



REMEDIES FOR FORCED MARRIAGE IN PAKISTAN

A HANDBOOK FOR LAWYERS

*Remedies for Forced Marriage
in Pakistan*

A HANDBOOK FOR LAWYERS

EDITED BY

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Note

Remedies for Forced Marriage - A Handbook for Lawyers 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: This printed version consist of only chapter 5 of the complete publication which focuses on the issue of forced marriages in Pakistan.

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.

This particular printed version discusses available remedies Pakistan 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 discusses 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. Remedies for Forced Marriage in Pakistan - A Handbook for Lawyers brings together expert commentaries by lawyers and activists working on the issue of forced marriages and interference with choice in marriage.

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The complete handbook can be downloaded from the following web link.
<http://www.interights.org/forced-marriage-handbook/index.html>

LEGAL REMEDIES FOR FORCED MARRIAGE IN PAKISTAN

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Sohail's relevant publications include, (co-edited with Farida Shaheed, Cassandra Balchin and Aisha Gazdar), *Shaping Women's Lives: Laws, Practices and Strategies in Pakistan*, Shirkat Gah, 1998, 'Honour' Killings and the Law in Pakistan' in Lynn Welchman and Sara Hossain, 'Honour': Crimes, Paradigms and Violence against Women, Zed Books, London, 2005, (with Cassandra Balchin), *Recognising the Unrecognised: Inter-Country Cases and Muslim Marriages and Divorces in Britain*, Women Living Under Muslim Laws, 2006, and 'Through the Looking Glass: The Emergence, Confused Application and Demise of Pakistan's Hudood Laws' in Lutz Oette, *Criminal Law Reform in Transnational Justice: Human Rights Perspectives for Sudan*, Ashgate, 2011. Sohail holds a Masters in Law in Development from the University of Warwick, focusing on Constitutional Law and Development, and Gender, Law and Development.

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LEGAL REMEDIES FOR FORCED MARRIAGE IN PAKISTAN

1. Introduction

This chapter discusses the remedies available in Pakistan to individuals who have faced interference with a marriage of choice, or threatened or actual forced marriage.

Forced marriage is a crime under the Pakistan Penal Code.¹ On the issue of choice in marriage, remedies may be invoked under various statutes and pursuant to judgments of the higher courts.

This chapter discusses how such cases affect both adults and minors. It outlines the range of remedies available to ensure the safety of individuals facing such situations – examining both existing laws and their actual practice. It discusses who can start proceedings, as well as the nature of proceedings that may be commenced.

Interference with the right to marry and forced marriage occurs irrespective of religious or ethnic background. However, this chapter focuses on the Muslim community, given that the overwhelming majority of Pakistan's population is Muslim, although some of the legal remedies discussed in this chapter equally apply to people belonging to different religious communities. The chapter first sets out the relevant *laws on marriage*, including on the requirements of a valid marriage (in particular consent), the marriage of minors, registration and proof of marriage. Secondly, it discusses *available legal remedies* for interference with choice in marriage and forced marriage. These include *constitutional* remedies, including those in the nature of *habeas corpus*, most often used to secure an individual's release or recovery from a threatened or actual forced marriage; *civil* remedies under family laws and tort actions for damages, and criminal law remedies, such as prosecution of those responsible for contracting attempted or actual forced marriages as well as procedures for recovery of survivors. In many situations there may be separate sets of criminal and civil proceedings for the protection of the person concerned. Given possible overlap between civil, constitutional and criminal laws, it is essential to be aware of developments in each sphere. Thirdly, and finally, the chapter outlines issues of particular relevance to British/Pakistani dual nationals.

2. Legal Context

At independence in 1947, Pakistan inherited the common law legal system introduced by the British during colonial rule. While many civil and criminal laws applicable today have continued to remain in force since the colonial period, others have been

This chapter has been updated to 2014. Particular thanks are due to Naz Modirzadeh for her assistance with research and drafting.

¹ Section 498-B PPC inserted in December 2011. It carries sentence of imprisonment of three to seven and fine of rupees five hundred thousand. Section 310-A, PPC is also applicable where a woman is given or compelled into marriage in settlement of a criminal liability or a civil dispute. It carries the same punishment as 498-B PPC.

amended or newly enacted since, with the most significant changes resulting from purported 'Islamization' of the law. These changes seriously affected rights relating to choice in marriage. In particular, the criminalisation of extra-marital sex regardless of consent as '*zina*'.²

Formal laws operate in the context of the widespread prevalence of tribal or customary practices. These legitimate violence against women in the name of 'honour', restrict rights regarding marriage, and continue to be condoned to a degree by the criminal justice system. Such practices include giving women in marriage to the Holy *Qu'ran*,³ or in settlement of family or tribal feuds, and may involve acts of physical violence, and, in the most extreme cases, death. Those responsible for such practices, usually close family members, enjoy some 'impunity' from prosecution and may even receive the positive support of the wider community or the police.

