before the respective bench of the High Court. If the petition is under Article 102(1) and alleges violation of fundamental rights, then the respondents must include public authorities, but in petitions under Article 102(2) in contrast the respondents may be only private parties.

**4.3.6. Jurisdiction:** Under Article 102 of the Constitution, the Court’s jurisdiction extends to situations where a person is held in custody ‘without lawful authority or in an unlawful manner’ irrespective of whether it is the custody of a private person or a state authority. There is no requirement in such a case to exhaust other remedies (for example, before the Family Court or any criminal court) as these are not considered to be ‘equally adequate or efficacious’ given the prolonged process that they involve.<sup>87</sup>

**4.3.7. Supporting Documentation:** The petition is in the form of a sworn affidavit setting out the petitioner’s own interest, the allegations that a person is being held in public or

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<sup>84</sup> See *Gwenda Mary Williams*, supra. In order to be used in the Bangladesh Courts, a power of attorney executed outside Bangladesh needs to be notarized, and attested by the Bangladesh High Commission or Embassy in that country: see Section 2, Powers of Attorney Act, 1882, as amended in 2012.

<sup>85</sup> *State v. DC, Satkhira (ex parte Nazrul Islam)*, 45 DLR 643 (orders to release a minor boy held in chains in jail, on the basis of a news report); *Dr. Faustina Pereira v. Bangladesh* 53 DLR (2001) 414 (orders to release prisoners held in jail beyond the terms of their sentence, following the Chief Justice’s constitution of a court to hear the allegations raised in a letter sent to him by a lawyer).

<sup>86</sup> See *Rehana Begum v. Bangladesh* 50 DLR 557 (respondents included Ministry of Home Affairs, in case of detention of an adult woman, a British national, who had married without her family’s consent and been placed in ‘safe’ custody in jail, on the basis of their complaint that she had been abducted).

<sup>87</sup> *Ayesha Khanam v Major Sabbir Ahmed* 46 DLR (1994) (HCD) 399. *Abdul Jalil v Sharon Laily Begum Jalil* 50 DLR (1998) (AD) 55.

private custody either without lawful authority or in an unlawful manner, and explaining the facts and circumstances.<sup>88</sup>

The petition should annex or incorporate reference to supporting documents such as:<sup>89</sup>

- any communication (letter, text of SMS or email) from the detained person or others (friends, relatives, teachers, social workers) concerning the allegations of her confinement /detention;
- any previous report by the detained person or others against those allegedly confining her to the police or others, or any complaints (to police or other authorities) noting her fear of abduction or forced marriage;
- any documents indicating that the victim is of age (*sui juris*), such as school certificates, marriage certificates, medical certificates or passport pages;
- where the detained person is already married, a marriage registration certificate or any other evidence of the marriage;
- (of relevance in cases concerning dual nationals or residents abroad) any evidence of her other nationality/residence abroad, and a letter from the detained person requesting a friend, a teacher, an employer, or a government official to take action for her return on her failure to return to her country of residence within a specified period;
- If the victim is detained in ‘safe’ custody, copies of related orders of the lower Courts.

Determining Age: A key issue for determination is the age of the alleged detenu. In making such a determination the High Court must first make a prima facie finding to the age of the girl. It may take into account various documentary and other evidence, including birth certificates, school certificates, medical certificates, statements by her parent, the appearance and other physical characteristics of the detenu and the results of ossification tests etc. It may reject expert opinion--even medical opinion--in preference of other evidence.<sup>90</sup> The apex court has noted that preference should be given to the statement of a father supported by a school certificate, including over medical certificates or a radiologist’s opinion or a sworn statement by the victim.<sup>91</sup> In some cases, even the superior courts have given little credence to the detenu’s statements.<sup>92</sup> The age of the detenu is to be determined according to the date of appearance before the Court and not the date of occurrence.<sup>93</sup>

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<sup>88</sup> The affidavit must be sworn before the Commissioner of Affidavits/Oaths of the Supreme Court and stamp duty and court fees must be paid on the application.

<sup>89</sup> These should be original documents or certified copies (particularly of court orders). Photocopies of documents will only be accepted if verified to be true copies and with prior permission of the Court. Filing photocopied documents may cause unnecessary delay.

<sup>90</sup> AIR 1916 PC 242

<sup>91</sup> See 10 BLT (AD) 2002 40, and *Wahed Ali Dewan v The State* 46 DLR(1994) (AD) 10.

<sup>92</sup> See *Khairunnessa v Illy Begum* 48 DLR(1996) (AD) 67, where the court said, without any basis for such comments, that giving credit to a girl’s statement that she is a major would amount to assuming that the mother is her daughter’s enemy and falsely claiming her to be a minor, and that the girl’s welfare would be safer and better in her own hands than her mother’s.

<sup>93</sup> *Nurunahar Khatun v State* 46 DLR (1994) (HCD)112; incidentally, the Court also noted here that the ‘parents’ affidavit re age should be taken with a grain of salt, given that they are highly interested persons’.

In a habeas corpus petition, the determination of age is done purely in order to make a decision as to custody, and will only be an interim decision, subject to correction by the trial court (hearing the case on kidnapping, rape etc.) on taking evidence.<sup>94</sup>

#### 4.3.8 Court proceedings

**a) Admission:** The Court usually treats habeas corpus petitions as urgent matters, and gives them priority over other cases and may allow a petition to be filed and moved on the same day if required (though this is very rare), with a request being made for a supplementary list to be issued if required

**b) Interim Orders:** Usually, the Court will on hearing the petitioner’s counsel, direct the respondents to show cause usually within one to two weeks why they should not be found to be detaining the victim without lawful authority or in an unlawful manner. It will also issue interim orders upon them to produce the victim before the Court on a specified date, or each date of hearing, and to enter appearance themselves.

The Court’s messenger will then serve this order on the respondents. In emergency situations, the petitioner’s lawyer may ask the Court to fix an earlier date of hearing, usually not less than a week, and offer to pay for the costs of a special messenger to ensure that the order is served without delay.

The petitioner may, with the Court’s permission, accompany the Court’s messenger, in order to help identify the detained person and the location where they are held.

The period between the filing of a petition and recovery of the detained person is potentially a dangerous one, especially if the respondent tries to frustrate the Court proceedings by moving her from place to place to evade service of notice. In such cases the Court may also issue orders on the police to ensure recovery of the detenu.

If any person obstructs the Court’s messenger or fails to comply with the Court’s notice for the production of the confined person, the Court may issue a notice of contempt upon them for obstructing its process.<sup>95</sup>

**Production in Court:** When the detained person is produced before the Court on the appointed date, the Court may question her to ascertain the circumstances in which she has been held, her age, her wishes. It may give her some time to make up her mind by allowing her to sit alone for some time. It may also hear arguments on behalf of the lawyers for both parties. The Court may, at its own discretion, or if requested, conduct this stage of the hearing within the judge’s chambers, in the presence of only the parties and their respective lawyers.<sup>96</sup>

**c) The Age Factor:** The age of the detained person, together with her marital status, are key determinants of the outcome of *habeas corpus* petitions in cases concerning

<sup>94</sup> *Khairunnessa v Illy Begum*, supra.

<sup>95</sup> The consequences of being held in contempt can be imprisonment or a fine. The High Court and Appellate Division have inherent powers to make orders for investigation or punishment of contempt of either Court (Art.108, Constitution).

