

Remedies for Forced Marriage

A HANDBOOK FOR LAWYERS

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INTRODUCTION

DEVELOPING LEGAL PROTECTION AGAINST FORCED MARRIAGE

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This Handbook brings together expert commentaries by lawyers and activists working on the issue of forced marriages and interference with choice in marriage in four different countries: Bangladesh, India, Pakistan and the United Kingdom.

The Handbook is intended to assist those seeking legal remedies in such cases, and in particular to prevent forced marriages, and protect those affected. While aimed primarily at lawyers, we hope that it will also be useful for voluntary sector workers, social workers and women's rights advocates and activists seeking to identify available legal remedies.

Process

The Handbook was first envisioned as providing a ready resource of information on then relatively inaccessible laws and procedures, as well as practical guidance for lawyers in England and Wales seeking to provide support to affected individuals threatened with or involved in forced marriages. At that time, there were few lawyers with any experience in this area. It was therefore felt that compiling basic laws, procedures and judgments would provide a much-needed resource, as would an outline of the range of remedies available, checklists of practical issues for consideration, and relevant forms and precedents.

As work on the Handbook continued, the issue of choice in marriage was further highlighted through both government and non-governmental initiatives within and beyond the United Kingdom. This led to a significantly changed scenario, in which information on developments in the United Kingdom, and on practical remedies for UK nationals/residents, became more widely available, largely through the work of the Foreign and Commonwealth Office's Forced Marriage Unit. However, there were no parallel efforts in other countries, with relevant information remaining hard to access. Available materials tended to refer to but not discuss in detail laws, procedures and judgments and were focused on readerships other than legal professional. In this context, retaining the Handbook's focus on legal remedies and on a target group of lawyers, the chapters were revised to include more discussion on legal texts and on recent judgments. However, given that legal remedies are usually the last resort, the Handbook also considers other practical measures for prevention or protection.

¹ Thanks are due to Ishita Dutta and Kaveri Sharma for their research and inputs.

Scope and Limitations

While the issue of choice in marriage of course affects many countries, for practical reasons the Handbook covers only four countries, that is, Bangladesh, India, Pakistan and the United Kingdom. It has also been updated only up to 2011 in the case of the chapters on the UK and on India, and up to 2014 for Bangladesh and Pakistan. Anyone who requires updated guidance needs to consult the now widely available resources available online, including on the site of the Forced Marriage Unit. Some of the more significant recent legal developments are highlighted below.

New Developments in Law and Practice

Since our work on this Handbook started, there have been many developments in laws, policies and their implementation.

In the UK, procedures have been developed for concerned professionals and agencies, a raft of policies has been put in place, and new legislation adopted on civil remedies. Specific communication and support strategies have also been developed for individuals from within the diaspora communities from South Asia, given the high incidence of such cases reported from these groups.

Old laws have been amended and new laws have been enacted to criminalize forms of violence against women that were previously not legally recognized including, honour killings, sexual harassment and acid violence. A slew of laws granting specific forms of protection to vulnerable women have also been passed such as the Prevention of Anti-Women Practices (Criminal Law Amendment) Act 2011, and the Women in Distress and Detention Fund (Amendment) Act, 2011. In terms of judicial decisions having a bearing on survivors of forced marriage, the decision of the British House of Lords in *Islam & Shah*² holding that women subject to state-tolerated domestic violence constitute a “particular social group” for the purposes of refugee claims, bears special mention.

Most recently, as noted by one of our researchers, Kaveri Sharma “the Anti-social Behaviour, Crime and Policing Act 2014 which came into force on 16th June 2014 has made it a criminal offence to force someone to marry. This includes: taking someone overseas to force them to marry (whether or not the forced marriage takes place); marrying someone who lacks the mental capacity to consent to the marriage (whether they’re pressured to or not), and breaching a Forced Marriage Protection Order. This Act applies to UK nationals overseas who are at risk of becoming the victim of a forced marriage. The maximum penalty for the new offence of forced marriage is seven years imprisonment. Law enforcement agencies will also be able to pursue perpetrators in other countries where a UK national is involved under new powers. The breach of a FMPO is a criminal offence with a maximum penalty of five years imprisonment and/or an unlimited fine.”

