

Remedies for Forced Marriage

A HANDBOOK FOR LAWYERS

EDITED BY

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Chapter 4
LEGAL REMEDIES FOR FORCED MARRIAGE IN INDIA

Lawyers Collective
Asmitu Basu and Jayna Kothari

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About the Authors

Lawyers Collective is a leading public interest service provider in India with a proven record of setting high standards in human rights advocacy, legal aid and litigation. It was created in 1981 to provide expert legal assistance to the underprivileged, especially women and children, workers in the unorganised sector and other members of marginalised groups. Lawyers Collective's membership comprises professional lawyers, law students and human rights activists. It adopts a multi-disciplinary approach in arguing for legal remedies and it collaborates with other professionals including epidemiologists, environmentalists, social scientists and others as needed.

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Chapter 4

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Chapter 4 Legal Remedies for Forced Marriage in India

Asmitu Basu and Jayna Kothari

1. Introduction

This chapter outlines the remedies available under Indian law to individuals in India and to Indian nationals living abroad and facing interference with their choices regarding marriage, in particular through forced marriage. It addresses the problem both in relation to forced marriage of minors and adults.

Increasing numbers of such cases are reported in the media and by NGOs.¹ Many such cases still go without redress. Where interventions are possible, cases are resolved largely through support from non-governmental organisations (NGOs) and women’s groups. In some cases, legal remedies are useful as a last resort.

This chapter first considers the legal context, providing an overview of relevant constitutional and legal provisions and the court structure. It then discusses the laws on marriage focusing on the requirements of a valid marriage, considering in turn those applicable to the Christian, Hindu, Muslim and Sikh communities, and then civil marriages. The chapter then reviews in turn, available remedies, under the constitution (including for writs of *habeas corpus*); civil law (such as annulment, separation or divorce), including the remedies available under the Protection of Women from Domestic Violence Act 2005,² tort law and finally, criminal law.

2. Legal Context

At independence in 1947, India inherited the common law legal system introduced by the British during colonial rule. Many of the statutory laws discussed here date back to that period, while others have been amended and new laws enacted after independence.

¹ BBC Online, “India Court Seeks “Honour Killings” Response”, <http://www.bbc.co.uk/news/10364986>; Daily News and Analysis India, ‘Delhi HC gives 18 year olds the Right to Choose’, 12 July 2010 http://www.dnaindia.com/india/report_delhi-hc-gives-18-yr-olds-right-to-choose_1408523 ; The Times of India, ‘Marriage, Murder and Judgment’, 10 April 2010, <http://timesofindia.indiatimes.com/india/Marriage-murder-judgment-it-was-all-wrong/articleshow/5758853.cms> ; Nandita Sengupta, Washington Post ‘5 sentenced to Death in Honour Killing’, 25 May 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/24/AR2010052404075.html>; The Hindu, “Call to Ban Child Marriage”, 27 February 2004. See generally Prem Chowdhury, *Contentious Marriages, Eloping Couples: Gender, Caste and Patriarchy in Northern India* (Oxford University Press, New Delhi, 2007), and AALI, “Report of National Consultation to Choose If, When and Whom to Marry”, <http://www.aalilegal.org/image/publication/REPORT.pdf>

² The Protection of Women against Domestic Violence Act 2005 (PWDVA) came into force with effect from 26 October 2006.

2.1 Constitutional and Legal Provisions

2.1.1 The Constitution: The Constitution of India 1950 ('the Constitution') in Part III guarantees a range of fundamental rights, including the rights to life (Article 21), freedom of expression and movement (Article 19) and equality and non-discrimination. Article 14 encompasses a negative injunction prohibiting the State from denying any person equality before the law or the equal protection of laws. Article 15 prohibits discrimination against any person on the grounds of religion, race, caste, sex or place of birth. This provision also empowers the State to take affirmative action for the benefit of historically disadvantaged sections of the population, and for women and children.

The Constitution provides for specific remedies, including *habeas corpus* petitions and applications for enforcement of fundamental rights, which often prove useful in cases on choice in marriage (see below).

2.1.2 Legislation: Rights relating to marriage, including dissolution of marriage, guardianship and custody of children and related issues are governed by various religious personal laws, which vary depending on religious community or affiliation.³ So, for example, the Hindu Marriage Act 1956 (HMA) lays down the various requirements of marriage for Hindus. Muslim personal laws on marriage are not similarly codified (except for the Muslim Personal Law (Shariat Application) Act, 1937, the Dissolution of Muslim Marriages Act, 1939 and the Muslim Women (Protection of Rights on Divorce) Act, 1986). The laws applicable to Christians include the Indian Christian Marriage Act, 1872 (CMA) and the Divorce Act 1869 (as amended 2001) (DA). Civil marriages, particularly between persons belonging to different religions, are contracted under the Special Marriage Act, 1956 (SMA),⁴ and marriages contracted under other laws may also be registered under it.⁵

Civil laws applicable to all communities which are relevant in the context of forced marriage include the Prohibition of Child Marriage Act, 2006 (PCMA),⁶ the Guardians and Wards Act 1890 (G&WA), the Majority Act, 1875, the Family Courts Act, 1984 (FCA) and the Family Courts Rules as laid down in various states⁷ as well as the recent Protection of Women from Domestic Violence Act, 2005 (PWDVA). The PWDVA may be used to prevent child marriages/forced marriages of daughters, as forced marriage is understood as a form of domestic violence (Section 3(a) PWDVA).⁸

³ Given the partition of the country in 1947 on communal lines, the new Constitution gave a prominent place to the right to freedom of religion. In the colonial period, before the Constitution came into force, each community had been governed by religious personal laws relating to family matters, including marriage and its dissolution. All such laws stood recognised and continued after the Constitution came into force. After Independence, the residual preoccupation with preserving religious identities, together with the constitutional guarantee of freedom of religion, meant that religious personal laws continued to be recognised, despite the constitutional provision permitting recognition of pre-constitutional laws only if they conformed to fundamental rights (Article 13, Constitution of India 1950).

⁴ Section 15, Special Marriage Act (SMA).

⁵ Section 18, SMA.

⁶ This law came into force in October 2007. It repealed the Child Marriage Restraint Act 1929 (CMRA).

⁷ For example, the Kerala Family Court Rules 1989. Similarly, other states have their own rules regarding the application of family laws, such as the Hindu Marriage Act (Calcutta High Court) Rules 1957 and the Bombay High Court Hindu Marriage and Divorce Rules 1955. Note that Central Family Court Rules are still to be formulated: <http://www.ncw-india.org/highlights.php>.

⁸ See Form 1 (the Domestic Incident Report, framed under Sections 9(b) and 37(2)c) of the PWDVA, which

Criminal laws, such as the Indian Penal Code, 1860 (IPC) and the Code of Criminal Procedure, 1973, also applicable to all communities, may be relevant in specific cases (see below).

2.2 Court Structure

The Supreme Court is the apex court of the country and its decisions are binding on all other Courts.⁹ At the next tier of the judiciary are the High Courts of each of the states. Each High Court has a principal seat in the State, and in some States there are also permanent benches in other areas within the State. The Supreme Court and the High Courts are empowered under the Constitution to formulate rules to regulate practice and procedure within each Court respectively. They hear original constitutional petitions as well as civil and criminal appeals and revisions.

Each State is divided into Districts (*zillas*), within each of which the District and Sessions Judge presides over civil cases, including family and criminal matters. At the first instance, family matters are heard by the District Judge (Civil Judge) in metropolitan areas and by exclusive Family Courts in areas with a population of more than a million,¹⁰ such as Mumbai.¹¹ Family courts may also be established outside metropolitan areas.

Below the District level, there is a hierarchy of judicial officials. The Civil Courts are known in different states as Courts of Munsifs, Sub-Judges and Civil Judges. In the Metropolitan areas, there are Small Causes Courts below the City Civil Courts. Criminal Courts include the Courts of the Chief Judicial Magistrates and Judicial Magistrates of the First and Second Class, who function under the supervisory authority of a District Magistrate.¹² In the Metropolitan areas, there is a Chief Metropolitan Magistrate's Court and Metropolitan Magistrate's Courts below the Sessions Court. All Magistrates are under the supervision of the High Court of the State concerned.¹³

refers to 'forcing you to get married against your will, preventing you from marrying a person of choice and forcing you to marry a person of his/their own choice'.

⁹ Article 141, Constitution of India 1950 (Constitution).

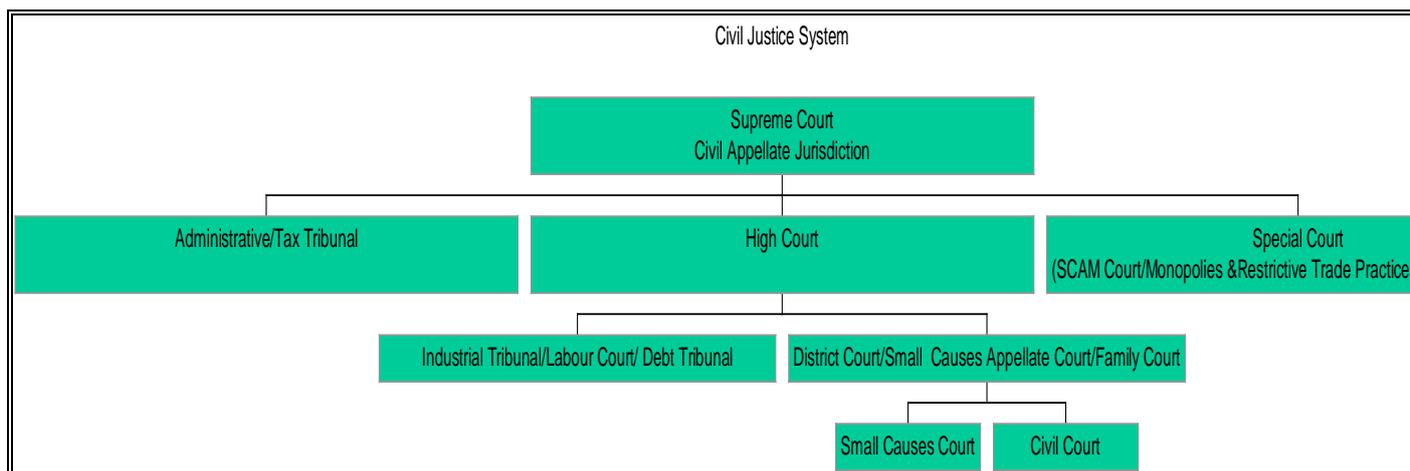
¹⁰ Section 3 (1) Family Courts Act 1984 (FCA). Note that not all cities have notified Family Courts as yet.

¹¹ Section 3(1), FCA 1984; Section 19 Hindu Marriage Act (HMA).

¹² Article 235, Constitution.

¹³ Article 227, Constitution. At the village level, disputes are frequently resolved by *panchayats* (rural governing bodies) (Article 243B, Constitution) or the more recently established *Lok Adalats* (people's courts) under the Legal Services Authority Act 1987 .<http://reference.allrefer.com/country-guide-study/india/india154.html>;

<http://www.soulkurry.com/v2/files/structure.doc>.



3. Marriage

This section discusses the laws on marriage applicable to various communities, outlining in turn the requirements for a valid marriage, the situation regarding marriage of minors, inter-religious or inter-community marriages, and the provisions for registration and proof of marriage (see section 5 below on civil remedies for dissolution of marriage).

As noted above, the laws on marriage are governed by the personal laws (as modified by statute) applicable to each of the five principal religious communities (Hindu (including Sikh),¹⁴ Muslim, Christian, Jewish and Parsi), or the Special Marriage Act, 1956 (SMA), and also by laws which apply to all irrespective of community, such as the PCMA, the Family Courts Act, the G&WA, and the Majority Act. Adivasi communities such as Santhals, Gonds

¹⁴ Buddhists, Jains and Sikhs are governed by the provisions of Hindu personal law.

and others each follow their customary laws in regard to marriage, divorce, inheritance. They can also avail of provisions under the special marriage code and civil inheritance laws. But, typically, in practice they follow their customary practices.