<sup>96</sup> See *Gwenda Mary Williams*, supra.

marriages of choice. The interplay of personal laws on marriage and guardianship together with criminal laws on kidnapping and abduction, as well as the laws on majority are particularly relevant here. So, although various personal laws provide that the age of majority for marriage below 18, the age of majority is otherwise 18, and the Courts have powers under various laws to detain persons aged under 18 in ‘judicial’ custody. The Courts may so detain any child aged below 18 and considered to be the victim of an offence,<sup>97</sup> or any female child aged under sixteen and allegedly ‘abducted or unlawfully detained for an unlawful purpose’.<sup>98</sup>

Consequently, deliberate abuse of the criminal provisions<sup>99</sup> by interested parties (often the families of the girls involved) can cause complications. In many *habeas corpus* cases which concern the issue of the right to marry at their core, there are conflicting claims by the woman (that she is a major and lawfully married of her own choice) and her parents (that she is a minor and has been abducted/kidnapped for forced marriage or raped). In this context the girl /young woman may find herself apprehended by the police and placed in ‘judicial custody’.<sup>100</sup> She or someone on her behalf may then seek her release from judicial or ‘safe’ custody by way of filing a *habeas corpus* petition. At the same time her parents or other family members may also seek her custody by way of a *habeas corpus* petition.

The judgments discussed below demonstrate certain trends. Where the detained person is an adult woman, aged 18 and over, the Courts have always held that she cannot be detained or placed in anyone’s custody against her will for any purpose, including marriage, and have set her at liberty.

However, the situation regarding girls aged below 18 is more complicated. Where the detained person is a married female aged sixteen and over, the Appellate Division has held in a line of cases that a person is only *sui juris* at 18 for the purpose of determining her custody, and have therefore held that girls aged 16-18 may not be set at liberty but only handed over from judicial custody into the custody of their parents. Earlier, the High Court had in some cases found that a woman aged over sixteen is entitled to contract a marriage of her own free will – even when the parents have opposed such a marriage — and set her at liberty to go with whomsoever she chose.<sup>101</sup> In contrast, in the case of girls aged under sixteen, the Courts have almost always returned them to their parents’ custody, even when they claim to be married.<sup>102</sup>

*i) Woman aged 18+:* The apex court has consistently held that a person who is aged 18 and over is *sui juris* (legally competent) and therefore must be set at liberty in any

<sup>97</sup> Section 55, the Children Act 1974. Under Section 2 of this Act, a child is a person aged under sixteen.

<sup>98</sup> Section 552, Code of Criminal Procedure 1898.

<sup>99</sup> In particular see sections 361, 366 and 366A of the Penal Code which are commonly deployed in such cases by parents intent on breaking up marriages of choice; cases are also filed in such cases under the Violence against Women Act.

<sup>100</sup> Judicial custody has been described as having the ‘complexion of the custody of a guardian’ and of ‘giving the girl a chance to make up her mind’: see 42 DLR 79; 42 DLR 297. See also *Jahanara Begum*, 15 DLR (1963) (DAC) 148.

<sup>101</sup> *Ananda Mohan v State* 35 DLR (1983) (HCD) 315 (question of custody loses relevance where the girl concerned is found to be over 18 years of age)

<sup>102</sup> *Siraj Mal & Ors. v. State* 45 DLR (1993) (HCD) 688 (minor’s consent to marriage is no consent at all in the eyes of the law)

application in the nature of habeas corpus under section 491 CrPC or Article 102 of the Constitution.<sup>103</sup> In a case concerning a British/Bangladeshi woman aged 19 years who was allegedly confined by her family for purposes of forced marriage, the Court made no finding regarding these allegations, noting only that she had an ‘apprehension of violence’, but nevertheless directed that she return to the UK with her parents.<sup>104</sup> More recently, it set at liberty an adult woman, aged 32, resident in the UK, who was allegedly confined for purposes of forced marriage.<sup>105</sup> Additionally, a woman aged 18 or above may not even be confined in judicial custody and such confinement is contrary to the constitutionally guaranteed right to freedom of personal liberty.<sup>106</sup>

In another case concerning the suspected forced marriage of an adult British/Bangladeshi woman, the High Court in UK exercised its inherent jurisdiction to make orders enabling the plaintiff to allow the facts of her feared confinement to be established. Upon service with the bench orders her relatives communicated with the plaintiff and her family in Bangladesh, due to which she was quite promptly interviewed in Dhaka by a British consular officer. Consequently, the plaintiff returned to the UK and conveyed her wish that the proceedings not be continued, maintaining that she had no need of the court's intervention on her behalf. Accordingly, the proceedings were discontinued.<sup>107</sup>

*ii) Girl 16-18 and married:* There are conflicting decisions on whether a girl aged 16-18 allegedly detained against her will may be set at liberty or not.

The Appellate Division has held that detaining in safe custody a girl aged 16-18 who is neither an accused nor a witness in a case, amounts to holding her illegally and/or in an improper manner. In such circumstances, it has directed that she, being a minor, that is under 18, be sent to the custody of her guardians/parents and stated that any reservations on her part regarding going to her father are immaterial.<sup>108</sup>

These cases contrast with an earlier line of decisions, where the High Court had found prima facie evidence that a girl aged over sixteen could not be held in judicial custody and set her at liberty, subject to appearance before the trial court.<sup>109</sup>

<sup>103</sup> 55 DLR AD 1.

<sup>104</sup> *Gwenda Mary Williams*, supra.

<sup>105</sup> *Dr. Shipra Chowdhury and another v Md Joynal Abedin* 29 BLD(2009)(HCD) 183.

<sup>106</sup> *Jesmin Nahar v State & Ors.* 55 DLR (2003) (AD) 48.

<sup>107</sup> *Re SK (Proposed Plaintiff) (An adult by way of her litigation friend)* [2005] 2 FLR 230.

<sup>108</sup> *Arun Karmakar v State* 10 BLT (2002) (AD) 40 (girl aged 17½ - 18 ½); *Sree Mangal Chandra Nandi v Bangladesh* 17 BLD(1997) (AD) 33 (under 18 held to be a minor); *Jharna Rani Saha v Khondoker Zayedul Hoque alias Jahangir and another* 52 DLR(200) (AD) 66 per ATM Afzal CJ (girl aged 17-18); *Sumati Begum v Rafiqueullah* 44 DLR(1992) (HCD) 500 (custody to mother where girl 16-18); *Sukhendra Chandra Das v Bangladesh* 42 DLR(1990) (HCD) 79 (17).

<sup>109</sup> *Tarapada Sarkar v State* 49 DLR (1997) (HCD) 360; *Ananda Mohan Banerjee on behalf of Priti Banerjee v State* 35 DLR (1983)(HCD) 315 at para 5. *Fatema Begum @ Urmila Rani v Gageswar Nath and the State* 9 BLD HC 469; *Manindra Kumar Malakar* 43 DLR(1991) (HCD) 71 (victim aged over 16 cannot be held against her will in relation to allegation under s366A BPC); *Jahanara Begum alias Josna Rani Saha v The State* 15 DLR (1963) (DACCA) 148. In *Badiur Rahman Chowdhury v Nazrul Islam* 16 BLD AD (1996) 263, the victim aged 16-18 was set at liberty, on a finding that she may be pregnant and had lived with the accused for six months, but it was noted that ‘[the] court should give more importance to the words of the parents than those of a wayward daughter who is currently enamoured’.