2.1 Constitutional and Legal Provisions

The Constitution of Pakistan 1973 provides for fundamental rights and fundamental principles of state policy which are relevant to the issue of the right to choice in marriage.

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

- the Muslim Family Laws Ordinance, 1961 ('MFLO');
- the Muslim Family Laws Rules, 1961 ('MFLR');
- the Dissolution of Muslim Marriages Act, 1939 ('DMMA');
- the Muslim Personal Law (*Shariat*) Application Act, 1962;⁵
- the Balochistan Civil Disputes (*Shariat* Application) Regulation, 1976;⁶

² *Zina* is defined as "wilful sexual intercourse between a man and a woman who are not validly married to each other" see section 4 of *Zina* (Enforcement of *Hudood*) Ordinance 1979. This Ordinance was amended by the Protection of Women (Criminal Laws Amendment) Act, 2006. The amendments reduced the scope for false allegations of *zina* and harassment of men and women contracting marriage of their own free choice.

³ This refers to certain practices of requiring a woman to forgo her right to marry, through taking an oath on the Holy *Qu'ran*. This is now a punishable offence under section 498-C, PPC, punishable with imprisonment of three to seven years and fine of rupees five hundred thousand.

⁴ This chapter discusses various statutory provisions and their interpretation by the Courts in Pakistan. Despite 'Islamization' of various laws, the term 'Muslim Law' as used here refers only to statutory provisions and judgments applicable to Muslims in Pakistan and should not be read as a general reference to '*Shariat*' law. Such statutory provisions apply to all Muslims, regardless of sect or school of law, other than with respect to inheritance and some aspects of child custody. Particular interpretations under specific schools of law will be discussed in the text where relevant.

⁵ This Act came into force with effect from 15 January 1976 with respect to the Khyber Pakhtunkhwa Province, which, before the adoption of the 18th Amendment to the Constitution of Pakistan 1973, was known as the North West Frontier Province (NWFP), and the Courts have since applied it retrospectively: see *Farida and 2 others vs. Rahmat Ullah and 2 others* PLD 1991 SC 213. It was extended to the Provincially Administered Tribal Areas (PATA) Khyber Pukhtunkhwa through Regulation II of 1976 dated 19 April 1976 and to the PATA of Balochistan through the West Pakistan Muslim Personal Law (*Shariat*) Application Act (Extension to the Tribal Areas of Balochistan) Regulation 1976.

⁶ It came into force on 18 February 1977 in the PATA of Balochistan, and all civil disputes between Muslim parties are adjudicated under this Regulation. It replaced the Frontier Crimes Regulation (FCR) 1901 in respect of civil disputes in these areas. All suits related to family laws are adjudicated under this regulation by the Qazi Courts of the *Majlis I Shura* (a court above the Qazi Court),

- the *Shariah Nizam-E-Adl* Regulation, 2009 for Provincially Administered Tribal Areas of Khyber Pukhtunkhwa;⁷ and
- the Balochistan Civil Disputes (*Shariat* Application) Rules, 1977.

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

- the Majority Act, 1875;
- the Guardians and Wards Act, 1890 ('GWA');
- the Child Marriage Restraint Act, 1929 ('CMRA') (as amended by the MFLO);
- the Sindh Child Marriage Restraint Act, 2013⁸
- the Family Courts Act, 1964 ('FCA');⁹ and
- the Family Courts Rules, 1964 ('FCR').

Criminal laws which may be applicable in such cases are:

- the Pakistan Penal Code, 1860 ('PPC');¹⁰
- the Code of Criminal Procedure, 1898 ('CrPC');
- the Domestic Violence (Prevention and Protection) Act, 2013, Province of Sindh;
- the Balochistan Domestic Violence (Prevention and Protection) Act, 2014¹¹;
- the Offence of *Zina* (Enforcement of Hudood) Ordinance, 1979 ('*Zina* Ordinance');¹²
- the Offence of *Qazf* (Enforcement of *Hadd*) Ordinance, 1979;
- the Juvenile Justice System Ordinance, 2000;¹³ and
- the Juvenile Justice System Rules, 2002.¹⁴

depending upon the pecuniary jurisdiction of the Court: see *Mirza Khan v Mst. Hooro and another* PLD 1985 Quetta 268 and *Abdul Malik v Mst. Bibi Amina* PLD 1985 Quetta 85.

⁷ This Regulation deals with both civil and criminal cases and has revived the system of Executive Magistracy which was earlier abolished in August 2001.

⁸ Through this law, which repealed the CMRA 1929, for the province of Sindh the minimum age of marriage for females been raised to eighteen (18) years.