Inter-religious marriages: Marriages between people of different religions are permitted in India. In general, the parties have two options: one of them may convert to the other's religion, enabling them to marry under the latter's personal law, or they may marry under the SMA, which provides for marriages between people of any faith or religion.¹⁵

Transnational marriages: The Foreign Marriage Act, 1969 (FMA) provides for the registration of marriages between persons of whom at least one is an Indian national. This Act has similar provisions to the SMA 1956. If such a marriage is solemnised under the laws of a foreign country, then it must be registered with a Marriage Officer appointed under the FMA for the marriage to be recognised as valid in India.¹⁶

3.1. Hindu Law

3.1.1 Requirements of a valid marriage: A Hindu marriage may take place anywhere, subject to meeting the requirements prescribed in the HMA, including the conduct of customary rites and ceremonies of either party (Section 7, HMA). If these include the *saptapadi* (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken. The marriage will not be valid under the HMA unless carried out in accordance with the essential rites and ceremonies. (The HMA recognizes local customs other than *saptapadi*, such as Sikhs taking seven steps around the *Granth Sahib* (holy book) or in Kerala the tying of a *taali* (necklace).)

3.1.2. Capacity: Under the HMA, to contract a valid marriage the parties must have capacity to marry, that is:

- they must be Hindus (or Buddhists, Jains and Sikhs, who are also governed by Hindu personal law);
- each party must have capacity to give consent, not invalidated by unsoundness of mind, mental disorder or insanity (otherwise the marriage is voidable at the request of the other party)¹⁷;
- neither party should be in a subsisting marriage;
- the bridegroom has completed the age of 21 years and the bride 18 years;¹⁸

¹⁵ Section 1, Indian Divorce Act 1869.

¹⁶ Section 17, Foreign Marriage Act 1969 (FMA).

¹⁷ See Section 5(ii), HMA.

¹⁸ But the Courts in India have held marriages to be valid even where one party is under the HMA prescribed age of majority. In certain cases, the courts have quashed complaints of kidnapping of minor girls who have testified that they have consented to the marriage. So for example in *Makemalla Sailoo v. Superintendent of Police & Ors.* 2006 (2) ALD 290, the Andhra Pradesh High Court held that the custody of a minor girl (held in a protective home as an alleged victim of a kidnapping by the man she claimed to be her husband) could not be granted to the parents, noting that "since the marriage which has taken place between the alleged detinue (the minor girl in protective home) and the 3rd respondent is a valid marriage in the eye of law, though it may be an offence under various provisions of various statutes, yet the marriage cannot be nullified and under the Hindu Minority and Guardianship Act, 1956 the 3rd respondent becomes a natural guardian of the detinue. The existing law does not leave any scope for us to take a different view. It is for legislature to look into the serious issues". Note that the PCMA has since clarified that "*every child marriage whether solemnized before or after*

- Neither party may be a *sapinda* of the other or within prohibited degrees of relationship.¹⁹

3.1.3 Consent: Valid consent means free and voluntary consent.²⁰ A marriage entered into without valid consent may be voidable under the HMA²¹ if it can be established that the consent of either party to the marriage was obtained by fraud or force.²²

Minors: Although the HMA lays down the minimum age of marriage as 21 years for men and 18 years for women,²³ it does not expressly invalidate marriages by minors. A marriage where either party is below the prescribed minimum age is neither void nor voidable under the HMA,²⁴ though the persons concerned, i.e. the parents/guardians that gave permission for

the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage.”

¹⁹ The term “*sapinda*” refers to relationships where there is a common lineage. According to section 3 (f) (ii) HMA “two persons are said to be ‘*sapindas*’ of each other if one is a lineal ascendant of the other within the limits of *sapinda* relationship, or if they have a common lineal ascendant who is within the limits of *sapinda* relationship with reference to each of them.” The term “*sapinda* relationship” is defined under section 3 (f) (i) HMA as “with reference to any person extends as far as the third generation (inclusive) in the line of descent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is counted as the first generation.” For examples, the reader may see any common text on Hindu law. A marriage in violation of the conditions regarding *sapinda* relationships and degrees of prohibited relationship is void, unless there is a custom or usage permitting it (Section 3 read with Sections 5 and 11, HMA). But this rule is flexible depending on customs of different communities..

²⁰ If the parties consent, though their consent may be the result of some persuasion, the intention is formed, and the marriage is valid. It is only where the participation of a party at the ceremony is that of an unwilling automaton, and the alleged marriage is not approved afterwards, that the marriage is vitiated by absence of intention: see J. Duncan M. Derrett, *Introduction to Modern Hindu Law*, (OUP, 1963), 137.

²¹ Section 12 (1)(c), HMA.

²² See *Babui Panmato v. Ram Agya Singh* AIR 1968 Patna 190, where the Patna High Court held that the scheme of Section 12 of the HMA leaves no room for doubt that in a case falling under clause (c), it is not necessary to prove that consent was obtained by force or fraud at the time of marriage, but only that consent was obtained by force or fraud before the marriage was solemnized.

²³ See Section 5(iii), HMA.

²⁴ See *P. Venkatramana v. State* AIR 1977 AP, 43, where the full Bench of the Andhra Pradesh High Court held that any marriage solemnized in contravention of Section 5 (iii) of the HMA is neither void or voidable, the only consequences being that the persons concerned are liable for punishment under Section 18 and further that if the requirements of Section 13(2) (iv) of the HMA, as inserted by the Marriage Laws (Amendment) Act, 1976, are satisfied, i.e. that the marriage was solemnized before the bride reached 15 years and she has repudiated the marriage after attaining that age but before attaining the age of 18 years, then, at the instance of the bride, a decree for divorce may be granted. See also *Manish Singh v. State Govt of NCT & Ors.* and *Ram Ladle Chaturvedi v. Commissioner of Police & Ors.* AIR 2006 Delhi 37 where the Delhi High Court in *habeas corpus* petitions also held that marriages solemnized in contravention of the HMA proscriptions were neither void nor voidable under sections 11 and 12 of the HMA but only punishable under Section 18 of the HMA and the CMRA. The Court made observations on ‘runaway marriages’ noting that such marriages were valid, both parties having given their consent, and satisfied the provisions of the HMA. It further noted that consensual, underage “runaway marriages” are not void but may be voidable, and that this approach would protect the woman and any children concerned from social stigma and undue hardship. It did not make any further comment regarding the effectiveness of laws on restraining child marriage, noting that child marriages occur in many parts of the country, and that the legislature was conscious of the serious consequences of declaring such marriages to be void or voidable, including exploitation of women who are vulnerable due to social and economic circumstances. The Court also clarified its reference to the “age of discretion” in an earlier judgment (*Ravi Kumar v. The State & Anr.* 124 (2005) DLT 1) which had been critiqued for appearing to lower the age of consent. In *Ravi Kumar*, a criminal case had been filed against a 28 year old man on allegations of abducting a

the minor to marry, any person who performed the marriage, any male aged 21 and over who was party to the marriage, would be punishable under the HMA (and/or the PCMA) for contravention of this condition of marriage.²⁵

However, all child marriages, i.e. a marriage to which either contracting party is a child, and where a child is defined as a male aged under 21 or a female aged under 18, are now voidable under the PCMA at the option of the party to the marriage who was a child at the time of the marriage.²⁶ This option must be exercised by that person filing their application within two years of attaining majority. Further, if a Hindu girl's marriage is solemnized before she attains the age of 15 years, and she repudiates the marriage after the age of 15 but before the age of 18 years, then the Court may grant a decree of divorce at her instance (see section 5 below, on civil remedies for dissolution of marriage).²⁷

Guardianship: The natural guardian of a Hindu minor (i.e. any person under the age of 18, or an unmarried girl not correct) is the father and, after him, the mother.²⁸ Such a guardian is not empowered by the HMA give consent to a marriage on behalf of the minor.²⁹

3.1.4 Registration: Registration of a Hindu marriage is not mandatory, and an unregistered marriage therefore may be valid.³⁰ However, registration of the marriage is always advised in

16-year-old woman, and they claimed to be lawfully married. The Delhi High Court found a woman above fifteen could consent to marriage and therefore the necessary facts were absent for an abduction charge to be made out. It also stated that the woman could refuse to give her consent to be placed in safe custody and the Court must consider this refusal. Referring to this, the Court in *Manish Sing* observed that the earlier judgment been given in the context of the girl having married without inducement or enticement and in relation to the charge of kidnapping against the person she had chosen to marry, and that these observations did not suggest any approval of the errant conduct. It took the view that “runaway marriages” are a generational problem and the result of a complex interplay of factors, and it is for the Legislature to consider whether the existing laws have failed to remedy the issue of child marriages. Though the judgment clearly validated marriages in contravention of the age requirement under S. 5(iii) of the HMA where the minor girls have consented to the marriage, and further disallowed forced confinement of such girls in protective homes, the Court did not discuss the effectiveness of the existing laws. These judgments show that the requirement of consent or capacity on the basis of age cannot be read and interpreted strictly.

²⁵ See Section 18, HMA, 1955, and Sections 11(1) and (2), PCMA 2006.

²⁶ Section 3(1) of the PCMA.

²⁷ Section 13(2)(iv), HMA, and see also *P. Venkatramana v. State* AIR 1977 AP 43 supra.

²⁸ Section 6, HMA. See also Section 4(a), Hindu Minority and Guardianship Act, 1956 which defines a minor as any person under the age of 18 years. In *Gita Hariharan v. R.B.I.* (1999) 2 SCC 228, the Supreme Court held that the words ‘after the father’ could be construed to mean ‘absence’, referring to the father’s absence from the care of the minor’s property or person for any reason, including physical and mental incapacity, indifference or mutual understanding with the mother while the child is in the exclusive care and custody of the mother (per Dr. AS Anand CJI and M. Srinivasan J at para 16).

²⁹ On the contrary, Section 11 of the PCMA provides that whoever is in charge of the child, whether a parent or a guardian, is liable to rigorous imprisonment extending to 2 years and /or a fine extending up to one hundred thousand rupees, if they do any act to promote or permit or participate in the solemnization of a child marriage. Section 11 (2) further states that “*it shall be presumed, unless and until the contrary is proved, that where a minor child has contracted marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnized.*”

³⁰ See Chapter II, HMA, 1955, in particular Section 8(5). See also Section 13, SMA which provides for registration. The Constitution provides that the registration of marriages is a state subject under Entry 30, List II of the 7th Schedule, i.e. only states can legislate on this issue, not the Centre. Some states have enacted laws on the compulsory registration of marriages, including Maharashtra, Gujarat, Karnataka, Himachal Pradesh and Andhra Pradesh. The Supreme Court in *Ashwini Kumar* AIR 2006 SC 1158 has urged all states to enact laws for the compulsory registration of marriages. The Court also held that “*though the registration (of marriages)*

order to avoid future complications. To register marriages solemnised under the HMA, certain particulars of the marriage as prescribed by the respective State Government are required to be entered into the Hindu Marriage Register. The procedure for registration varies from State to State.

3.1.5 Proof of marriage: A registration certificate provides proof of the marriage. As an alternative, statements by the person officiating at the wedding or of guests attending or photographs of the wedding would provide some evidence of the marriage.

3.2 Muslim Law

3.2.1 Requirements of a valid marriage: Under Muslim law,³¹ marriage is a contract.³² Consent is therefore an essential element of marriage and may be either expressly stated or implied by conduct. Although there is no particular requirement of any ceremony, in practice a religious functionary is usually present at a ceremony held at the bride's family home.

The only essential requirement of a Muslim marriage is that a contract of marriage must come into existence. For the contract to be complete, there should be a proposal of marriage made by, or on behalf of, one of the parties, and accepted by or on behalf of the other, at one and the same meeting, along with a stipulation to pay dower (*meher*). Among the Sunnis, it is the practice for the proposal and acceptance to be made in the presence and hearing of two adult male witnesses. The Shias do not insist on the presence of witnesses.