In a pre-independence case, the then Dhaka High Court directed the release of a 16 year old girl, on bail pending disposal of the criminal case in which she was allegedly a victim. It observed that no Court had any power to detain a woman aged sixteen plus against her will, given that she is not an accused and is at most a witness, although it could do so for minors exercising its inherent discretion. It described safe custody as having the ‘complexion of guardianship’ and being intended to isolate the person from ‘certain influences’.<sup>110</sup>

In a few cases, the Court had directed that a girl in such circumstances who refused to go with her parents must continue to be held in judicial custody until she became 18 and *sui juris*, i.e. able to decide for herself.<sup>111</sup> In discussing its reasons, the Court has variously referred to the importance of the woman needing to ‘develop her independent opinion’, it apparently being assumed that her choice to marry someone other than the person selected by her family cannot have been made on this basis.<sup>112</sup>

iii) Girl aged under sixteen: Where the girl is aged under sixteen, the Court is likely to give great weight to her parents’ claim to her custody. It will usually not set her at liberty, firstly, because of her age and, secondly, because of the view that her welfare is best served by being with her parents. Generally, where a girl in safe custody is found prima facie to be aged below sixteen, then the Court directs that, in the absence of a neutral care home, she should be handed over to her parents’ or father’s custody as they are considered her ‘best well-wisher’ and her refusal to go ‘is not at all a material consideration’.<sup>113</sup> Arguably, it may be possible to seek a direction that a girl under sixteen who has a real apprehension of violence or abuse at the hands of her family instead be held in a shelter home for her own safety. The Court considered such an averment in the case of *Nirmal Chandra Shaha v the State & Ors.*<sup>114</sup> and stated that given the real likelihood of the minor girl being subjected to physical and verbal abuse by her family, the Court would have allowed for the minor girl to be placed in the custody of an NGO. However, as the minor girl stated her willingness to go back to her parents such a decision has been rendered unnecessary.

However, the Court may not return her to her parents’ custody if she makes a statement to the effect that she has apprehensions regarding the appropriateness of her remaining with them. In such situations, the Court has on occasion allowed the girl to go with relatives or, exceptionally, her lawyer, whom it considers to be genuinely interested in

<sup>110</sup> *Jahanara Begum alias Jotsna Rani Saha v State and Snandra Nath Saha*, 15 DLR (1963) 39 in Sara Hossain, ‘Wayward Girls’, *supra*.

<sup>111</sup> *Hasina Begum v State and another* 48 DLR (1996)(HCD) 300 per Md. Mozzamel Hoque J.

<sup>112</sup> *Dr Kazi Mozammel Hoque v State* 45 DLR (1995) (HCD) 197; *Babul Miah v State* 30 DLR (1978) (HCD) 187. Sara Hossain, ‘Wayward Girls’, *supra*.

<sup>113</sup> *Abdul Majid Sarkar v State* 55 DLR (2003)(AD)1 per Mahmudul Amin Choudhury J. at para 14 (victim found to be 15 on prima facie determination of her age by entry in municipal birth register); *Bashu Dev Chatterjee v Umme Salma and others* 51 DLR (1999) (AD) 238 per ATM Afzal CJ. *Prafullah Kamal Bhattacharya v Bangladesh* 28 DLR(1976) (HCD) 123 at para 15; *Krishna Pada Dutta v Bangladesh* 42 DLR (1990) (HCD) 297 (14 years).

<sup>114</sup> 57 BLD (HCD) (2010) 30 584.

her welfare. In some cases it has placed her for a certain period in a government-run shelter home or any other refuge to which she is willing to go.<sup>115</sup>

In this context it is useful to consider the case of an 11 year old married by her mother and step-father to a 20 year old in Bangladesh and left behind there whilst the rest of the family returned to the UK. SB was made a ward of court by Bennett J on 29 March 2007, following which decision the Forced Marriage Unit in the FCO made arrangements for her return to the UK.

d) *Costs*: The costs of filing a petition vary, depending on the lawyers. While legal aid from the National Legal Services Authority has not as yet been used to support any *habeas corpus* petitions, legal aid from NGOs, or pro bono services from lawyers may be available.

**4.3.9 Outcome of a habeas corpus petition:** In a *habeas corpus* petition, the respondents must establish that they are not detaining the person ‘without lawful authority’ or in an ‘unlawful manner’ (under Art. 102, Constitution) or ‘illegally or improperly’ (under Section 491 CrPC). After examining the detainee, and hearing the lawyers, if the Court considers that the detention has been either ‘without lawful authority’ or ‘in an unlawful manner’ it may direct that the person detained be set at liberty immediately, from the Courtroom itself. If the detained person is a minor, the Court may direct that s/he be placed in the custody of her parents or of a protective home (run by the government or by an NGO).

Any private individual or public authority who fails to comply with High Court orders may be found to be in contempt of court, either on a petition by any person, or *suo motu* (see above). In cases of state officials, eg police officers, the Court has directed that disciplinary action be taken (in cases of state custody).

Although compensation is not usually sought for or granted in *habeas corpus* petitions, the Court has made such awards exceptionally where it has found a violation of fundamental rights; however it has done so only in cases of state detention.

#### **4.3.10 Appeal:**

If a petition under Article 102 of the Constitution (or Section 491 CrPC) is dismissed by the High Court, an appeal may lie to the Appellate Division, if the High Court grants a certificate or if the Appellate Division grants leave (permission) to appeal.

## **5. CIVIL REMEDIES**

Matrimonial remedies such as annulments, declarations that a marriage is void, divorce or separation are available in cases where a forced marriage has taken place, depending on the facts and circumstances, and the personal law applicable. While the law allows injunctions to be sought to prevent a forced or child marriage and also allows claims for compensation for any loss or injury in the course or as a result of forced marriage, in

<sup>115</sup> *Manindra Kumar Malakar v Ministry of Home Affairs* 43 DLR(1991) (HCD) 71. *Sumati Begum v Rafiqullah* 44 DLR (1992) (HCD) 500, and *Rokeya Kabir v State* 52 DLR (2000) (HCD) 234.

practice the only civil remedies used in Bangladesh in such cases are divorce or separation.

## 5.1. Family Law

**5.1.1 Muslim law:** In cases of forced marriage, although a declaration that the marriage is void is the most appropriate remedy, it is rarely used, and divorce is more commonly sought. An out of court divorce may be possible, otherwise suits for a declaration that a marriage is void, or for judicial divorce may be brought before the Family Court.<sup>116</sup> Such proceedings are relatively inexpensive but may be lengthy, extending over several years with appeals in certain circumstances to the District Court and then to two levels of the Supreme Court.

### a) Declaration that ‘marriage’ is void

The Family Court may grant a declaration that a marriage is void, if it did not take place as alleged, or was contracted by force or fraud, but there are no reports of such declarations having been sought.

### b) Divorce

Under Muslim Law as enforced in Bangladesh, a marriage may be dissolved unilaterally by the issuance of divorce by the husband or the wife (if she has been ‘delegated’ the right to do so) or through mutual agreement or by court decree. In each case (except mutual agreement divorces), there must be compliance with the procedures provided under Section 7 MFLO.<sup>117</sup>

#### Extra-Judicial Divorce may be effected:-

- By a man unilaterally, by issuing a verbal or written *talaq* (unilateral termination of marriage) and on compliance with Section 7 of the MFLO;
- By a woman unilaterally if she is delegated the right of *talaq* (*talaq e tawfiz* which may be conditional or unconditional) by her husband in the *nikahnama* (at clause 18 in the standard form) or any subsequent agreement, by issuing the *talaq* orally or in writing.<sup>118</sup> The divorce will be effective on compliance with the Section 7 MLFO procedure, ie by notice to the concerned authority. It must also be proved that delegation was made by registered instrument, that is a document registered under the Registration Act or an attested copy of an entry in the Marriage Register.<sup>119</sup>
- By both parties through *mubarat* (mutual agreement).<sup>120</sup>

<sup>116</sup> Section 5, Family Courts Ordinance, 1985.