⁹ The Family Courts Act, 1964 (FCA) was substantially amended by Ordinance No. LV of 2002, promulgated on 1 October 2002. This law does not extend to the FATA and PATA of Balochistan.

¹⁰ The PPC was amended by the Protection of Women (Criminal Laws Amendment) Act, 2006 ('Women's Protection Act'), to establish the offence of fornication (Section 496B PPC) and to incorporate offences of abduction to compel marriage (Section 365B PPC) and enticing or taking away or detaining with criminal intent a woman (Section 496A PPC), which had earlier been included within the *Zina* Ordinance.

¹¹ Domestic violence protection laws of provinces of Sindh and Balochistan provide for protection mechanisms which can be used for a person in danger of a forced marriage.

¹² The *Zina* Ordinance was amended by the Protection of Women Act, 2006 which received the President's assent on 2 December 2006. Note that the *Zina* Ordinance is applied to the FATA by S.R. No. 362 (1) 79, dated 23 April 1979, see Gazette of Pakistan 1979, Extraordinary, Part II at 632. It has also been extended to the PATA of Balochistan from 29 April 1979, see the Balochistan Gazette 1979, Extraordinary (Issue No. 58, dated 14 June 1979) and to the PATA of NWFP through Notification dated 31 May 1979. The 2006 amendments have not been extended to any FATA or PATA, and the *Zina* Ordinance of Kashmir has not been subjected to any amendment similar to those effected elsewhere under the Women's Protection Act.

¹³ The Lahore High Court struck down the Juvenile Justice System Ordinance, 2000 as being *ultra vires* of the Constitution in *Farooq Ahmad vs. Federation of Pakistan through Secretary Law and Parliamentary Affairs, Government of Pakistan, Islamabad* PLD 2005 Lahore 15. This judgment has been stayed pending appeal before the Supreme Court.

¹⁴ Juvenile rules are provincial; each province has formulated rules which are identical.

International instruments ratified by Pakistan and relevant to the right to choice in marriage include:

- the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 1956 ('Slavery Convention');¹⁵
- the International Covenant on Economic, Social and Cultural Rights, 1966 ('ICESCR');¹⁶
- the International Covenant on Civil and Political Rights, 1966 ('ICCPR')¹⁷;
- the Convention on the Elimination of All Forms of Discrimination against Women, 1979 ('CEDAW');¹⁸
- the Convention Against Torture and Cruel Degrading and Humiliating Treatment or Punishment, 1987 ('CAT');¹⁹ and
- the Convention on the Rights of the Child, 1990 ('CRC').²⁰

It is important to note that the tribal areas,²¹ that is the Federally Administered Tribal Areas (FATA)²² along the Pakistan-Afghanistan border and the Provincially Administered Tribal Areas (PATA)²³ within Balochistan, the Khyber Pakhtunkhwa and Gilgit-Baltistan²⁴ do not operate under the same legal system as the rest of Pakistan. In the FATA areas, federal laws are only applicable if so notified by the President.²⁵ In the PATA areas, federal or provincial laws are not applicable unless so directed by the Governor of the province concerned, with the prior approval of the President.²⁶

¹⁵ Ratified by Pakistan in 1958.

¹⁶ Ratified by Pakistan in April 2008.

¹⁷ Ratified by Pakistan with reservations in June 2010.

¹⁸ Ratified by Pakistan in 1996, subject to a reservation to Article 29, and a declaration that its ratification is subject to the provisions of the Constitution of Pakistan.

¹⁹ Ratified by Pakistan with reservations in June 2010.

²⁰ Ratified by Pakistan in 1990, subject to reservations which were withdrawn in 1996.

²¹ Article 246 of the 1973 Constitution provides that 'Tribal Areas' are the areas in Pakistan which immediately before the commencement of the Constitution were Tribal Areas.

²² The FATA comprise the Tribal Areas adjoining Peshawar District, Kohat District, Bannu District, and Dera Ismail Khan District called frontier regions, as well as the Bajaur, Orakzai, Mohamanad, Khyber, Kurram, North-Waziristan and South Waziristan Agencies: see Article 246, Constitution of Pakistan 1973.

²³ The Provincially Administered Tribal Areas comprise the Districts of Chitral, Upper Dir, Lower Dir and Swat (which includes Kalam), the Tribal area in Kohistan District, Malakand District, the Tribal Area adjoining Mansehra District (except new district of Kala Dakha since January 2011) and the former State of Amb in Khyber Pakhtunkhwa and in Balochistan Districts of Zhob, Loralai (excluding Duki Tehsil), Kila Saifullah, Kohlu, Dera Bugti, Dalbandin Tehsil of Chagai District and Marri tribal territories of Sibi District: see Article 246, Constitution of Pakistan.