3.2.2 Capacity: Any Muslim male or female of sound mind, who has reached puberty, may enter into a contract of marriage. A person who is not of sound mind, or has not yet reached puberty, may also be married if consent to the marriage is given by their respective guardian (see para 3.2.2.2 below).³³ The PCMA would apply to penalise such child marriages however (see 3.1.2.2. above on the interplay of criminal and family laws relating to child marriage).

Under Muslim law, a Muslim woman may not marry a non-Muslim man, although a Muslim man may validly marry a non-Muslim woman who is a *kitabiyah* (i.e. of a revealed religion, namely Christian or Jewish). Further, parties whose relationships are within 'prohibited degrees' to each other may not marry.³⁴ While men may contract polygamous marriages, women may not.

The reader is referred to any standard text on personal laws for further details.

cannot be proof of a valid marriage, yet it has great evidentiary value in matters of custody of children, rights of children born from the wedlock of the two persons whose marriage is registered and the age of the parties."

³¹ There are differences in the laws applicable to the two major sects of Sunnis and Shias respectively, and between the four different schools of law applicable to Sunnis, namely the Hanafi, Maliki, Shafei and Hanbali schools. The discussion here focuses mainly on the Hanafi law, which is applicable to the majority of Indian Muslims. It may be noted that in cases where a Sunni woman marries a Shia, she does not thereby become subject to the Shia law (Mulla, *ibid*, para 32).

³² See Mulla, *ibid*, at para 250.

³³ See Mulla, *ibid*, at para 251.

³⁴ The reader is referred to any standard text on Muslim law for further details on the meaning of 'prohibited degrees' in the context of marriage.

The prohibitions against certain kinds of marriages under Islamic Law can be broadly classified into absolute, relative, prohibitive and directory.³⁵

3.2.3. Consent: As noted above, the two adult parties to a marriage must consent, or the marriage will be invalid.³⁶ If the bride is a minor, and is represented by her guardian, the latter's consent is sufficient.

It seems that all sects of Islam are unanimous that a contract of marriage is complete and binding only when there is mutual consent on behalf of both the parties, when the parties see one another, and of their own accord agree to bind themselves, both being of the capacity to do so³⁷. It is only when consent is obtained from both the parties that there is no doubt as to the validity of the marriage.

Even in the rules relating to Guardians (*walis*) there is no specification that it only the minor bride's guardian who would have to consent to the marriage and the consent of the guardian of a minor groom would not be required if such is that case.

Minors: A person below the age of puberty³⁸ has no capacity to enter into a marriage without the consent of his or her father, or, in their absence, his or her guardian in marriage (*wali*). The following persons are entitled, in order of priority, to act as guardians in marriage: the father, the father's father, the brother, and other collaterals,³⁹ the mother and maternal relations. In practice, if any of these persons are present, and ask the bride to express her consent, her silence is generally understood to constitute implied consent.

Adults: There is unanimity of opinion in different schools of thought that a male who has attained the age of puberty, and who is of sound mind, can enter into a valid marriage without the consent of the guardian. But opinions differ on whether a female in the same situation can marry without the consent of her guardian. The Hanafis and Shias hold the view that the guardian's power of giving a child of either sex in marriage comes to an end when the child attains the age of puberty. According to the Maliki and the Shafei schools, the father's powers as guardian of a girl child do not come to an end till she is married. However, this view has not been upheld by Indian Courts; thus, the Kerala High Court has held that the marriage of an adult Shafei girl is valid, even without the consent of her father or any other guardian in marriage.⁴⁰

³⁵ For example see Justice SHA Raza, Commentaries on Mahommedan Law, 2007 at 1299.

³⁶ In *Mohiuddin v. Khatijabi* AIR 1939 Bom 489, the Bombay High Court held that even under the Shafei School of Law, the marriage of an adult virgin is invalid if performed without her consent, The Court noted that, "In this particular case, not only did the defendant not give her consent, but she had actually approached the police to have the marriage prevented, and the marriage was ultimately forced upon her against her wishes ... and the marriage thus celebrated under compulsion cannot be regarded as valid." This judgment thus set out the general principle of the requirement of active consent of the bride at the time of marriage under Muslim law.

³⁷ *Harrod v. Harrod*, 1 Kay & J. 4 s.c. 18 Jur.; 2 WR 612

³⁸ The age of puberty may vary from case to case, for example in *Md. Idris v. State of Bihar* 1980 Cri LJ 764, the age of puberty for a girl was stated to be 15 years.

³⁹ Collaterals are descendants in parallel lines from a common ancestor or ancestress. In this case they would be brothers and cousins.

⁴⁰ *Kamna v. Ethiyumma*, 1967 KLT 913; *Kummali Abubukker and ors v Vengatt Marakkar* AIR 1970 Ker 277: The Kerala High Court considered whether under Mohammedan Law a marriage is valid without the consent of the woman's father. It considered the role of the *wali*, relying on the Shafei and Maliki interpretations. It was

3.2.4 Registration: Although the registration of Muslim marriages is not compulsory, in some states, such as Assam, Bihar, Orissa and West Bengal, such marriages may be registered voluntarily.⁴¹ In practice, many Muslim marriages may be registered with the local mosque. While a certificate of registration from the mosque may provide *prima facie* proof of marriage, the validity of the marriage does not depend on such registration. Thus, a Muslim marriage which is otherwise valid will not be rendered invalid due to non-registration.

3.2.5 Proof of marriage: Where registration certificates are available, they would provide *prima facie* evidence of marriage. However, in the vast majority of cases where such certificates are not available, evidence from persons present at the solemnisation of the marriage may be taken as proof of marriage. As Muslim marriages are usually solemnised at the bride's father's or guardian's residence, and in the presence of both party's agents (*vakils*) and guests, such persons may act as witnesses.

3.3 Christian Law

The Indian Christian Marriage Act, 1872 (ICMA), which governs marriage among Indian Christians, allows for solemnization of marriages either in church or before a Marriage Registrar.

3.3.1 Requirements of a valid marriage: Marriages under the ICMA may be solemnized by a Minister of Religion or a Marriage Registrar in any form he deems fit to adopt. Essential procedural requirements include the presence of two witnesses (other than the Minister), notice of the intended marriage, publication of such notice and a declaration by one of the parties to the marriage that there are no impediments to the marriage.⁴²

3.3.2 Capacity: One or both parties must be Christians. The age of majority for a Christian marriage is 21; thus anyone aged below 21 who wishes to solemnize such a marriage requires the prior consent of their father, or if he is dead, their legal guardian, and if there is no guardian then their mother. There is no requirement that the parties must be of sound mind. Marriages may not be contracted between persons among whom there is some 'impediment' of 'kindred or affinity'.⁴³

The Indian Christian Marriage Act, 1872 deals exclusively with the solemnization of marriage and leaves the requisites of a valid marriage to be determined in accordance to

stated that the Shafei view that a marriage is invalid without the consent of the wali was rarely applied, whereas the Maliki view of the wali as a communicator or agent for a woman was more generally invoked. The Court therefore held, taking into account that the woman had given birth to two children, that the guardian could not raise any protest or cast doubt on the validity of the marriage.

⁴¹ Section 4 (2) Muslim Personal Law Shariat Application Act 1937.

⁴² Paras Diwan, *Family Law*, (Allahabad Law Agency, 2001), 49. The notice requirements may be omitted if the solemnisation is done by a licensed person in the presence of at least two credible witnesses along with the requisite declarations.

⁴³ The ICMA deals exclusively with the solemnization of marriage, and leaves the requisites of valid marriage to be determined in accordance with the personal laws of the parties. This has introduced some uncertainty. The Law Commission in its 15th Report, 1960 submitted recommendations and the draft of 'The Christian Marriage and Matrimonial Causes Bill, 1960' the First Schedule of which listed prohibited relationships. But this has not yet come into force.

personal laws of the parties. This had introduced an uncertainty in the legislation. The Law Commission of India in its Fifteenth Report, 1960 submitted a report on the law relating to marriage and divorce among Christians in India. In this report, the Commission had also provided “The Christian Marriage and Matrimonial Causes Bill, 1960” the First Schedule of which listed out prohibited relationships. However, the same has not come into force as yet.

3.3.3 Consent: Consent is an essential element of a valid Christian marriage, as the parties to the marriage have to make a written declaration of consent before the marriage can be solemnized⁴⁴ and registered. If either party’s consent is obtained under duress, s/he may seek annulment of the marriage, under the Indian Divorce Act, 1869 .⁴⁵

Minors: If either party is a minor,⁴⁶ the consent of his or her father, if living, or, if the father is dead, the consent of the guardian of such minor person, or if there is no guardian, then that of the mother, is essential before a marriage may be solemnized (Section 19, ICMA). The marriage of a minor without such consent is not valid. Such a marriage is voidable at the option of a contracting party who was a minor (ie aged 18-21 years) at the time of marriage.

3.3.4 Registration: A marriage solemnized under the ICMA must be registered with the Registrar General (established under the Births, Deaths and Marriages Act, 1886). Marriages solemnized in church may also be registered by a Marriage Registrar, or by the concerned clergyman in accordance with the procedure provided under the ICMA.⁴⁷

3.3.5 Proof of marriage: Certificates of marriage may be obtained from the respective Registrar General or Marriage Registrar, or the clergyman concerned from the respective Church records.

3.4 Special Marriage Act 1954, (SMA)

Many couples who marry of their own choice opt to do so under the SMA. Given that registration of such marriages is compulsory, as is the parties’ written declaration of consent, it is difficult for parents in such cases to later force their daughter to allege that her consent was obtained by force or fraud and thus compel her to seek annulment of the marriage.

3.4.1 Requirements of a valid marriage: Marriage under the SMA does not require any particular ritual or ceremony. The marriage is solemnized before a Marriage Officer duly authorized to do so. The parties are required to submit a formal application to marry before the Marriage Officer who must then publish a notice to allow an opportunity for any concerned person to raise an objection to the intended marriage. If no objection is raised by any person on any of the grounds specified under the SMA (Section 4) after thirty days from publication of the notice, the Marriage Officer will solemnize the marriage,⁴⁸ and issue a

⁴⁴ Section 51, Indian Christian Marriage Act 1872 (ICMA).

⁴⁵ Section 19, Indian Divorce Act 1869 (IDA) as amended by the Indian Divorce (Amendment) Act, 2001.

⁴⁶ Section 3, ICMA defines a minor as ‘a person who has not completed the age of twenty-one years and who is not a widower or a widow’.

⁴⁷ Sections 28, 30, 31, ICMA.

⁴⁸ Section 7, SMA. If there is an objection to the marriage, the Marriage Officer will inquire into the matter of objection, taking no more than 30 days to complete the inquiry (Section 8(1) SMA). If the Marriage Officer upholds the objection and refuses to solemnize the marriage, an appeal may be preferred to the District Court

marriage certificate. The parties along with three witnesses must sign the declaration of marriage which will be countersigned by the Marriage Officer. The marriage will be complete when the parties say to each other in the presence of the Marriage Officer and three witnessed “ *I (A), take the (B) to be my lawful wife (or husband).*”

3.4.2 Capacity: Any woman aged above 18 years may marry any man aged above 21 years, provided that neither is in a subsisting marriage, that each has consented voluntarily to marry, is of sound mind and not within ‘prohibited degrees’ of the other.⁴⁹ The parties may be of any religion or no religion.

3.4.3 Consent: Each party must freely consent to the marriage, and is required to make a declaration that s/he takes the other as their lawful spouse. Given the age requirements under the SMA, there is no question of any minor marrying under this law.

3.4.4 Registration: Registration of marriages under the SMA is compulsory. Registration is to be done before the Marriage Officer, who is required to maintain registers of solemnized marriages in accordance with the procedure provided under the SMA.

3.4.5 Proof of marriage: Certificates of marriage, which provide *prima facie* proof of the marriage, may be obtained from the office of the concerned Marriage Officer.