<sup>117</sup> This requires that a notice be served by the person issuing the divorce on the arbitration council with a copy to the other party. The notice takes effect within 90 days of its receipt unless the parties reconcile in the interim.

<sup>118</sup> Section 8, MFLO.

<sup>119</sup> Section 6(3), MMDRA; see also *Atiqul Huque Chowdhury v Shahana Rahim* 47 DLR (1995) (HCD) 301.

<sup>120</sup> Dissolution of Muslim marriage through mutual consent of the spouses on mutually agreed terms and conditions. The offer for such dissolution can be initiated by either spouse.

*Judicial Divorce* by way of a decree of dissolution of marriage from a Family Court<sup>121</sup> may be sought by a woman married under Muslim law on the basis of:

- *Khula* if she can establish irretrievable breakdown of the marriage and if she agrees to forego any claims against her husband including for dower;<sup>122</sup>
- *Under any ground provided for in the DMMA, 1939*, the most pertinent in forced marriage cases being cruelty (which may include mental or physical violence),<sup>123</sup> or repudiation of the marriage by a woman who exercises the ‘option of puberty’ (see below on Minors, para 5.1.4).

### c) Procedure for Divorce

Under Section 7 MFLO, any man wishing to obtain a divorce is required, after a spoken or written pronouncement of *talaq*, to issue a notice to the Chairman of the concerned Union *Parishad* (if in a rural area) or to the *Paurashava* (Municipality) or City Corporation (if in an urban area) in the location of the wife’s residence,<sup>124</sup> with a copy to her.<sup>125</sup> Similarly, following issuance of divorce through any other means, whether delegated divorce by the wife or a Court decree of dissolution, the Section 7 MFLO procedure must be followed.<sup>126</sup>

On receipt of the notice, the concerned authority is empowered to constitute an Arbitration Council (comprising the Chairman and a representative of each party) to receive notice of divorce or to attempt reconciliation between the parties. The Arbitration Council will call the parties for the purposes of reconciliation; if they fail to respond, the divorce will take effect on the lapse of 90 days from receipt of notice by the Arbitration Council (or, if the woman is pregnant then on completion of 90 days or her delivery whichever is later).<sup>127</sup> During these 90 days, *talaq* may be revoked and reconciliation could be effected between spouses after the court decree is issued.

<sup>121</sup> Section 5, Family Courts Ordinance. Note that the relevant Family Court is located where the cause of action arose, or where the parties last resided together, or where the wife ordinarily resides.

<sup>122</sup> *Khurshid Bibi’s Case* 1 PLD 1967 SC 97 at 144; *Hasina Ahmed v Syed Abul Fazal* 32 DLR (1980) (HCD) 294; *Sheerin Alam Chowdhury v Captain Shamsul Alam Chowdhury* 16 BLD (1996) (HCD) 24.

<sup>123</sup> See Section 2(viii), DMMA and *Hasina Ahmed v Abdul Fazal* 32 DLR (1980) (HCD) 294 (‘cruelty of conduct’ not involving physical ill-treatment), *Hosne ara Begum v Reazul Karim* 43 DLR (1991) (HCD) 543 at 545 para 8 (cruelty of conduct includes compelling wife to do domestic work if in a well to do family).

<sup>124</sup> Section 2, MFLO.

<sup>125</sup> Section 7, MFLO.

<sup>126</sup> Section 8 MFLO read with Section 23 of the Family Courts Ordinance provides that once the Court issues a decree of divorce, it shall within seven days send a certified copy by registered post to the appropriate Chairman in compliance with section 7 MFLO, and on receipt, the Chairman will proceed as if he had received notice of a divorce under the MFLO. The divorce will become effective 90 days from receipt of the decree, unless any reconciliation has occurred between the parties in the meantime.

<sup>127</sup> Failure to constitute an Arbitration Council (*Abdul Aziz v Rezia Khatoon* 21 DLR (1969) (HC) 733) or failure of the Arbitration Council to take necessary steps for reconciliation may not be material: *Abdus Sobhan Sarkar v Md. Abdul Ghani* 25 DLR (1963) (HCD) 227. The 90 days reconciliation period starts from date of receipt of notice by Arbitration Council: *Shafiqul Islam v State* 46 DLR (1994) (HCD) 700.

Failure to send the notice to the Chairman may render the divorce invalid.<sup>128</sup> It is unclear whether the failure to give notice to the wife will have the same effect.

### *Minors*

**Option of Puberty:** A woman married while aged under 18 on the basis of consent having been given by her father or other guardian may repudiate the marriage before she is 19, provided the marriage has not been consummated.<sup>129</sup> She may lose this right if there is any unreasonable delay in her exercising it after attaining 18 and being informed of its availability, or if she consummates the marriage after reaching the age of 18 (unless it is by force or duress).<sup>130</sup>

Arguably, a person who has been married off by their guardian while lacking mental capacity may also exercise this option on acquiring such capacity.

**Declaration:** Any person who can establish that s/he was a minor or lacking mental capacity at the time of marriage, may also obtain a declaration that the marriage is void. This may be the most appropriate remedy in cases where the entry in the *kabin-nama* regarding the age of the bride/groom is deliberately falsified and their ages are shown as higher than in reality for the purposes of registration. Such a suit should be filed before the Family Court, and as soon as possible after the woman reaches the age of 18 and a man reaches puberty. In practice such suits are rarely filed.

**Registration:** Registration of divorces is voluntary. The person who effects the divorce may apply for registration to the Nikah Registrar within the jurisdiction where the divorce was effected.<sup>131</sup> If the divorce resulted from the wife's exercising her power of delegated divorce, a copy of an attested entry in the register of marriages (or a separate deed) showing that such delegation was made must be produced prior to registration.<sup>132</sup> The Nikah Registrar must be satisfied that the divorce has been effected and may examine the person concerned to this end. If the Nikah Registrar refuses to register the divorce, the applicant may prefer an appeal to the Registrar within 30 days.<sup>133</sup> An attested copy of an entry in the register must be made available to each party by the Registrar.<sup>134</sup> Any person may inspect the Register.<sup>135</sup>

It maybe pertinent to mention here the decision of the High Court of Justice in London in the case of *B v I* concerning the forced marriage of a British/Bangladeshi girl performed in Bangladesh when she was aged sixteen. The Court, three years later, held that there

<sup>128</sup> See *Syed Ali Newaz Gardezi* supra, *Abdul Mannan v Safrun Nessa* 1970 SCMR 845 and *Abdul Aziz v Rezia Khatoon* 21 DLR(1969) (HCD) 733. But contra *Sirajul Islam v Helana Begum* 48 DLR (1996) (HCD) 48 (holding that where divorce was clearly established by husband's conduct (and where he had followed the procedure under Section 6 MMDRA), it is not ineffective merely due to non-service of notice under section 7 MFLO).

<sup>129</sup> S.2 (vii), Dissolution of Muslim Marriages Act, 1939 (DMMA), as amended by Section 13(b), MFLO and Ordinance XXV of 1986.

<sup>130</sup> See *Mst. Daulan v Dosa*, 8 DLR(1956) (WP) 77 and Pakistan Chapter for further details.

<sup>131</sup> Section 6(1) MMDRA and Rules 20-22, 25 MMDRR.

<sup>132</sup> *Atiqul Hoque Chowdhury v Shahana Rahim*, 47 DLR (1995) (HCD) 301.

<sup>133</sup> Rule 21, MMDRR.

<sup>134</sup> Section 9, MMDRA.