In Bangladesh, policy initiatives on women’s rights have included reference to early marriage as a human rights concern, as well as to the issue of choice and consent. Laws have been enacted to address forms of violence that were previously not

² *Islam v Shah* : [1999] 2 All E.R. 545

recognized by the law, including the Domestic Violence (Prevention and Protection) Act, 2010. This law is significant in that it creates an express provision criminalizing ‘sexual violence’ in domestic relationships. Judicial decisions have also contributed towards these increasing recognitions and protections. ‘Fatwa’ violence against women and girls, accusing them of breach of community norms on sexuality and sexual behaviour, and imposing humiliating punishments upon them, was declared to be illegal by the High Court Division, Supreme Court of Bangladesh in 2010. Proposals to repeal and replace the Child Marriage Restraint Act 1929, to increase penalties for child marriage, and expand the scope of those to be held accountable, as well as enabling the annulment of such marriages are currently under consideration. An issue that remains completely unaddressed is the forced marriage of sexual orientation minorities. This is not only because of legal provisions that discriminate on grounds of sexuality and sexual orientation but also deep-seated social attitudes against homosexuality. These attitudes were recently brought to the fore after media reports circulated information about two young women who ran away from home and performed religious rites akin to a marriage. One of the women was subsequently arrested and falsely charged under a draconian law against human trafficking at the behest of the other woman’s family who clearly disapproved of the relationship.

In India, a national campaign on the right to choice in marriage is emerging, alongside discussions that foreground discrimination in enjoyment of this right on the ground of gender, religion and sexual orientation. Despite concerted advocacy and some progressive shifts in social attitudes on these issues, recent legislative, judicial and political actions in India have taken an alarmingly regressive turn. In December 2013, the Supreme Court of India in *Koushal v Naz Foundation*³ overturned a judgment of the Delhi High Court in *Naz Foundation v Government of NCT Delhi*⁴ that had earlier struck down Section 377 of the Penal Code, the so called anti-sodomy law, in so far as it penalized private, consensual sex between two adults as unconstitutional. In effect it returned the gay community in India to the shadows of criminality and continued social stigmatization. On the other hand in *National Legal Services Authority v Union of India*,⁵ the Supreme Court took a markedly different tone and approach from the *Koushal v Naz Foundation* case, holding that the right to self identify as one’s own gender including as “third gender” was an important part of one’s right to live with dignity. A negative judicial precedent was also set by the Delhi High Court in November 2014, when it held that marital rape does not constitute rape. This decision followed the continued refusal on part of the Indian government to include marital rape as a sexual offence in the Criminal Law Amendment Ordinance, 2013 in December 2013. The changing political climate in India has also led to a recent resurgence in ‘love jihad’ claims by Hindu right wing organisations which allege that there is a widespread conspiracy aimed at eroding Hindu dominance in India which is being furthered by young Muslim men who are seducing and eloping with Hindu women and converting them to Islam. A countermeasure in this regard is a public interest litigation filed before the Allahabad

³ Civil Appeal No.10972 of 2013 (Arising out of SLP (C) No.15436 of 2009)

⁴ *Naz Foundation v. Govt. of NCT of Delhi*, [160 Delhi Law Times 277, p. 2](#)(Delhi High Court 2009)

⁵ WP(Civil) No. 604 of 2013

High Court seeking ban on the use of the term ‘love jihad’ as it is giving rise to a new form of communalism and having a polarizing effect on society.⁶

In Pakistan, which already had a significant body of case law on choice in marriage, there have been attempts to amend discriminatory legislation which had restricted women’s rights to choice in marriage. In Bangladesh, policy initiatives on women’s rights have included reference to early marriage as a human rights concerns, as well as to the issue of choice and consent. In each case, there are separate resources available documenting such developments, which should be consulted alongside this Handbook.