4. Constitutional Guarantees and Legal Remedies

4.1 Fundamental Rights

Recognition of the fundamental rights issues relating to forced marriage is critical to framing adequate responses to the problem and for obtaining effective redress for victims. The Indian Constitution provides for extraordinary remedies, under Article 226 and Article 32 respectively, of filing a writ petition for the protection of fundamental and other statutory rights by the State.⁵⁰ Such remedies not only provide immediate relief in cases of forced marriage, for example, the production of the person in confinement and their examination in person by the Court, but also redress for the violation of the fundamental rights of any person who is threatened with or subjected to being forced into a marriage.

Part III of the Indian Constitution guarantees fundamental rights, including the right to life (Article 21), the right to equality (Article 14), freedom from discrimination (Article 15) and other fundamental freedoms such as freedom of movement, the right to residence in any part

Constitutional Remedies: Articles 32 and 226 from the Indian Constitution

Article 32 Remedies for enforcement of rights conferred by this Part

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

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of the country, and freedom of association (Article 19).

4.1.1 The right to life: Article 21 of the Constitution guarantees that no person shall be deprived of her/his life or personal liberty except according to procedure established by law. The right to life in its entirety has been widely interpreted by the Indian Supreme Court to include all that is needed for a person to lead a meaningful life with dignity.⁵¹ It could be argued, therefore, that a forced marriage in itself amounts to a gross violation of the very right to life of the person as well as of the right to personal liberty (see Lata Singh’s case in text box below).

Reiterating the ‘sacred and sacrosanct’ status of the right to life and denouncing honour killings as being antithetical to the norms of a civilized society and the rule of law, the Delhi High Court has upheld the validity of a Government order exempting a Bangladeshi national from deportation proceedings on humanitarian grounds that her life and the life of her daughter would be exposed to danger from her father in case she was sent to her family.⁵²

4.1.2 The right to equality: Article 14 of the Constitution guarantees to every person equality before the law and equal protection of the laws. Article 15 provides that there shall be no discrimination against any citizen on the grounds of religion, race, caste, sex, or place of birth. In addition, it provides that the State may make special provisions for women and children.

⁵¹ The Indian Supreme Court has elaborated on the right to life as encompassing the right to live with dignity, including in the context of several landmark judgments relating to women. See for example, *Vishaka v. State of Rajasthan and Others* AIR 1997 SC 3011 which dealt with the right to freedom from gender-based violence in particular sexual harassment.

⁵² *Abdus Sadur Khan Vs. Union of India*, 176 (2011) DLT 630 in AALI, Compendium of Judgments: Right to Choice in Relationships, 2011

Lata Singh's case

Lata Singh v. State of U.P. & Anr. 2006(6) SCALE 583

The Supreme Court issued a writ of mandamus directing the administration/police authorities throughout the country to ensure that if any adult undergoes an inter-caste or inter-religious marriage with another adult, the couple should not be harassed by anyone nor subjected to threats or acts of violence, and that the police should institute criminal proceedings against anyone who does so.

The Court further held that the parties in the instant case, being adults, were free to marry anyone they liked, as there is no bar to an inter-caste marriage under the Hindu Marriage Act or any other law. The Court stated that it is in national interest that such inter-caste marriages are encouraged.

Lata Singh, 27, a Masters student, filed a writ petition under Article 32 of the Constitution before the Supreme Court, seeking orders to quash criminal cases pending against her husband and other in-laws. She alleged that after she left her brother's home to marry of her own free will, he lodged a missing person report with the local police station. The police then arrested relatives of Lata's husband, including his sisters (one of whom had a one month old child). Her brothers beat up the husband's mother and uncle, broke things in their home, confined one of the uncles for several days, and filed a false case of kidnapping against the husband, after which several family members were arrested. Lata also alleged that her brothers had threatened to kill her husband and his family. She sought assistance from the Rajasthan Women's Commission, which recorded her statement and forwarded it to the local Superintendent of Police, and also informed the National Human Rights Commission and State Government. The police then filed a final report stating that no offence was committed by any of the accused. The accused were all released, and the NHRC so informed. The Investigating Officer then recorded Lata's statement which she gave, after armed guards were provided for her security, to the Chief Judicial Magistrate, under section 164 Cr.P.C. She stated that she had married of her own free will.

The Court found that as there was no dispute that Lata was a major, she was free to marry or live with anyone she liked. It held that there was no bar to an inter-caste marriage under the Hindu Marriage Act or any other law. The Court further commented as follows:

'...[there is news] that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage.'

4.1.3 Forced marriage and fundamental rights: The right to life and the right to equality are supplemented by the several freedoms guaranteed under Article 19 of the Constitution, including the freedoms of movement, speech and expression, association, and to reside in any part of the territory of India. These fundamental rights and freedoms serve to secure the autonomy and liberty of the individual and are enforceable by the Courts.

Threatened or actual forced marriage may entail a violation of one or more of these fundamental human rights, primarily the all-encompassing right to life and dignity. It may also entail the violation of the freedom of movement and liberty and the right to equality, in which case the remedy of a writ of *habeas corpus* may be used. The High Courts and Supreme Court have been entrusted by the Constitution with a duty to enforce the fundamental rights of the parties approaching them for such relief. In such cases, the High Court or Supreme Court could also be petitioned by way of a writ for mandamus, to pass

orders directing the police to take appropriate steps to prevent harassment of the couple (see below).

4.2 *Habeas Corpus* Petitions

The writ of *habeas corpus* is available as a remedy in all cases of wrongful deprivation of personal liberty. It is a process for securing the liberty of the individual by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. A writ of *habeas corpus* may be filed before the Supreme Court or any High Court. The right to approach the Supreme Court by way of an application or petition under Article 32 of the Constitution for the enforcement of a fundamental right is itself a fundamental right, while the right to approach a High Court under Article 226, though not a fundamental right, is still a constitutional right.

The writ of *habeas corpus* is a prerogative writ by which the causes and validity of detention of a person are investigated by a summary procedure. If the person or authority having custody of the detained person does not satisfy the Court that the deprivation of the personal liberty of the detainee is according to the procedure established by law, that person is entitled to their liberty. The writ is available against a private person as well as a state authority. Under common law, a writ of *habeas corpus* is available for the release from private detention of a person if they were wrongfully detained by anyone without their consent. The Constitution provides that on a writ of *habeas corpus*, filed by any person, a High Court concerned may direct that “the person in custody be brought before the Court so that it may be satisfied that he is not being held in custody without lawful authority or in an unlawful manner.”⁵³ The question of what amounts to unlawful custody or wrongful detention of the person is usually decided by the Court in each case according to the circumstances.

4.2.1 Relevance of a *habeas corpus* petition in cases of forced marriage: In India, the writ of *habeas corpus* has proved to be an effective remedy in relation to forced custody,⁵⁴ illegal confinement⁵⁵ (including in cases of interference with the right to choice in marriage)⁵⁶ and other related matters. In *habeas corpus* petitions, brought in the context of restrictions on a woman’s right to marry, the Supreme Court has held that an adult woman is free to stay in any place she likes without constraint by her parents or alleged husband.⁵⁷ The writ of *habeas*

⁵³ Article 226, Constitution of India

⁵⁴ *Mohd. Ikram v. State of U.P.*, AIR 1964 SC 1625.

⁵⁵ In *Nilima Priyadarshini v. State of Bihar*, 1987 (Supp.) SCC 732 where a woman alleged that she was illegally confined against her wishes, the Supreme Court directed the person against whom the complaint was made to produce her before the Additional Chief Judicial Magistrate, who was in turn directed to enquire into the matter and report to the Supreme Court to issue appropriate directions.

⁵⁶ See further *Jyoti alias Jannat & Anr. v. State of UP & Ors*, 2003[2] JIC 468 (All); *Yasmeen alias Megha Mathur v RC Mathur and Ors*, Writ Petition No. 319 (H/C) of 1993 All; *Madhu Bala v. Narendra Kumar and Ors*, 1982 (2) SCC 444; *Kiran Kumari v. Anand Pratap Singh*, AIR 1980 SC 1749; *Gian Devi v Superintendent, Nari Niketan, Delhi and Others* (1976) 3 SCC 234; *Mohd. Ikram Hussain vs. State of U.P.*, AIR 1964 SC 1625. Also see Association for Advocacy and Legal Initiatives, 'Baseline Report: Rights of Women in relation to Marriage in India', International Women’s Rights Action Watch-Asia Pacific (IWRAP-AP), Malaysia, http://www.iwraw-ap.org/aboutus/pdf/FPrights_women_rtn_marriage.pdf

⁵⁷ *Gian Devi v. The Superintendent, Nari Niketan Delhi and Others*, supra, in which the applicant filed a fundamental rights petition under Article 32 against her detention, and the Court held that the petitioner being 18 years old, was *sui juris* and thus no restrictions could be placed upon the person with whom she chooses to

corpus has also been used in instances where one parent has taken forceful and unlawful custody of the child,⁵⁸ when the Supreme Court has directed one of the parents to produce the child. In cases concerning the custody of a minor child, the Court has held that:

“... *The matter is to be decided not on considerations of the legal rights of the parties, but on the sole and predominant criterion of what would best serve the interest and welfare of the minor*”.⁵⁹

In recent cases of “runaway marriages”, the Courts have further reiterated that where the minor girl has consented to marriage, she cannot be forced to go back to her parents, particularly in view of the fact that such marriages are not void *ab initio* but are merely voidable in law. These *habeas corpus* petitions were accordingly dismissed by the Court, or in several cases even withdrawn by the parents.⁶⁰

Habeas corpus petitions have been extensively deployed to address illegal detention (in state institutions such as protective homes, asylums and police stations) of women who refuse to succumb to parental pressures to break up their relationship or marriage.⁶¹ For instance, Gian Devi, an 18-year-old woman, secured her release on filing a petition for writ of *habeas corpus* against her detention in a Nari Niketan.⁶² Similarly, Kalyani Chowdhury filed a petition in the Allahabad High Court alleging that she was illegally detained in a protective home for women.⁶³ In each case, the Court concerned held the detention of an adult woman in a protective home to be illegal.

stay, whether it is the person to whom she claims to be married or the person to whom her father is alleged to have married her.

⁵⁸ *Dushyant Somal v. Sus Somal*, (1981) 2 SCC 277.

⁵⁹ See *Elizabeth Dinshaw v. Arvind M. Dinshaw*, (1987)1 SCC 42 where the petitioner filed a petition in the Supreme Court seeking a *habeas corpus* order for production of her minor child, and the handing over of his custody pursuant to the order of a competent foreign Court. See also the case of *Surinder Kaur Sandhu v. Harbax Singh Sandhu*, (1984) 3 SCC 698.

⁶⁰ See fn 23, *supra*, for details of the cases.

⁶¹ *The reader is advised that the following list is not exhaustive and the reader is referred to any standard text for further details.*

Licensing of homes is a state subject and several states have statutes that require protection homes to be licensed under state law. There are different methods of establishing / notifying / registering / maintaining “homes” under different legislations. Such “homes” derive their statutory validity from the specific provisions under each legislation.

Some examples of central legislation which provide for setting up of homes are Juvenile Justice (Care and Protection of Children Act), 2000, Immoral Traffic (Prevention) Act, 1956, The Mental Health Act, 1987

The Ministry of Women and Child Development (MWCD) introduced the Scheme of Short Stay Homes for Women and Girls (scheme) for those women and girls who are either exposed to moral danger or are victims of family discord and the resulting strain of relationship or emotional disturbances. It was clarified by the MWCD that the Homes under this scheme should not be equated with destitute homes or orphanages or homes for the aged and infirm. Under this particular Scheme, voluntary organizations were given financial assistance to maintain homes. The definition of voluntary organization and details of the nature of such organization eligible for assistance was provided in the scheme itself.

⁶² *Gian Devi v The Superintendent, Nari Niketan, Delhi & Others*, *supra*.

⁶³ *Kalyani Choudhury v State of UP* 1978 CriLJ 1003. This judgment clarified that it is illegal to detain a woman in a protective home when there is no ground to hold her there under the Suppression of Immoral Traffic in Women and Girls Act 1956.