<sup>135</sup> Section 13, MMDRA.

had never taken place a marriage capable of recognition in England and Wales as the girl had not freely consented to the marriage.<sup>136</sup>

***Divorce relating to marriage abroad:*** Under Bangladesh law, a Muslim man who issues a *talaq* in Bangladesh and complies with the Section 7 MFLO procedure may thereby terminate a marriage performed outside the country, and the Courts will recognize such a termination as valid, so long as the domicile of the parties at the time is found to be Bangladesh.<sup>137</sup> Arguably, a woman could also exercise her power of delegated divorce in similar circumstances on compliance with the Section 7 MFLO procedure.

A woman may also seek a divorce under the Dissolution of Muslim Marriages Act regardless, even where the marriage took place abroad, so long as the parties are domiciled in Bangladesh, or last resided together within the Court's jurisdiction.<sup>138</sup>

**5.1.2. *Christian Law:*** Under Christian law, a marriage may be annulled by the High Court on the ground that the consent of either party was obtained by force or fraud.<sup>139</sup> Annulment, separation or divorce may be sought from the District or High Court on certain other grounds.<sup>140</sup>

**5.1.3 *Hindu Law;*** Under Hindu Law as applicable in Bangladesh, as marriage is considered an indissoluble union, neither annulment nor divorce is available to any party to exit the marriage. Separation is therefore the only practical remedy available and may be obtained by agreement or by decree from the Family Court.

**5.1.4 *Special Marriage Act:*** Any marriage solemnized under the SMA may be annulled if the parties lacked capacity.<sup>141</sup> Such a remedy is available only from the High Court.

## 5.2 Tort Actions

Civil suits may be filed seeking compensation for false imprisonment, assault, battery or conspiracy to injure, as appropriate. However, such claims are not made in practice, and are unlikely to provide an effective remedy, given the expense and delay involved, and also given that victims in such cases rarely wish to give evidence against or seek any remedy from their parents or relatives for fear of rupturing family ties or of reprisals.

## 5.3 Injunctions

Injunctions may be sought from the Family Court to prevent a threatened forced marriage involving an adult.<sup>142</sup> Injunctions may also be sought from a First Class Magistrate to

<sup>136</sup> *B v I* [2010] 1 FLR 1721.

<sup>137</sup> *Mrs. Marina Jatoi v Nuruddin K. Jatoi* 20 DLR (1968) (SC) 27.

<sup>138</sup> *Herbert Gaulstan Manook vs. Thelma Eileen Manook* 5 DLR (1953) (DB) 462; PLD 1955 (Dhaka) 1

<sup>139</sup> Section 7, Divorce Act.

<sup>140</sup> See Chapter III on divorce, and Chapter V on separation, Divorce Act 1869. See Chapter IV (Sections 18-21) on nullity on grounds of either party being impotent, being within prohibited degrees, being mentally ill or incapacitated, or having former spouse living, Divorce Act 1869.

<sup>141</sup> Section 17, SMA.

<sup>142</sup> Section 16A, Family Courts Ordinance (as amended by Act No. 30 of 1989). But see *Makbul Ahmed v Sufia Khatun* 40 DLR (1988) (HCD)305 (Family Court cannot grant a temporary injunction restraining

prevent a child marriage that has been arranged or is about to be solemnised.<sup>143</sup> Before issuing the injunction, the Magistrate must issue notice to any adult person who is allegedly entering into arranging/solemnizing the marriage and give him/her an opportunity to show cause. Failure to comply with an injunction is punishable by one month’s imprisonment (not applicable to a woman offender) or a fine of Taka 1000 or both. In practice such injunctions would rarely be sought.

## 6. CRIMINAL OFFENCES AND REMEDIES

Cases involving interference with the right to choice in marriage may involve the commission of criminal offences such as abduction, kidnapping, wrongful confinement, hurt, grievous hurt, or in extreme cases, rape or murder. Prosecution and punishment of those responsible for such offences is one avenue of redress available to the victim. In addition, compensation for the victim may also be realizable from fines imposed against an offender. In practice however the criminal law is rarely used to prevent or punish forced marriage, or compensate those affected. Rather these provisions are often abused, by family members acting in collusion with state authorities, to deny young women and men the right to choice in marriage, as discussed below.

In practice, the criminal law is most useful for ensuring recovery of persons facing threats or acts of forced marriage, by way of remedies such as habeas corpus petitions (available under s491 CrPC, as discussed above), orders for restoration to liberty of abducted females (s552 CrPC) and search warrants (s100 CrPC). The most practical remedy is the habeas corpus petition.

Offences	Law relating to the Offence
<b>WRONGFUL RESTRAINT against a person’s will</b>	Section 341, BPC
<b>WRONGFUL CONFINEMENT</b>	
<ul style="list-style-type: none"> <li>• against a person’s will</li> <li>• for three or more days</li> <li>• for ten or more days</li> <li>• of person for whose liberation writ issued</li> <li>• with intention that this will not be known to any person interested in person confined</li> <li>• to extort property or constrain illegal act</li> <li>• to extort confession or compel restoration of property</li> </ul>	S 342 BPC S343 S344 S345 S346 S347 S348

marriage of a woman to any person under Order 39 Rule 1 CPC given that Section 20 of the Family Courts Ordinance provides that the CPC does not apply to suits before the Family Court). See also *Khodeja Begum*, supra.

<sup>143</sup> Section 12, CMRA.

<b>ASSAULT/CRIMINAL FORCE</b>	
<ul style="list-style-type: none"> <li>• <b>Punishment for Assault/ Criminal Force than on grave provocation</b> of three months and/or fine.</li> <li>• on woman with intent to outrage modesty</li> <li>• with intent to dishonour person other than on grave and sudden provocation</li> <li>• in attempt wrongfully to confine a person</li> <li>• on grave provocation</li> </ul>	S 352 Bangladesh Penal Code 1860 S354 S355 S357 S358
<b>KIDNAPPING/ABDUCTION</b>	
<ul style="list-style-type: none"> <li>• <b>Punishment for kidnapping from Bangladesh/lawful guardianship, of</b> seven years and to fine.</li> <li>• Kidnapping or abduction in order to murder or put in danger of murder</li> <li>• Kidnapping or abducting with intent secretly and wrongfully to confine person</li> <li>• Kidnapping/ Abduction of any woman with intent to compel her to marry against her will or force/ seduce her to illicit intercourse or by criminal intimidation/abuse of authority/method of compulsion induce any woman to go from any place with intent to force/ seduce her to illicit intercourse</li> <li>• <b>Procuration of a minor girl</b> under 18 years to go from any place with intent that she may be forced or seduced to illicit intercourse</li> <li>• <b>Importation of girl from foreign country</b> with intent that she will be forced or seduced to illicit intercourse</li> <li>• <b>Kidnapping/Abducting subjecting to Slavery-</b> Kidnapping or abducting in order to subject person to grievous hurt or slavery</li> <li>• <b>Concealing/Confining a kidnapped/abducted person</b></li> </ul>	S 363 Bangladesh Penal Code 1860 S364 S365 S366  S366A S366B S367 S368
<b>TRAFFICKING</b>	
<ul style="list-style-type: none"> <li>• <b>Trafficking of Women-</b>Imports/Exports/Buys/Sells/Hires or obtains possession of woman with intent to employ or use for prostitution/illegal or moral purposes</li> <li>• <b>Trafficking of Children-</b>Imports/Exports/Buys/Sells/Hires or obtains possession of children with intent to employ or use for prostitution/illegal moral purposes</li> <li>• <b>Abduction of Women and Children-</b>Kidnap/compel any woman/child to go from any place by force or inducement or deceitful means</li> </ul>	S 5 Violence against Women Act, 2000  S 6 Violence against Women Act, 2000 S 7 Violence against Women Act, 2000
<b>SEXUAL ASSAULT</b>	
<ul style="list-style-type: none"> <li>• <b>Rape</b>, including statutory rape of minors aged under sixteen.</li> <li>• <b>Sexual harassment</b>-person with a view to satisfying his</li> </ul>	S 9 Violence against Women Act 2000

sexual lust violates the modesty of a woman	S 10
<b>CHILD MARRIAGE</b>	
<ul style="list-style-type: none"> <li>• Adult party marrying a child</li> <li>• Solemnising a child marriage</li> <li>• Parent/guardian concerned in child marriage</li> </ul>	S 4 Child Marriage Restraint Act 1929 S 5 S 6

## 6.1 Criminal Offences

Cases involving interference with the right to choice in marriage may involve the commission of particular criminal offences. There is no separate offence of forced marriage as such, although abduction for the purpose of forced marriage (under section 366 of the Penal Code) is a crime. Forced sex within marriage (marital rape) is also not recognized as a crime (unless the wife is aged below sixteen years).<sup>144</sup> Kidnapping of children by either parent is also not recognized as a crime.