These developments have highlighted that while cases of forced marriage may involve an international dimension (usually involving parties from one South Asian country and the UK respectively), they are also an issue of national concern. Thus while the different country chapters address issues which arise in international cases, for example regarding dual nationals and consular protection, they largely focus on remedies available within the national system.

Given the format of the Handbook, it does not discuss in detail the application of specific laws or analyse trends in judgments. Rather, it highlights the relevant legal remedies, assessing the likely effectiveness of each, and setting out a checklist of issues for consideration. The Handbook does not attempt to discuss customary laws or practices on the right to choice in marriage, restricting itself to the formal legal system and the role of the judiciary, local government authorities and law-enforcing agencies. Readers who require more detailed guidance, or who require specific legal advice, are encouraged to seek professional advice. Anyone who intends to take legal action should of course not proceed without consulting a lawyer with expertise in the country concerned.

Format and Structure

The Handbook discusses available remedies in four countries for securing the right to choice in marriage. While focusing on legal remedies – available through the courts – it also identifies practical steps to be taken prior to or alongside any attempted legal action.

The Handbook is divided into two parts, the first on the United Kingdom and the second on the three countries in South Asia. In each case the discussion on legal remedies focuses broadly around four broad areas, namely applicable laws, the court system, the criteria for validity of marriage, and remedies for prevention and protection. The discussion on remedies in the UK differs significantly from that in the other countries, reflecting the different legal systems.

Part I of the Handbook discusses available remedies in the United Kingdom.

Chapter 1 first sets out the court structure in the UK and the laws relating to validity of marriage. It then discusses the validity of marriage, including in relation to

⁶ See for instance Sandeep Joshi, ‘Uttar pradesh court says no “love jihad” in the state’, *The Hindu* 17 September 17 2014

recognition of marriages contracted in other jurisdictions and sets out matrimonial remedies for forced marriage, as well as relevant criminal laws and the provisions of the Human Rights Act. It goes onto discuss remedies for prevention, repatriation and protection in turn. It separately considers remedies available for children and adults. The emphasis is on civil laws, in particular remedies available under the Forced Marriage Protection Act, the Children Act, and the Family Law Act as well as the Court's inherent jurisdiction.

Chapter 2 complements Chapter 1 by identifying non-legal remedies within the UK. It sets out background issues for consideration when advising or assisting in relation to a forced marriage case, general principles to be followed by all agencies in the form of a checklist, outlines how to establish a coordinated strategy and its key points, and lists best practices. Lastly, it discusses the range and role of agencies which provide protection in the UK and other jurisdictions, including the police, housing services, social services and immigration services.

Part II of the Handbook focuses exclusively on legal remedies available in three countries in South Asia.

Given the similarity of the legal systems, the chapter structures for each country are similar. **Chapters 4, 5 and 6** each outline the laws applicable, including constitutional provisions relevant to the right to choice in marriage, as well as specific family and criminal laws, along with the relevant court structure for Bangladesh, India and Pakistan respectively. Each chapter then outlines as necessary background the laws on marriage, identifying the requirements of a valid marriage, and highlighting issues of consent, the marriage of minors and registration and proof of marriage. Given that each of these countries have plural legal systems, with a range of different religion based personal laws applying to different communities, the laws relevant to the major communities – Muslims, Hindus, Christians – is considered in each chapter.

Each chapter goes on to consider the relevant constitutional guarantees, and the remedy of *habeas corpus*, usually the most effective in cases of forced marriage/interference with choice in marriage. It then considers in turn relevant criminal laws and civil laws (both family and tort laws). In conclusion, each chapter considers specific issues arising in cases with an international element.

Each chapter also contains additional information in the form of case studies and checklists, as well as extracts of relevant judgments, both positive and negative.