Another important aspect of judgments on *habeas corpus* concerns the issue of private detention. Even though *habeas corpus* has been traditionally understood as ‘a writ of right and not a matter of course’, there has been a certain ‘routinization’ in its use. It has been used by the natal family as a technique of exercising custodial power to recover the ‘adult runaway daughter’, and also by a ‘husband’ seeking custody of his wife where she is being held by her natal family.⁶⁴ In one case, the Court emphasised that:

*‘...habeas corpus petition are not meant for the High Court to monitor police investigations as that is the bounden duty of the police being the investigating agency without any interference of law courts and the High Court is certainly not meant to be treated as an executing court for enforcing investigation of the cases which are registered by entertaining habeas corpus as habeas corpus petitions are certainly not meant to monitor police investigation’.*⁶⁵

One commentator has noted that ‘[b]y and large false cases if brought by the parents against their children do not result ultimately in prosecutions for perjury or contempt.’⁶⁶ However, in *Mohd Ikram Hussain v The State of UP and Others* AIR 1964 SC 1625 the Court found the father guilty of contempt when he failed to produce his daughter in Court, after her husband filed a *habeas corpus* petition seeking her release. The Court also noted that it was unusual for a husband to file a *habeas corpus* petition, especially when criminal charges of abduction had been pressed against him.

A petition for *habeas corpus* may also be filed by a third party. For example, *Miss M.S. Annaporani v State of UP*,⁶⁷ details the violence suffered by a 30-year-old Hindu woman who was gang raped and paraded through a village after she married a Muslim man. This petition ultimately failed since the criminal case was compounded and the victim became a hostile witness. Despite the very public violence involved, the police intervention was weak, and appeared to treat such violence as a legitimate customary punishment for inter-caste or inter-community marriage, rather than a criminal offence requiring prosecution.

In recent years, the higher judiciary has taken a critical view of inaction on the part of law enforcement agencies in protecting the fundamental rights of persons who undergo inter-caste or inter-religious marriages holding that all administrative and police authorities in the country are duty bound to ensure that the marital life of any adult who undergoes such a marriage is not disturbed or harassed. Additionally, the officers concerned have the responsibility to take stern legal action against any person who threatens or commits acts of violence or instigates violence against the persons undergoing the inter-caste or inter-religious marriage.⁶⁸

4.2.2 Obtaining a writ of habeas corpus

⁶⁴ Baxi, Pratiksha, 2006, ‘Habeas Corpus in the Realm of Love: Litigating Marriages of Choice in India’ *Australian Feminist Law Journal*, 25:59-78.

⁶⁵ *Dwarka Prasad v State of Rajasthan and Ors* 2002 CriLJ 1278.

⁶⁶ Baxi, Pratiksha, see fn 58 supra.

⁶⁷ 1993 CriLJ 487.

⁶⁸ *Ashok Kumar Todi Vs Kishwar Jahan and ors.* AIR 2011 SC 1254; *Arumugam Servai Vs. State of Tamil Nadu* AIR 2011 SC 1859, in AALI, *Compendium of Judgments: Right to Choice in Relationships*, 2011.

a) Forum: A petition for *habeas corpus* may be filed before the Supreme Court or any High Court for the protection of fundamental rights. In the Supreme Court, the writ of *habeas corpus* is available only in case of violation of fundamental rights by the State, guaranteed under Article 21, but does not relate to interference with the personal liberty by a private citizen. Thus, strictly speaking, the Supreme Court cannot issue a writ of *habeas corpus* in relation to Article 21 where the illegal detention complained of is by a private person, such as in forced marriage cases. The Supreme Court may, however, issue a writ of *habeas corpus* in cases where it is alleged that the state's inaction (eg lack of prompt and effective investigation) in relation to a complaint of forced marriage, amounts to a failure to comply with its positive obligations to protect individuals, including non-citizens. Typically, writ petitions for *habeas corpus* filed under Article 32 also include state parties as respondents. Both forums, i.e. High Courts under Article 226 and the Supreme Court under Article 32, can be used to obtain a *habeas corpus* petition in cases of forced marriages.

The High Courts, on the other hand, have jurisdiction to issue this writ not only for violations of fundamental rights but also for other purposes and can issue it against a private person. Therefore, in cases of forced marriage, where the woman may be illegally confined by her own family or relatives, the High Court would be the appropriate forum for seeking relief through a writ of *habeas corpus*, in cases of both citizens and non-citizens.

b) Petitioners: As noted above, any person may apply for a writ of *habeas corpus* to the Supreme Court (under Article 32 of the Constitution) or to a High Court (under Article 226 of the Constitution). This means that the person who is allegedly held in illegal detention or, where they are under confinement and therefore unable to access the Court, any other person such as a relative, sister, brother, friend, or public spirited person, may apply to the Court for orders in a *habeas corpus* petition seeking their release.

c) Respondents: Ordinarily, in cases of interference with the right to marry, such petitions are filed against the family members of the person illegally detained and the police. The order, when issued by the Court, directs the family members to produce the detained person in Court. If the High Court's direction in a proceeding for a writ of *habeas corpus* for the production of the body of a person is disobeyed, the contemnor (the person who wilfully fails to obey the orders of the Court) is punishable by attachment (seizure of property by court order) and imprisonment. A contempt proceeding by the High Court would be issued if, for example, the Court found that any parent of the detained person, having the knowledge of her whereabouts and also having her custody, was wilfully and deliberately disobeying the directions of the Court.

4.2.3 The Proceedings

a) Costs: The costs of filing a *habeas corpus* petition can vary greatly, depending upon the lawyers, the place of filing and the prevalent legal costs in the area concerned. If the petition has been brought by a woman in the context of her natal family filing a complaint against her husband, then she will clearly be unable to get financial support for her petition from them and be particularly vulnerable. Legal aid may be available, but is likely to be of varying quality, depending on the service provider concerned. Under the Legal Services Authority Act, 1987, a woman is entitled to free legal aid from the state or District Legal Services Authority in each High Court and District Courts may be approached for such assistance.

b) Supporting documentation: A petition for a writ of *habeas corpus* should be accompanied by an affidavit by the person restrained stating that the petition is made at their instance and setting out the nature and circumstances of the restraint. Where the person restrained is unable, owing to the restraint, to swear the affidavit, the petition should be accompanied by an affidavit by any other person acquainted with the facts, stating the reason why the person restrained is unable to do so and providing other relevant particulars such as her age, marriage certificate if any etc. In many cases, the Supreme Court has treated letters written by persons in illegal confinement as *habeas corpus* petitions.⁶⁹ If the Court is of the opinion that the confinement is not justified, it will issue the writ and direct the respondent to show cause why they should not be directed to release the detained person immediately.

However, in many such cases the family may have sent the woman concerned away to a relative or friend's house. If the petitioner is unaware of this and unable to provide the correct address at which the detained person is held, then the Court order may not be effective, or its enforcement may be delayed. If the respondents state that they do not have possession of the person, the rightful remedial direction may be to file a missing person FIR.

c) Length of proceedings: *Habeas corpus* petitions are treated with the utmost urgency by the Courts and normally heard within a couple of weeks. Interim orders may be sought at the hearings. The nature of such proceedings requires that they be 'heard expeditiously and be as free of technicalities as possible'.

d) Interim procedures: In *habeas corpus* petitions, where the matter is awaiting final hearing by the Court, interim orders for production of the detained person at each hearing may be available as a remedy. The High Court may also order an inquiry preceding an order for production if required to establish particular facts. The petitioners can also seek an *in-camera* examination of the detained person, that is, to have her examined in the Judge's chambers and/or only in the presence of the parties and the lawyers concerned. The Court may then question her in order to determine the circumstances in which she has been held, her age and her wishes regarding where and with whom to live. Prior to this, the Court may give some time to the woman to make up her mind without any pressure by leaving her alone in the chambers⁷⁰ or in conversation with a woman lawyer, and in other cases may allow or direct her to talk to her parents,⁷¹ before she answers any questions about the choices and decisions she wishes to make. In order to determine the issue of illegal detention the Court may adopt any procedure which is not expressly prohibited, and in practice it is open about receiving and collecting evidence or issuing orders for enquiry.⁷²

⁶⁹ Supra n.23. *Upendra v. State of UP* 1981 3 SCALE 1137 (SC).

⁷⁰ *Krishna Kumar and Others v State of UP & Others* 1993 CriLJ 3825.

⁷¹ *Oroos Fatima alias Nisha and another v Senior Superintendent of Police, Aligarh and another* 1993 CriLJ 1.

⁷² In *habeas corpus* petitions, the Supreme Court has ordered immediate production of the person in illegal confinement before the Magistrate, and directing the latter to record her evidence and submit it to the Court. In some cases, where the authenticity of the petition was not clear, the Court has even ordered the Central Bureau of Investigation (CBI) to make enquiries and investigations and submit its report within a given time period to the Court. But even in a proceeding for *habeas corpus*, the Court is competent to mould the relief as to meet the requirements of a particular case (see *Varier v. Secy., Home Affairs*, (1978) Cr. L.J. 86 (para 36) Ker) or to issue appropriate directions (Cf. *Kadra v. State of Bihar* (1981) 3 SCC 671; *Khatri v. State of Bihar* AIR 1981 SC 928, *Hiralal v. State of J.K.* (1984) Supp. SCC 682 (para 6)).

e) Possible outcome of a *habeas corpus* petition: The High Court can grant an order requiring the production before it within a specified period of the person who is allegedly illegally detained. On the person's production, and after hearing the lawyers, and in some cases the detained person, the Court will direct the person(s) responsible to release the detained person immediately if it takes the view that the person is detained and the detention is not justified. If the Court finds that the detained person is a minor, then it may direct that she be placed in the custody of her parents or in a state home, rather than being released.

If any person disobeys a High Court direction for the production of the body of the detained person, then the Court may be petitioned to issue a notice of 'contempt of court' against that person. If such a person is then found to have committed contempt, s/he may be punishable by attachment and/or imprisonment.

Compensation is not usually granted in *habeas corpus* petitions, but may be granted exceptionally (as part of its special and extraordinary powers under Art. 226) if the Court is satisfied that the custody was unlawful and caused a violation of the detained person's fundamental rights.⁷³ In the context of forced marriage, the Supreme Court has awarded compensation to persons illegally detained by the police after false FIR alleging rape and abduction were filed by the family petitioner's wife who were opposed to her marriage with the petitioner.⁷⁴

f) Dismissal of a *habeas corpus* petition: Writ petitions regarding private custody are usually filed before a single judge bench in the first instance. In cases where a *habeas corpus* petition is dismissed by the High Court, it is always possible to appeal against such dismissal before a Division Bench (constituted by two judges sitting together) of the same High Court and then before the Supreme Court in a Special Leave Petition. Relevant High Court Rules in each State should be consulted.

5. Civil Remedies

5.1 Matrimonial Remedies

The various personal laws and the SMA provide for civil matrimonial remedies which may be useful in cases of forced marriage.

5.1.1 Hindu law: Under Hindu law, the available matrimonial remedies to escape from a situation of forced marriage are annulment, judicial separation or divorce.

a) Voidable Marriages and Annulment: A marriage is void if it is bigamous, that is one of the parties is already in a subsisting marriage, or if the parties are within prohibited degrees. As mentioned above, a marriage under Hindu law is voidable and may be annulled by a Court on the ground of one party lacking capacity due to insanity, or non-consummation caused by

⁷³ *M C Mehta v Union of India* (1987) I SCC 395; *Bhim Singh v. State of J. & K.* AIR 1986 S.C. 494 (para 3); *Rudul Shah v. State of Bihar* AIR 1983 SC 1086 (paras 10 & 11); *Sebastian Hongray v. Union of India* AIR 1984 SC 2984.