In respect of an alleged crime, any person may lodge a First Information Report (FIR) with the police,<sup>145</sup> or make a complaint directly to a Magistrate.<sup>146</sup> If it appears that no offence has been made out, the police may file a report ('final report') indicating the termination of the investigation. If, however, it is determined that there is sufficient evidence to prosecute, the police will file a report ('charge-sheet'), charges will be framed, and the case will proceed to trial.

The police may arrest without warrant any person who is concerned or reasonably suspected of being concerned in a cognizable offence or against whom a complaint has been made. After making an arrest, the police must produce that person before a Magistrate within 24 hours.

The police are responsible for executing court orders, including search warrants and any directions for recovery of a person alleged to be wrongfully confined or restrained, and for investigation of any alleged criminal offence. If they appear reluctant to record an FIR or to take particular action, it may be possible to seek necessary directions from the High Court for the police to take the required steps.<sup>147</sup>

In practice, few prosecutions are brought against those responsible for cases of interference with choice in marriage due to victims being reluctant to prosecute their closest relatives often their own parents.

<sup>144</sup> See Section 9, SVAW Act.

<sup>145</sup> Section 154 CrPC, and Ch XVI, CrPC.

<sup>146</sup> Section 200 CrPC.

<sup>147</sup> *Yasmin Sultana v Bangladesh* 54 DLR (2002) (HCD) 269.

### **ABUSING THE LAW TO DENY THE RIGHT TO CHOICE IN MARRIAGE**

While complaints of kidnapping and abduction are not made by the victims of forced marriage, they may be made as part of a process of harassment by persons seeking to frustrate young people's right to choice in marriage. Typically, the parents of the person who has chosen to marry of her free will and without her family's approval will make (false) allegations to the police or to a Magistrate that their daughter is a minor and/or that she has been kidnapped, abducted or raped. The draconian provisions of the Violence against Women Act (which severely restrict the powers of the lower courts to grant bail) further exacerbate such abuse of the law.

The police will then conduct an investigation, and in the meantime, arrest the man (the newly wed husband) and the woman or girl concerned, producing them before a Magistrate, who will likely remand the former to custody, and order the detention of the latter in 'judicial custody' in a shelter home. If the woman/girl is able to establish that she is a major and validly married of her own free will, following medical evidence or on the provision of other documentary proof, she will ultimately be set at liberty. However, in many cases, women or girls in such situations face undergoing prolonged periods of incarceration before they can access any legal support or redress.

**6.1.1 Offences under the Bangladesh Penal Code:** Several offences defined by the BPC may be committed in the course of cases of interference with choice in marriage. In the more extreme cases, these would include murder, attempted murder, causing grievous bodily harm or hurt. The offence which is most directly relevant and is most frequently invoked (though often abusively, as noted above) is Section 366 BPC regarding abduction for forced marriage.

*“Whoever kidnaps or abducts any woman with intent that she may be compelled or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment (which may extend to imprisonment of either description of ten years, and shall also be liable to fine; and whoever by means of criminal intimidation as defined in the Bangladesh Penal Code (Act XLV of 1860), or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.” (emphasis added)*

- Other offences which may be committed include: wrongful restraint or confinement, including keeping any person in wrongful confinement knowing that a writ has been issued for their release (ss3 41-348 BPC),
- assault or use of criminal force (ss 352, 354 (to outrage modesty), 355 (with intent to dishonour a person), 357 (in attempt wrongfully to confine a person) and 358 (on grave and sudden provocation) BPC),
- kidnapping or abduction (ss 363, 364, 365, 366(for the purpose of forced marriage), 367 BPC),
- procurement of minor girl (s366A BPC), importation of girl from foreign country (s 366B BPC), kidnapping or abduction to subject a person to slavery (s 367 BPC), and
- concealing or keeping in confinement a kidnapped/abducted person (s368 BPC).

As noted above, these provisions, though occasionally invoked in cases of alleged forced marriage, are more usually resorted to by parents seeking to interfere with or prevent marriages of choice.

**6.1.2 Offences under the Violence against Women and Children Act 2000:** This Act defines a number of offences relevant to the issue of interference with choice in marriage:

- Kidnapping (Section 2(b))
- Confinement (Section 2c)
- Trafficking of women (section 5) and children (Section 6)
- Abduction of women and children (Section 7) and
- Rape, including statutory rape of minors aged under sixteen (Section 9),

Abduction has been defined as compelling a person to go from one place to another by use of force or by enticement or by inducement or by deceitful means or by use of threat (section 2(b)). Rape includes sexual intercourse by any man with any woman not being his wife and aged over sixteen years without her consent or against her will, or with any woman aged under sixteen, with or without her consent.<sup>148</sup> The maximum punishment for abduction or rape is life imprisonment.

Such cases are tried before the Special Tribunal on Suppression of Violence against Women and Children according to specific procedures laid down in the Violence against Women Act (including, for example, provisions for speedier trial, restrictions on bail, non-publication of the names of any victims).

Again, while prosecutions for such offences are possible, they rarely occur at the instance of victims facing forced marriage or interference with marriages of choice, for the reasons discussed above.

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<sup>148</sup> This means that a bride under sixteen, given in marriage by her guardian, could successfully prosecute her husband. No such cases have been brought to date.

### **Case Study: Shubina in Safe Custody**

The British High Commission (BHC) in Dhaka, Bangladesh and the FMU in London received phone-calls to say that Shubina (17), a British-Bangladeshi dual national, had been abducted in Bangladesh. Shubina's father alleged that while on holiday Shubina had disappeared, that he had heard people saying a neighbouring family had abducted her and that they had made her marry their son "simply for a visa to the UK".

The father lodged a case with the police alleging abduction and illegal under-age marriage without parental permission. The police found Shubina and arrested 19 year old Asad for abduction and offences with a minor. The police put Shubina into "safe custody" in a government-run women's shelter home until the investigation should be completed. Staff from the BHC were able to see Shubina there and she told them the reality of the situation. She had been to Bangladesh on holiday earlier with her family and knew they wanted her to marry a cousin from their village. She did not like this person. Instead she had developed, over previous holidays, a relationship with Asad. After her GCSEs Shubina was taken to Bangladesh to marry the cousin her family had chosen. However, once the family arrived in Bangladesh, Asad and his family approached Shubina's family to ask if he could marry her. Her father refused and was very angry as he had not suspected his daughter's relationship and had already promised Shubina in marriage to another person.