⁷⁴ *Arvinder Singh Bagga Vs. State of U.P. and Others*, AIR 1995 SC 117 in AALI, Compendium of Judgments: Right to Choice in Relationships, 2011

impotency, or if the consent of either party is found to have been obtained by fraud or force.⁷⁵ Mere pressure, strong advice and persuasion or any ‘importunity’ (inconvenience) would not amount to fear or force. Force will only be found to have occurred if the consent was induced or compelled as a result of actual use of force or threat to use force; it is unclear whether it would be necessary to establish physical force or whether the Court may interpret this more widely. The force or fraud must be ‘as to the nature of the ceremony or as to any material fact or circumstance’.⁷⁶

The requirements for annulment are first, that any petition for annulment be presented within one year of the discovery of fraud or the cessation of force, and second that the petitioner had not lived with the respondent after the discovery of fraud or cessation of force. A single act of sexual intercourse after the discovery of fraud will be fatal to the petition.

Once a voidable marriage is annulled, the decree of nullity is given retrospective effect from the date of the marriage and the marriage is deemed to have been void for all purposes from the very beginning.

b) Divorce: A divorce may be obtained by mutual consent. If this is not possible, the aggrieved party may file a petition for divorce before a district Civil Judge, Additional District Judge or in the Family Court on various fault-based grounds including, among others, cruelty, desertion and adultery (Section 13, HMA). The parties must have been married for at least one year before filing of the petition.

c) Judicial Separation: Either party may seek judicial separation from their spouse in order to escape from a forced marriage (section 10, HMA). The grounds for judicial separation are the same as those for obtaining a divorcé. There is no required minimum period of marriage following which such an application should be filed. Once a decree for judicial separation has been issued, a woman is no longer required to cohabit with the husband. Remarriage following a separation is not possible. Further, non-consensual sexual intercourse with the wife by the husband would amount to rape during the period of judicial separation (Section 376, Indian Penal Code 1860).

5.1.2 Muslim law: Under Muslim Law, several matrimonial remedies are available to individuals seeking to escape a forced marriage. These include repudiation of the marriage through exercising the option of puberty, jactitation or dissolution. Some of these remedies may be obtained extra-judicially, that is without the parties having to go to a Court, while others are only obtainable in the form of judicial decrees. The Dissolution of Muslim Marriages Act, 1939 (DMMA) provides for a judicial dissolution of marriage between Muslims on various grounds.⁷⁷ Most laws including the HMA do not extend to Jammu and Kashmir)

⁷⁵ Section 12(1)(c), HMA.

⁷⁶ In *Tapan Ranjan Das v. Smt. Jolly Das* AIR 1990 Cal. 353, the Court considered the issue of whether the husband had tricked his wife into signing registration papers, which she allegedly believed were for the purpose of a music competition. It noted that if this were so, the marriage would be void under the Special Marriage Act 1954. The Court found on the facts that the parties were legally married, as she knew of the marriage and being literate and 18 years of age would have understood the papers, and made no finding of fraud.

⁷⁷ It is important to note here that the DMMA does not apply to the State of Jammu and Kashmir which has its own statute enacted in 1942 with slight modifications. [Editors’ note: The state of Kashmir is a disputed

a) Option of Puberty: A Muslim woman who married as a minor on the basis of her guardian's consent may exercise her 'option of puberty' to repudiate such a marriage after attaining puberty, and before she reaches the age of 18, if the marriage is not consummated.⁷⁸ She may exercise this option by filing a substantive suit under Section 2 (vii), DMMA. This is also available under HMA.

b) Jactitation: Where a man falsely claims to be the husband of a woman, the proper remedy is for her to bring a suit for a declaration that the parties are not married. Either party can bring such an action where a marriage has been contracted under Muslim law. There is no bar on a suit being brought by a minor female.⁷⁹

c) Divorce: Generally, both parties to the marriage contract may have an option to divorce, but the husband's right in this respect is usually much greater than that of the wife. The husband may dissolve the marriage tie at his will. The wife will only have the power to dissolve the marriage if the husband delegates his power of divorce to her (*talaq-e-tafweed*). A clause to the effect that, under certain specific conditions, the wife may pronounce divorce upon herself may be included in the marriage contract or another written agreement. Such an agreement is valid if firstly, the option for divorce is not absolute and unconditional and, secondly, the conditions are reasonable and not opposed to public policy.⁸⁰ A wife exercising her powers under such an agreement must establish that the conditions entitling her to exercise the power have been fulfilled.

A divorce can also take place by mutual agreement. The wife can purchase her divorce from her husband as in the *khula or mubaraat* forms of divorce, discussed below.

d) Khula or Mubaraat: One common practice used by Muslim women is the dissolution of marriage through mutual consent by way of *khula or mubaraat*.

territory, with about two-thirds of its territory under Indian control and one-third nominally free, but under Pakistani control. India refers to the entire state as Jammu and Kashmir, and refers to the parts under Pakistani control as "Pakistan Occupied Kashmir." We (as editors) take no position on the dispute,]

⁷⁸ Sec.2 (vii), DMMA effectively fixes fifteen as the age of puberty. This clause does not speak of puberty as such, but only of an age, although in fact it deals with an option arising at puberty.

⁷⁹ Fyzee, Asaf A.A., *Outlines of Muhammadan Law*, 4th Edn. (OUP, 1999),130; Tyabji, Faiz Badruddin, *Muslim Law*, 4th Edn., (Bombay, 1969), 90; Ameer Ali, Syed, *Mohammedan Law*, Tagore Law Lectures, 1884, Vol. II, 5th Edn., (Calcutta, 1929), 426. The procedure in cases of jactitation remains the same for men and women, that is filing of a suit for declaration. There is at least one reported case of the Bombay High Court (*Armaity Jimmy Sukhia v. Victoria Robert Crasto* 1997 (99(3)) BOMLR1, where the wife from the first marriage (according to Parsi law) filed a suit claiming perpetual injunction on jactitation of marriage by the second wife (married under Muslim law), without taking action under the law on bigamy. In fact, though the defense had argued that such action can be brought only by the husband, the Court upheld the *locus standi* of the plaintiff. The Court granted the motion, injunctioning the second wife from using the name of the husband, even when the second marriage had not been declared void *ab initio* in a court of law. Note that there is very limited case law on jactitation in India, as the issue is usually dealt with under bigamy laws.

⁸⁰ A pre-nuptial agreement by a Muslim husband in a *nikah-nama* (deed of marriage) that he would pay separate maintenance to his wife in case of disagreement and that the wife should have the power to divorce herself in case of failure to pay maintenance for a certain period, was held to be not opposed to public policy and enforceable under Muslim law: *Buffatan Bibi v. Sk. Abdul Salim*, AIR 1950 Cal 304.

A divorce by *khula* is a divorce with the consent, and at the instance, of the wife, in which she agrees to give a consideration to the husband (typically paying back her dower/waiving outstanding financial rights) in exchange for his *talaq* of her. In such a case, the terms of the bargain are a matter of arrangement between the husband and the wife.⁸¹

If the divorce is effected by mutual decision of both the husband and the wife (involving the free and full consent of both parties), it is known as *mubaraat*.⁸² *Mubaraat* is considered to be more progressive than the other forms of divorce under Indian laws, as it is in the form of a bilateral agreement between the parties, with both parties consenting. Unlike *khula*, the wife is not required to pay any compensation to the husband. The offer in this form of divorce may be initiated by either the wife or the husband, and on acceptance, the dissolution of marriage is complete. However, the wife is required to observe *iddat* after the divorce.

Like the *khula*, the *mubaraat* operates as a single, irrevocable divorce and does not involve any court procedure.

e) Judicial decree of dissolution: A Muslim marriage may be dissolved by judicial decree under the DMMA at the instance of any married woman, on any single ground specified there including desertion, adultery, cruelty, insanity or apostasy.⁸³

5.1.3 Christian law: Under Christian law, the available matrimonial remedies to escape from a situation of forced marriage are annulment, judicial separation or divorce.

a) Annulment: Under the Divorce Act 1869, the notion of voidable marriage is not recognized. However, a marriage may be nullified (annulled) on the ground of the consent of either party having been obtained by force or fraud,⁸⁴ either party being impotent/suffering from insanity at the time of marriage, or there being a prohibited relationship between the parties.

b) Separation: Either party may seek a judicial separation on grounds of adultery, cruelty or desertion for two years or upwards and without any excuse.

c) Divorce: A marriage can be dissolved by either party under the Divorce Act on various grounds, including cruelty, adultery, unsoundness of mind, conversion to another religion, or desertion for more than two years. The parties, if they mutually consent, may file a petition before the Court to dissolve the marriage on the ground that they have been living separately for more than two years and that they have not been able to live together.

⁸¹ As a general rule, in *khula*, the wife makes some compensation to the husband or gives up a portion of the *mahr* (dower), but this is not absolutely necessary. The Hanafi law lays down that a *khula* repudiation can validly take place even without payment of compensation by the wife: see Asaf A.A. Fyzee, *Outlines of Muhammedan Law*, 4th Edn. (OUP, 1999), 165.

⁸² Indian Courts have held that in the case of an agreement between a Muslim husband and wife entitling the wife to divorce her husband, where the conditions were not conducive to the best spirit of marriage, and the agreement was opposed to public policy, it would not operate to enable a divorce or dissolution of marriage between the couple: see *Jani v. Mohd. Khan*, AIR 1970 Jammu & Kashmir 154.

⁸³ Section 2, Dissolution of Muslim Marriages Act 1939 (DMMA).

⁸⁴ Section 19, Indian Divorce Act, 1869 (IDA) as amended by the Indian Divorce (Amendment) Act, 2001. Under the IDA, a marriage can be nullified on grounds that consent was obtained by force or fraud: see *Benjamin Doming Cardoza v. Mrs. Gladys Benjamin Cardoza* AIR 1977 Bom. 175.

5.1.4 Special Marriage Act (SMA): Under the SMA, the available matrimonial remedies to dissolve a marriage include annulment, separation or divorce. A marriage which contravenes any of the essential requirements of a valid marriage, regarding monogamy, sanity, age or absence of prohibited relationship will be null and void. Either party may petition for a declaration of nullity on any of these grounds or on the grounds of impotence.

A marriage may be voidable at the option of one party on grounds, *inter alia*, of non-consummation of marriage, or lack of consent resulting from coercion or fraud (section 25, SMA). The meaning of ‘coercion’⁸⁵ or ‘fraud’⁸⁶ is as defined in the Indian Contract Act 1872.

5.1.5. Recognition by Indian Courts of Judgments/Orders of Foreign Courts: The Code of Civil Procedure 1908 provides for recognition of foreign judgments and decrees by Indian courts and also specifies the criteria by which a foreign judgment would be considered conclusive as to the matter adjudicated between the parties.⁸⁷ Thus, if the parties obtain orders of annulment or divorce from a foreign court, such orders would be recognized by Indian Courts if they are in compliance with the CPC.

To annul a marriage according to Indian law, the parties are usually required to be present in India. Someone holding a power of attorney for the petitioner may initiate an annulment petition. The Court may require the petitioner’s presence for the purpose of giving evidence. In practice, in many cases, the Family Courts have passed *ex parte* decrees where one party refuses or fails to appear in Court.

If a foreign national is served and does not appear then an *ex parte* order is passed. However, whether a decree is entitled to recognition in a foreign court will depend on the law of the country in which the question of such recognition arises.

5.2 Remedies under the Protection of Women from Domestic Violence Act, 2005 (PWDVA)

⁸⁵ Section 15 of Indian Contract Act 1872 defines coercion as “... *the committing, or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860), or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.*”

⁸⁶ Section 17 of Contract Act define fraud as follows: “*Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent,⁵ with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:*

- (1) *the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;*
- (2) *the active concealment of a fact by one having knowledge or belief of the fact;*
- (3) *a promise made without any intention of performing it;*
- (4) *any other act fitted to deceive;*
- (5) *any such act or omission as the law specially declares to be fraudulent.*

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.”

⁸⁷ Sections 13 and 14, Code of Civil Procedure, 1908. Section 13 lays down the exceptions to this rule, *inter alia* where: “*the judgment is not pronounced by a court of competent jurisdiction; it has not been given on the merits of the case; there is a refusal to recognise the laws of India in cases where such law is applicable; the proceedings in which the judgement was obtained are opposed to natural justice; the judgement has been obtained by fraud; it sustains a claim founded on a breach of any law in force in India.*”

The PWDVA came into force in October 2006. It provides protection to children and women who are or have been in a domestic relationship with the abuser, where both parties have lived together in a shared household and are related by consanguinity, marriage or through a relationship in the nature of marriage (thus covering co-habitants) or adoption. In addition, relationships with family members living together as a joint family are also included. It covers daughters living in a domestic relationship facing violence from another male member of the natal family.⁸⁸ It defines ‘domestic violence’ to include actual abuse or threat of abuse that is physical, sexual, verbal, emotional or economic. Form 1 of the Protection of Women from Domestic Violence Rules, which is the format for recording complaints of domestic violence, lists “forcing you to get married against your will” as a form of verbal and emotional abuse.

The PWDVA also protects women living outside a marriage in relationships in the nature of marriage.

It further provides for the rights of women to secure housing, by providing remedies for a woman subjected to domestic violence to reside in the shared household, which includes the marital home, whether or not she has any title in such home. The right is secured by a Residence Order, which can be passed by a Magistrate. Under this law, the right to reside is not dependent on ownership of the home, but on the fact of being in a relationship and living in a shared household.

The law also provides for Protection Orders to be obtained to cover a wide range of situations. These orders can be passed to protect the ‘aggrieved person’ (the woman seeking relief from the Court) to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the applicant, attempting to communicate with her, isolating any assets, like joint bank accounts, used by both parties and causing violence to the applicant, her relatives or any other person providing assistance to her. The breach of a Protection Order is an offence punishable with imprisonment up to one year or fine. In addition, the Court may issue a warrant of arrest against the respondent, for the violation of any order made under the PWDVA.

The Court can also direct the offender to furnish monetary compensation to the victim for loss of income and any loss attributable to destruction of property or removal of the same from the victim’s possession.

The PWDVA may be used to prevent forced marriages from taking place. One reason for its success is the practice of disposing of any application within six months, given that the law is aimed at providing emergency relief to women.⁸⁹

⁸⁸ Under the PWDVA, the respondent is an adult male member, except where an aggrieved woman is married or is in a relationship in the nature of marriage, where she can also file a complaint against the female relatives of the husband/partner. Hence, complaints of domestic violence cannot be made against female members of the natal family living with the aggrieved woman in a domestic relationship (Section 2(q)).

⁸⁹ Section 12(5), PWDVA.

5.3 Injunctions on Child Marriages

The PCMA provides that any marriage where the child is “by force compelled or by any deceitful mean induced to go from any place” is null and void.⁹⁰

The PCMA also provides for an injunction to restrain the marriage of minors and for the prosecution of such offences.⁹¹ The Court, if satisfied on the basis of information laid before it through a complaint or otherwise that a child marriage in contravention of this law has been arranged or is about to be solemnized, may issue an injunction against any person including a member of an organization or an association of persons involved.⁹² The Court must give prior notice to such person before issuing any injunction, and give her or him an opportunity to show cause against its being issued.⁹³ Failure to comply with such an injunction is punishable by imprisonment of up to two years, or by a fine of up to Rupees one lakh, or by both.⁹⁴ However, prosecutions are not frequently brought under the PCMA.

5.4 Injunctions

An injunction is a judicial process whereby the Court orders a party either to do or not to do any particular act. In the former case it is called a mandatory injunction and in the latter a restrictive injunction. The essential aim of obtaining an injunction is to prevent an apprehended injury.

An injunction may be either temporary or perpetual.⁹⁵ The purpose of a temporary injunction is to preserve the matters in *status quo* until the issues between the parties can be decided finally. A perpetual injunction, on the other hand is, in effect, a decree and concludes a right. Usually, when a civil case is filed, a temporary injunction is sought from the Court until it hears evidence and gives a final order which is called a perpetual injunction.

Although there appear to be no specific instances of injunctions being granted by courts in India to restrain forced marriages, it may be possible to seek them in certain circumstances. Temporary and perpetual injunctions have been used extensively and effectively to provide relief in other matrimonial matters. For example, an injunction could be used to restrain a husband from entering the matrimonial home under certain circumstances. Similarly, following grant of a decree for judicial separation, further injunction orders may be granted to restrain a husband from molesting his wife or from interfering with her occupation of the matrimonial home. Based on these precedents, perpetual injunctions could also be sought against a Hindu or Christian husband to restrain him from contracting a bigamous marriage.⁹⁶ It could, perhaps, be argued that such injunctions should be granted to prevent family members from implementing a forced marriage. Given the availability of specific orders,

⁹⁰ Section 12(c), PMCA.

⁹¹ Section 13 (1) of the PCMA. Section 14 of the PCMA provides that a marriage solemnized in contravention of an injunction order issued under Section 13 shall be void *ab initio*.

⁹² *Ibid.*

⁹³ Section 13(6), PCMA.

⁹⁴ Section 13(10), PCMA

⁹⁵ In India, temporary injunctions are dealt with under the provisions of the Code of Civil Procedure, 1908 and perpetual injunctions under the Specific Relief Act, 1963.

⁹⁶ *Shankarappa v. Basamma* AIR 1964 Mys. 247; *Sitabai v. Ramchandra* AIR 1958 Bom. 116.

civil/injunctive in nature, under the PWDVA, such injunctions are unlikely to be resorted to in forced marriage cases.

5.5 Common Law Tort Claims

Common law provides extensive protection to a person of full age and capacity from interference with his or her personal liberty. Any such interference is classified as a tort (a civil injury or wrong), giving rise to civil proceedings. A tort claim would compel a wrongdoer in a civil action to make compensation or restitution to the injured party.

To date, there have been no reported tort claims in India concerning a threatened or actual forced marriage. However, an action for damages could be brought in respect of the torts of assault, battery and false imprisonment.

These tort claims can be used in extreme cases of forced marriage as a civil remedy for damages, and in many cases exemplary damages may also be awarded. In practice, it is unlikely that any of these claims would be commonly brought in relation to forced marriage, as the processes involved are very lengthy, in some cases extending over several years.

5.5.1 Torts of assault and battery: The torts of assault and battery are based on the action of trespass and so any direct and immediate interference with personal liberty is actionable without proof of damage. The application of force to the person of another, without lawful justification, amounts to the wrong of battery. This applies however trivial the amount or nature of the force may be, and even if it does not, and is not intended or likely to do any manner of harm. Instead it is enough if the plaintiff on reasonable grounds believes that s/he is in danger. Even to touch a person without her or his consent or some lawful reason is actionable.

However, in cases of assault, the position is very different, and fear or apprehension must be proved. The interest that is protected by the law of assault and battery is not merely that of freedom from bodily harm but also that of freedom from such forms of insult as may be due to interference with the person. An assault is not merely a tort, but also a criminal offence, and the civil and criminal remedies are in general concurrent and cumulative (*see* below, Section 6 on Criminal Offences and Remedies).

5.5.2 Wrong of false imprisonment: The wrong of false⁹⁷ imprisonment consists in the act of arresting or imprisoning any person without lawful justification, or otherwise preventing them without lawful justification from exercising their right of leaving the place in which they are. Unlawful detention may be either custodial or non-custodial. As it is derived from the action of trespass, there is no need to prove actual damage. Even if the plaintiff fails to prove some of the ingredients of this tort, they may have a special action on the case for the infringement of their liberty. The taking possession or control of the person, even without actual contact, would be the governing factors. Imprisonment and arrest are usually related to criminal law and police and speedier remedy is available through writ.

⁹⁷ The term false here is used not in the ordinary sense of fallacious, but in the less common though well-established sense of erroneous or wrong: see Ratanlal & Dhirajlal's *The Law of Torts* (Wadhwa and Company, Nagpur, 1992) (22nd Edition), 203.

6. Criminal Offences and Remedies

This section outlines the criminal law remedies available in India in cases of interference with rights in marriage, and lists the offences defined in the IPC, which are most often committed in this context. Such offences include kidnapping, abduction and wrongful confinement. In each case, a criminal complaint may be filed with the concerned police officials and/or Magistrate.

The police can intervene if the actions taken to interfere with rights to choice regarding marriage involve commission of any of the offences defined in the IPC. In many cases, police intervention may be critical in rescuing a victim from confinement or in working with NGOs or statutory bodies such as the National Human Rights Commission, National Commission of Women or their State level counterparts.

6.1 Kidnapping, abduction or inducing a woman to compel her into marriage

Section 366 of the IPC defines the offence of “kidnapping, abducting or inducing a woman to compel her marriage, etc.”, which is punishable by imprisonment of up to ten years and a fine. Before reviewing the scope of Section 366 IPC, it is important to first examine definitions of kidnapping and abduction in the IPC.

6.1.1 Kidnapping: Kidnapping is defined in Section 361 of the IPC to mean “taking or enticing away of a minor out of the keeping of the lawful guardian of such minor without the consent of such guardian” (emphasis added). The penalty prescribed for kidnapping depends on the nature of the offence. The penalty for kidnapping simpliciter is a maximum of seven years’ imprisonment (Section 363 IPC).

Under Hindu law, as a consequence of the broad interpretation given by the Supreme Court in the Gita Hariharan case, it is possible to argue that the removal of a child by either of the parents, particularly the mother, will not amount to kidnapping.⁹⁸ Under Muslim law, the father is usually the legal guardian of a minor, and in general, the mother is permitted custody of a daughter until she reaches puberty and of a son until the age of seven.⁹⁹ Where the father and mother are living together, neither the father nor the mother can take the child away from the other’s custody without permission.¹⁰⁰ The Courts do not usually consider it kidnapping when either party removes the child unless there is an explicit order of the Court.

Given that in most cases concerning interference with rights in marriage, it is either or both parents who are involved in coercing their child to marry, the offence of kidnapping is unlikely to be of relevance.

⁹⁸ *Supra* n.27.

⁹⁹ Paras Diwan, *Family Law*, (Allahabad Law Agency; 2001), at p. 268.

¹⁰⁰ For Muslims in India, guardianship for marriage is regulated by their personal law and is not affected by the Guardians and Wards Act, 1890 (GWA). The GWA procedures can be followed by Muslims who have opted for its application. However, given that separate personal laws are applicable to Muslims, the definition and appointment of a “guardian” will be decided in accordance with Muslim personal law.

In practice complaints of kidnapping or rape are often made by parents/guardians against any man whom their daughter has married by choice or eloped with. They may also bring theft or other charges against their own daughter. The criminalization of choice is an important aspect of the way in which the law is used against consenting adults. Parents may also claim that their daughters are minors and therefore should remain in their custody. In such cases the woman or her husband may file a *habeas corpus* petition for release from detention, if she is held in ‘protective custody’ following the filing of a criminal case by her parents. (See section 3, above, for case law on consent in marriages under Hindu Law).

6.1.2 Abduction: Abduction is defined in Section 362 of the IPC as “forcible compulsion or inducement by deceitful means of any person to go from any place.” While kidnapping from guardianship is an offence which can only be committed in relation to a minor, the offence of abduction may concern a person of any age, and there is no reason to prove that in addition to being abducted, s/he was also taken away from lawful guardianship. In cases of forced marriage involving an adult woman, where either of the parents, by deceitful means, induces their daughter to go to another place for the purpose of marriage, then they may be said to have abducted her.¹⁰¹

If a woman is either kidnapped or abducted with the intent that she may be compelled, or knowing it to be likely that she may be compelled, to marry any person against her will, then an offence would be committed under Section 366 of the IPC. The maximum penalty is imprisonment for ten years and a fine.

To prove that an offence has been committed under Section 366(1) of the IPC, it is necessary to establish first, that the accused kidnapped or abducted a minor girl/woman; and second, that the accused intended or knew that it was likely that such girl/woman might or would be compelled to marry a person against her will, or be forced or seduced to illicit intercourse.

6.1.3 Wrongful Restraint: This provision can be used in relation to cases of forced marriage where the accused person restrains an individual from moving from one place to another. Section 339 of the IPC defines wrongful restraint as “... the voluntary obstruction of any person so as to prevent that person from proceeding in any direction in which the person has a right to proceed.”