Shubina and Asad had then run away and married, with the help of Asad's family. Shubina wished to remain in Bangladesh with Asad and his family for a while. She did not want to return to the UK or to go back to her family. But she felt she had no choice but to compromise with her father, as he said that he would only drop the charges against Asad if she returned to the UK with the family. The BHC stressed to Shubina that she may not be safe in going back to her family in the UK in these circumstances. When she insisted that she was going to return they also highlighted what assistance was available to her in the UK. They tried to stay in touch with Shubina after her return to the UK.

Source: Personal Communication with Forced Marriage Unit of the FCO

**6.1.3 Offences under the Child Marriage Restraint Act 1929:** This Act penalises any 'child marriage', that is any marriage in which the groom is aged below 21 and/or the bride below 18. Accordingly any adult party to a child marriage, any person solemnizing a child marriage or any parent or guardian who promotes or permits a child marriage to be solemnized or negligently fails to prevent it from being solemnized may be punished with one month's imprisonment or a fine of Taka 1000 or both.<sup>149</sup> The complaint must be

<sup>149</sup> Sections 4 (male adult party), 5 (solemnizer) and 6 (parent or guardian) of the CMRA, supra.

made to a First Class Magistrate by the Union *Parishad* or *Paurashava* or Municipal Corporation, or by any authority specified by the Government, within one year of the alleged offence.<sup>150</sup> The Act further provides that any breach of an injunction to prevent a child marriage is punishable by three months imprisonment and/or a fine.<sup>151</sup> Penalties of imprisonment under this Act may not be imposed on a woman. There are few, if any, complaints made under this law, given that the government has not yet specified any authority for this purpose, and local government representatives tend not to take up such cases.

## 6.2 Other Remedies

**6.2.1 Habeas Corpus Petition:** As noted above, this is the most effective remedy available in cases of forced marriage or marriages of choice. See generally above Section 4.3 which discusses orders in the nature of habeas corpus which may be sought under the Constitution. In addition such orders may also be obtained from the High Court under Section 491 of CrPC which provides as follows:

*“If [it] finds that the person brought before it was being illegally and improperly confined or detained and is a minor [the] Court may make over the custody to [the] guardian which will be dealing with him in accordance with law, but if the person is a major, the only jurisdiction which the court can exercise is to set at liberty whether illegally or improperly detained in public or private custody”.*<sup>152</sup>

The Court’s jurisdiction extends over cases where the person is ‘illegally or improperly detained’, including by an order of a competent court directing that a person be held in ‘judicial custody’.<sup>153</sup>

**6.2.2 Search Warrant:** An application for a search warrant, under Section 100 CrPC, may be made to a Metropolitan, First Class or Executive Magistrate to secure the release of any person who is allegedly illegally confined within his/her jurisdiction.<sup>154</sup> The Magistrate, if s/he has reason to believe that the person is so confined may then direct the police or other persons to execute the search warrant, and to produce the person in Court to be dealt with in accordance with law. On production of the person, the Magistrate would take their statement,<sup>155</sup> and based on that, determine whether to set them at liberty or, if they are minors, to hand them over to the custody of any protective home (‘safe custody’) or any other person such as their legal guardian.

<sup>150</sup> Section 9, CMRA.

<sup>151</sup> Section 12(5) CMRA.

<sup>152</sup> *Abdul Majid Sarkar v State* 55 DLR (2003) (AD) 1; *Arun Karmakar v State* 10 BLT (AD) 40; *Bashu Dev Chatterjee v Umme Salma* 51 DLR(1999) (AD) 238.

<sup>153</sup> *Dabiruddin Ahmed v Dr. Chittaranjan Deb Nath* 1984 DLR(1984) (AD) 77. Some decisions hold that the scope of Section 491 is wider than that of Article 102: see *Syed Rezia Begum v Government* 40 DLR (1988) (HCD) 210 and *Sri Kripa Shindu Hazra v State* 30 DLR (1978) (HCD) 103 (both re state detention).

<sup>154</sup> See also Sections 101 (directions for executing search warrants), 102 (persons in charge of closed place to allow search), 103 (search to be made in presence of witnesses) and 105 (Magistrate may direct search in his presence) CrPC.

<sup>155</sup> Under Section 164 CrPC.

**Comparison of search warrant and habeas corpus petition:** A search warrant may be obtained from a Magistrates’ Court in any part of the country, while a habeas corpus petition may only be sought from the High Court in Dhaka. In all other respects, however, it is preferable to seek an order of *habeas corpus* in cases of forced marriage, given that the High Court:

- has territorial jurisdiction over the whole country, not only one District ;
- has wider powers to deal with issues arising in cases of forced marriage, including powers to remand a case to any subordinate court, or to issue directions on any administrative authority;
- is empowered to enforce its orders both against public functionaries and private persons.

As discussed above, Magistrates often make such orders sending a woman/girl to judicial custody or handing her to the custody of her parents, in the context of claims by her family of her alleged abduction/kidnapping and counter claims by her that she has married of her own choice.

**6.2.3. Order for restoration of abducted female (s552 CrPC):** A Metropolitan or First Class Magistrate, on a complaint regarding the alleged abduction or unlawful detention for any unlawful purpose of a woman or a female child aged less than sixteen, may make an order to restore such a woman to her liberty, or to hand her over to ‘her husband, parent, guardian or other person having lawful charge’ if she is a child. The Court may direct the use of necessary force to ensure compliance with this order. In such cases the Magistrate should take the statement on oath of the alleged victim. Any such order is subject to revision by the Sessions Court (under Section 439A CrPC) and exceptionally may be set aside by the High Court in exercise of its inherent jurisdiction (Section 561ACrPC). In practice, such orders are rarely made, greater resort being had to the issuance of search warrants under Section 100, as noted above.

**6.2.4 Compensation:** Any person convicted of an offence and sentenced to pay a fine may be ordered to pay the sum involved to the victim for loss or injury caused as a result of the offence.<sup>156</sup> Any person convicted of an offence under the Violence against Women Act may also be directed by the Tribunal concerned to pay a fine as compensation to the victim, either directly or from his existing or future assets.<sup>157</sup>

**6.2.5 Contempt Orders:** If any private individual or public official disobeys a Court order or shows disrespect to the Court, they may be held in contempt of court, either on the application of any person or by the Court itself.<sup>158</sup>

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<sup>156</sup> Section 545, CrPC.

<sup>157</sup> Sections 15 and 16, Violence against Women Act.

<sup>158</sup> See Art. 108, Constitution and Section 19, FCO re powers of contempt of Supreme Court and Family Court respectively; See Suo Motu Contempt Rule No. 6 of 2008, arising out of *Dr. Shipra Chowdhury and another v Md. Joynal Abedin and others*, 29 BLD (HCD) 183, regarding non-compliance with court orders for production of a woman allegedly held against her will

## **7. Cases with an International Element**

This section addresses certain issues relevant to cases with an international element, which involve persons who are nationals or residents of the UK who may be involved in or threatened by a forced marriage in Bangladesh.

While a dual Bangladeshi/British national may not have access to consular protection from the British authorities while in Bangladesh, they could still obtain judicial protection from courts, both in Bangladesh (for example, through a writ of habeas corpus) or in Britain (for example, through proceedings for wardship or under the Forced Marriage (Civil Protection) Act, see UK chapter). Bangladeshi nationals who are residents of the UK may also be able to obtain protection through court orders in Bangladesh and the UK respectively.

### **Case Study: Humayra escapes forced marriage**

Dr. Humayra Abedin, a 33 year old Bangladesh national, was held against her will by her family for four months under the threat of forced marriage.

Dr. Abedin lived in the UK, where she practiced as a doctor. She had travelled to Dhaka on being informed that her mother was ill, but within two days of her arrival was forcefully confined in her parents' home. After police enquiries regarding her whereabouts, her parents reportedly removed her to a psychiatric clinic. A *habeas corpus* petition, under Article 102 of the Constitution, was filed by her cousin, a woman doctor, and a local human rights group who were concerned that she was held against her will. The High Court of Bangladesh directed her parents to produce her before the Court. The parents repeatedly failed to comply with the Court's order. The Court then directed the Inspector General of Police to ensure her recovery. Finally, the parents' lawyer appeared before the Court and claimed that the detainee though an adult was 'unmarried' and 'mentally ill' and therefore required to be in her parents' custody. The High Court then issued notices on Dr. Abedin's parents threatening to hold them in contempt of court if they failed to comply with its orders.

In the meantime, separate proceedings were started before the High Court of Justice in London under the Forced Marriage (Civil Protection) Act 2007 requesting the Bangladesh judicial authorities to cooperate in tracing the whereabouts of Dr. Abedin, ensuring her contact with the local human rights organisation and the British High Commission and facilitating her return to the United Kingdom.

On the next date of hearing, Dr. Abedin was produced in Court by her parents. The High Court after hearing her testimony in camera directed that she be set at liberty and that her parents return her passport and return ticket. It further directed court officers and the police to accompany her to the British High Commission and requested the British High Commission to arrange her safe journey to the United Kingdom and to keep her in their custody till she left Bangladesh.

On her return to the UK, Dr. Abedin confirmed before the High Court in London that she had been drugged and held against her will in a psychiatric clinic, and later forced to enter into a marriage ceremony and that she had instructed lawyers to initiate nullity proceedings on her behalf.

### **7.1 Recognition of foreign judgments**

It may be possible to seek enforcement of a foreign judgment (for example a nullity decree) before a Bangladesh Court, rather than to begin new legal proceedings in Bangladesh. If such a judgment has been passed by a superior court in any jurisdiction

classified as a ‘reciprocating territory’, then it may be enforced by filing a suit in a Bangladesh court.<sup>159</sup> Such a judgment would be recognized as conclusive regarding any matter thereby directly adjudicated upon between the same parties litigating under the same title, and could be executed by any Bangladesh court, unless it falls within certain exceptions specified by law.<sup>160</sup> No notification has been published to date classifying any countries as reciprocating territories.

## 7.2 Dual Nationality

**7.2.1 Recognition of Dual Nationality:** Bangladesh recognises dual nationality, and this has certain implications for dual nationals in Bangladesh caught up in cases relating to marriages of choice or forced marriage, with regard to the extent of consular protection they may claim from their country of other nationality. First, there is a possibility that their other country of nationality will not make any official representations on their behalf, on the basis that while in Bangladesh they are in a country of which they are a national and therefore not normally eligible for consular assistance.<sup>161</sup> Second, if a dual national travels to Bangladesh on the passport of another country, they may be granted visa-exemption (if they hold a ‘no visa required’ stamp on that passport) to travel to Bangladesh. While this makes their travel to and from Bangladesh easier, it may also make it harder to track their movements.

**7.2.2. Acquisition of Dual Nationality:** Bangladesh currently recognises dual nationality only in respect of certain countries in Europe and North America. The Government has powers to grant nationality to a national of any state which has been notified in the Official Gazette,<sup>162</sup> or to any person.<sup>163</sup> Further a person who is already a national of such a state or acquires nationality of such a state will not thereby lose their Bangladeshi nationality.<sup>164</sup>

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<sup>159</sup> See Section 44 CPC 1908, CPC (Amendment) Act 2003 (Act 40 of 2003).

<sup>160</sup> See Section 13 CPC 1908, CPC (Amendment) Act 2003 (Act 40 of 2003). These exceptions relate to a judgment which a) has not been pronounced by a court of competent jurisdiction; b) has not been given on the merits of the case; c) appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Bangladesh in cases in which such law is applicable; d) has been obtained in proceedings which were opposed to natural justice; e) has been obtained by fraud; or f) sustains a claim founded on a breach of any law in force in Bangladesh.

<sup>161</sup> All persons of whatever nationality in any country are subject to the laws of that country.

<sup>162</sup> Article 2B, Bangladesh Citizenship (Temporary Provisions) Order, 1972 (Presidential Order No.149 of 1972).

<sup>163</sup> Section 9 Citizenship Act, 1951.

<sup>164</sup> Article 2B(1), Proviso, PO 149 of 1972. On dual nationality, see the Bangladesh Citizenship (Temporary Provisions) Order of 1972, signed 15 December, 1972 by President Abu Sayeed Chowdhury; Notification dated 23 September 2008 (SRO No. 270-Law/2008). This notification states that any Bangladeshi-British dual national would retain Bangladeshi citizenship automatically unless s/he expressly relinquishes allegiance to Bangladesh ‘voluntarily’, (and that Bangladeshi-Britons will be able to use their Bangladeshi passports on entering Bangladesh). A notification issued in March 2008 extended this provision *mutatis mutandis* to Bangladeshi nationals acquiring citizenship in North America or Europe.

A person will also be deemed to be a Bangladeshi citizen if:

- a) they were born in Bangladesh;<sup>165</sup> ...
- b) they have a father who is a Bangladeshi citizen by birth, or since December 2008, a father or mother who is a Bangladeshi citizen by birth;<sup>166</sup>
- c) they were born outside Bangladesh, and have a father who is a Bangladeshi citizen by descent and the birth is duly registered with the Bangladesh Consulate or Mission in the country of birth, or have a father in government service at the time.<sup>167</sup>

In addition, a person will be deemed to a Bangladeshi citizen or national if on 26 March 1971:

- a) their father or grandfather was born in the territories comprised in Bangladesh and if they were and continue to be permanent residents of Bangladesh on 25 March 1971 or
- b) they were a permanent resident of the territories now comprised in Bangladesh on 25 March 1971 and continue to be so resident and are not otherwise disqualified from being a citizen by any other law.<sup>168</sup>
- c) they are a person to whom the above would have applied but for their being resident in the United Kingdom.<sup>169</sup>

So a British national who has never sought Bangladeshi nationality may nevertheless be deemed to be a Bangladeshi if they fall into any of the above categories and may find themselves being treated as such by the British or Bangladeshi authorities

**7.2.3 Loss of Bangladeshi nationality:** As noted above, any Bangladeshi national over 21 who is or becomes the national of any other country (other than certain countries in Europe or North America) will thereby lose their Bangladeshi nationality.

The law also provides that the Government may deprive of their nationality any Bangladeshi national who remains resident abroad for over seven years and fails to register annually with the Bangladesh mission in the country concerned either on an application or on its own motion.<sup>170</sup> In practice this provision does not seem to be applied, even though many Bangladeshi nationals abroad do not register themselves with the concerned Missions.

This means that two categories of dual nationals would be liable to be dealt with by the authorities as Bangladesh nationals when in Bangladesh, namely:

- Persons aged under 21 who are nationals of any other state and by birth or descent of Bangladesh, and

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<sup>165</sup> Section 4, Citizenship Act 1951.

<sup>166</sup> Section 5, Citizenship Act, 1951. The Citizenship (Amendment) Act, 2009 interpolated the word 'mother' next to the existing word 'father' in section 5.

<sup>167</sup> Ibid.

<sup>168</sup> Article 2, PO 149 of 1972.

<sup>169</sup> Article 2(A), PO 149 of 1972.

<sup>170</sup> Section 16(4), Citizenship Act, 1951 read with Rule 25(4)-(6), Citizenship Rules, 1952.

- Persons aged 21 and over who are nationals of certain states in Europe (including Britain) and North America and also of Bangladesh, and have not expressly revoked their Bangladeshi nationality.

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