This provision requires that the person should be completely and successfully prevented and obstructed from proceeding in any direction in which he/she has a right to proceed. The punishment for committing such an offence is a maximum of one month’s imprisonment or a fine of Rs 500, or both.

6.1.4 Wrongful Confinement: Section 340 of the IPC defines wrongful confinement as wrongfully restraining a person in such a manner as to prevent that person from proceeding beyond certain circumscribed limits. Thus, a person is wrongfully confined if they are not allowed to move from place to place and are also confined. The punishment for this offence is a maximum of one year’s imprisonment or a fine of up to Rs 1000 or both.

¹⁰¹ In *Fatmaya Lal v. Emperor* AIR 1942 Lah. 89, a woman was forcefully carried away from the man with whom she was living by members of her husband’s family. The Court held that the forcible carrying away of a grown up woman against her own will, even though with the object of restoring her to her husband, constituted an offence under section 362 IPC.

Further, Sections 343 and 344 of the IPC respectively define the offences of wrongful confinement for three days or more (punishable with a maximum of two years' imprisonment, or fine, or both) and for ten days or more (punishable with imprisonment of up to three years and a fine).

6.1.5 Criminal Intimidation: This provision may be used in cases where the complainant is threatened with any type of injury to cause her to consent to the marriage or to cause alarm to her. Section 503 of the IPC defines the offence of criminal intimidation as including threatening a person with any injury, to his or her person, reputation, or property; or to the person or reputation of any one in whom that person is interested. The threat must be with intent, to cause alarm to that person; to cause the person to do any act which s/he is not legally bound to do as the means of avoiding the execution of such threat; or to cause that person to omit to do any act which that person is legally entitled to do as the means of avoiding the execution of such threat. This offence is punishable by up to two years' imprisonment or a fine or both and is a non-cognizable offence.

6.2 Section 498A IPC

Section 498A IPC deals with domestic violence, and may be used in cases where a woman who is a victim of forced marriage is undergoing violence at the hands of her husband or in-laws. It provides that if the husband or his relatives subject a woman to cruelty, then they shall be punished with a term of imprisonment of up to three years and a fine. Cruelty here may be mental or physical, including conduct which is of such a nature as is likely to drive a woman to commit suicide, or to cause grave injury or danger to her life, limb or health. This provision also covers harassment combined with demands for property and dowry. Any person, including a relative, friend or even a public servant can give information in this regard to a police officer.

6.3 Other Offences

Apart from the above provisions, there are other general offences of physical harm defined in the IPC such as hurt (Section 319), grievous hurt (Section 320), force (Section 349), criminal force (Section 350), assault (Section 351), murder (Section 302), culpable homicide not amounting to murder (Section 304).

Further, the offence of rape (Section 376) may be relevant in a case of attempted forced marriage or in cases of forced marriage involving minors (however, note that adult marital rape is not an offence and statutory rape of minor wives is almost never prosecuted). Sexual intercourse with a girl below the age of 16 (now 18)¹⁰² years, with or without consent is also defined as rape. Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape. Rape is subject to different penalties depending on circumstances. Rape is punishable with minimum imprisonment of seven years and a maximum of a life term and fine, unless the woman raped is the accused's wife and is not under twelve years of age, which is punishable by imprisonment of up to two years or fine or

¹⁰² Editor's note: this change was introduced by the 2012 and 2013 amendments

both. There are different punishments for rape by a police officer, public servant, superintendent or hospital staff.

6.4 Procedure

Any person, including the victim, her/his friends or relatives or an NGO official could give information orally or in writing to the police regarding one of the above offences. The police would then record a First Information Report (FIR) in a crime register maintained in the police station. If the police refuse to record it, then a report should be made to the Officer-in-Charge, or to a higher police official. A copy of the FIR would then be provided to the person who provided the information. This should state relevant facts and related offences, and be signed. If the police fails (refuses) to register an FIR in cases of rape and aggravated rape, it is an offence under S. 166A IPC with the punishment of imprisonment of six months to two years and also fine.¹⁰³

The police will then conduct investigations, including visiting the scene, recording the victim's statement, and conducting a medical examination if required, recording statements of any eyewitnesses, and seizing any relevant evidence. The victim's statement must also be recorded by a magistrate as provided for in Section 164 of the CrPC. They may or may not arrest the accused at this stage¹⁰⁴.

After completing investigations, if there is no evidence to show that an offence was committed, the police will report accordingly to the Magistrate (by filing a 'final report'). Alternatively, if the police find there is sufficient evidence, they will file a report (commonly described as a 'charge sheet') against the accused.

Even if the police give a final report stating no offence is made out, it is possible for the victim or any other person make a complaint directly to the Magistrate who could examine the informant, and then order a further enquiry.

Once a charge sheet is filed, the matter will be listed for trial. It may take up to several years to dispose of a trial, as monthly dates of hearing will be fixed. The victim and witnesses will not be needed on every date, but will have to attend on certain dates in order to give evidence. The Public Prosecutor (PP) will conduct the case, but the victim may request a private lawyer to represent her separately and such a lawyer may, with permission of the PP, then assist the PP.

6.5 Use of Criminal Laws

It is important to be aware of the context in which such laws are used in practice. Often girls or young women who want to exercise their right to choose their spouse resort to elopement. They usually marry in a religious ceremony. If the woman is aged over 18 and the man over 21, they may marry under the SMA. Public notification of the parties' names prior to marriages under the SMA renders them increasingly vulnerable to attack from community members, particularly where they are marrying across caste or religion. In such cases, where

¹⁰³ Editor's note: This was also introduced in 2013 amendment.

¹⁰⁴ Editor's note: This change was also introduced in the 2013 amendment.

the parents disapprove of the marriage, they may register complaints with the police, falsely accusing the husband of rape, kidnapping or abduction for forced marriage under Section 376 and Section 363/ 366 IPC. The police, when they find and apprehend the couple then arrest the husband and place the ‘victim girl’ in a Child Welfare Centre (see below) or hand her over to her parents’ custody. In other cases, the police may implicate the girl/woman in a case of theft, following accusations brought by her own family. While the girl is in police custody, she may face violence at the police station aimed to compel her to retract her decision to remain in a relationship or marriage of choice. There have also been instances reported of custodial rape after the family makes such charges.¹⁰⁵

In these circumstances, the relationship often ends as the parents coerce the girl to marry someone of their choice or induce her to break up with her husband/fiancé by refusing to withdraw the case against him until she does so. In this context, a widespread view is that an offence has been committed against the parent, rather than the child, in that the focus is on the child having been removed from the lawful custody of the parent, rather than on the harm done to her. This is particularly the case if the girl is aged under sixteen. Even if the eloping couple marries, the marriage itself may not subsist in the face of strong opposition from their respective families. In the absence of any evidence of the marriage (given that most marriages are not registered), the woman may marry or be made to marry again without even divorcing. The man may remain in prison until he is able to obtain bail. Even in the more exceptional cases, where the woman is willing to come forward and give evidence of having voluntarily left her parent’s home and married of her own choice, the man may only be released on bail and will still be required to undergo trial before ultimately securing an acquittal.

Thus, the criminal offences of kidnapping and abduction are invoked more to deter than to facilitate women in exercising their right to choose their partners. Reported judgments on kidnapping and abduction are indicators of the use and the misuse of the law. For example, in *S. Vardarajan v State of Madras*,¹⁰⁶ the leading judgment on Section 363 of the IPC, the Supreme Court held that no offence of either ‘taking’ or ‘enticing’ a woman could have occurred where it was found that she had contacted her lover, met him at the appointed time and gone to the Marriage Registrar’s office and there was no evidence of any enticement by him. However, at the initial stage, the law only required that a prima facie case be made out, and thus a case was registered under Section 363 IPC resulting in considerable harassment of the couple. In a recent judgment, *Jinish Lal Sah vs State of Bihar*,¹⁰⁷ the Supreme Court stated that for the purposes of Section 366 and Section 376 IPC, there should be material to establish that either the alleged marriage or the intercourse has taken place without the woman’s consent, if she is above the age of 18 years or 16 years as the case maybe. After the enactment of the Criminal Law Amendment Act, 2013 and Protection of Children from Sexual Offences, Act, 2012 the age of consent for sexual intercourse is now 18 years).

¹⁰⁵ The Mathura Case (*Tukaram and Another v Maharashtra* (1979) 2 SCC 143) that sparked off the first amendment to the rape law in independent India followed the custodial rape of a young tribal woman who had been illegally detained at a police station during the so-called investigation of a complaint lodged by her brother that she had been abducted by her lover. Also see the Suman Rani case, *Premchand v State of Haryana*, AIR 1989 SC 937. See also AALI, “Baseline Report on Rights of Women in relation to Marriage in India”, at http://www.iwraw-ap.org/aboutus/pdf/FPrights_women_rtn_marriage.pdf

¹⁰⁶ AIR 1965 SC 1942.

¹⁰⁷ (2003) 1 SCC 605.

Another reason why the criminal law may not prove effective in such cases is the insensitivity of the police's treatment of victims. For instance, the police may refuse to accept complaints by the victim of forced marriage, conduct gender-insensitive questioning of the victims or, as noted above, collude with the family to file false charges against a woman's spouse in cases where she has married according to her own choice. In many cases, the police view such cases as involving 'family matters' and, therefore, as suitable for resolution within the family rather than requiring police involvement.¹⁰⁸ In several cases where the police have failed to do their duty and have refused to register genuine complaints of domestic violence or forced marriage, successful writ petitions have been filed in the High Courts for action compelling the police to register complaints and make arrests.¹⁰⁹

To pre-empt misuse of the criminal laws, women and girls aged above 16 years but below 18 years have used the strategy of immediately recording a statement with the police regarding having left home/married voluntarily and of her own free will, and regarding the lack of enticement, and giving details of parental opposition. However, this may be a difficult strategy to adopt in practice, particularly in rural areas or small towns. Even though a case would not be registered against the parents, the woman's recording of a prior statement with the police, or alternatively, keeping a copy of the birth certificate or any other proof of age would at least prevent the police from registering any case against her husband, or assist them in closing any case against him as being false upon investigation. There is a concern that such a strategy would only be effective if there was no risk of the police colluding with the family. In many cases, given prevailing social mores and, as noted above, existing practices within the police, reporting to the police may increase risks to the lives of the couples. Other successful pre-emptive strategies could include publishing advertisements in the newspapers reporting the marriage as having taken place; addressing a letter to the police, with copies to higher police officials and to the National Human Rights Commission and the National Commission for Women, or a legal notice to the family – once the girl/woman has already left home. Again, however, there are real concerns for young people regarding lack of confidence in state agencies.¹¹⁰

¹⁰⁸ These problems are also experienced in other South Asian jurisdictions, see ASK, INTERRIGHTS and Shirkat Gah, Submission to the Home Office Working Group on Forced Marriage, March 2000 (available at www.soas.ac.uk/honourcrimes/FMsubmission.pdf).

¹⁰⁹ In *Om Prakash v State (Delhi Admn)* (1992) Supp 3 SCC 48, the Supreme Court issued strict directions and guidelines to the Commissioner of Police to take action following a complaint by a mother whose daughter went missing. In *Bhagwant Singh v. Commissioner of Police* (1983) 3 SCC 344, parents sought a remedy for the allegedly callous and biased investigation by the police into their daughter's death following demands for dowry.

¹¹⁰ See Perveez Mody, *The Intimate State: Love-Marriage and the Law in Delhi*, Routledge: Delhi and UK, 2008); "Love & the Law: Love-Marriage in Delhi", *Modern Asian Studies*, 36, 1, pp. 223-256, Cambridge University Press, Cambridge. For *habeas corpus* in the context of same-sex relationships, see Priya Thangarajah and Ponni Arasu, "Queer Women and the Law", in Arvind Narrain and Alok Gupta (eds), *Law Like Love: Queer Perspectives on the Law*, (Yoda Press: New Delhi, 2011), and "Queer Women and the Law In India: the Writ of Habeas Corpus" at <http://www.lassnet.org/2009/readings/arasu-thangarajah08queer-women-habeas.pdf>.