²⁴ The areas within Gilgit-Baltistan were formally known as the Federally Administered Northern Areas (FANA) until promulgation of the Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009, and include the districts of Astore, Diamer, Ghanche, Ghizer, Gilgit, Hunza-Nagar and Sakardu form Gilgit-Baltistan.

²⁵ See Article 247, Constitution of Pakistan, 1973.

²⁶ Here, 'laws' includes statutes enacted by Parliament or the relevant Provincial Assembly, or Ordinances promulgated by the President or respective Governors. The Orders issued by the President/Chief Martial Law Administrator (when there is no Parliament) apply to the Tribal Areas unless specifically mentioned otherwise.

A separate legal regime also operates in Kashmir and as a large proportion of forced marriage cases originate in this area, the relevant laws applicable within this area are set out below.

Kashmir²⁷

Kashmir is a separate entity with its own legislature, executive and judiciary. The State of Pakistan is responsible for some of its affairs including security and foreign affairs.²⁸ 'State subjects' of Kashmir include persons residing within Kashmir or Pakistan.²⁹

Most laws applicable in Kashmir are similar to or the same as those enforced in Pakistan. These include:

- the Azad Jammu and Kashmir Interim Constitution Act, 1974;
- the West Punjab Muslim Personal Law (*Shariat*) Application Act, 1948;³⁰
- the Dissolution of Muslim Marriages Act, 1939;³¹
- the Azad Jammu and Kashmir Enforcement of *Shariat* Act, 1989;
- the Nikah Registration Act, 1986 and
- the Nikah Registration Rules.³²

Civil laws applicable to all communities include:

- the Azad Jammu and Kashmir Family Courts Act, 1993;
- the Azad Jammu and Kashmir Family Courts Rules, 1998;
- the Majority Act, 1875;
- the Guardians and Wards Act, 1890; and
- the Child Marriage Restraint Act, 1929.³³

Criminal laws which may be applicable in forced marriage cases are:

- the Azad Jammu and Kashmir Penal Code, 1860 ('APC');
- the Criminal Procedure Code, 1898;
- the Azad Jammu and Kashmir Islamic Penal Laws Enforcement Act 1974;³⁴

²⁷ Editor's Note: The state of Kashmir is a disputed 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." Pakistan uses the term "Azad Jammu and Kashmir" for this part of Kashmir, the term used in the Interim Constitution 1974. For the purposes of this document, and for brevity, we (as editors) have referred to the area as Kashmir and we take no position on the dispute; this is not affected by leaving intact the formal titles of legal instruments in this section.

²⁸ See Section 31(3), Interim Constitution, 1974.

²⁹ A 'State subject' is a person as defined in the Government of the State of Jammu and Kashmir Notification No. I-I/84, dated 20 April 1927, as amended from time to time: see Section 4 of the Interim Constitution.

³⁰ This Act was adapted and enforced in Kashmir by the Adaptation of Laws Resolution, 1948 see Council Resolution No 279/ 1948 dated 22 March 1948.

³¹ This Act was adapted and enforced in Kashmir by the Azad Kashmir Adaptation of Laws Act, 1959. Its provisions are not the same as those under the Act enforced in Pakistan, which was amended to some extent by the MFLO ,1961 and the Women's Protection Act.

³² Rules framed under the Nikah Registration Act, 1986 are applicable regarding the registration of Nikahs.

³³ The G&WA and CMRA were adapted and enforced in Kashmir by the Azad Kashmir Adaptation of Laws Act, 1959.

- the Offence of *Zina* (Enforcement of *Hudood*) Act, 1985;
- The Offence of *Qazf* (Enforcement of *Hadd*) Act, 1985 and
- The Azad Jammu and Kashmir Juvenile Justice System Act, 2003.

2.2 The Court Structure

The Supreme Court is the apex court of the country and its decisions are binding on all other courts across the country.³⁵

Five High Courts, one in each Province (Balochistan, Punjab, Khyber Pukhtunkhwa and Sindh), and one for the capital territory in Islamabad, form the next tier of the judiciary. Within each Province, the High Court has a principal seat in the capital and benches in other areas.³⁶ The Supreme Court and the High Courts are empowered under the Constitution to formulate rules to regulate their own practice and procedure. They hear original constitutional petitions as well as civil and criminal appeals and revisions.

The Subordinate Courts within each Province are subject to the respective High Court's supervision and control.³⁷ They include the District and Sessions Courts³⁸ at the District level, and below that, other civil and criminal courts headed by a Civil Judge and Magistrate³⁹ respectively. The District and Civil Courts hear civil matters; the latter also function as Family Courts and are the courts of first instance for all matrimonial matters. The Sessions Judges and Magistrates hear criminal cases. The Sessions Judges, by virtue of their office, and Additional Sessions Judges, by nomination, act as ex-officio Justices of the Peace (JP) for each District.⁴⁰ District *Nazims* (similar to a Mayor) also have important supervisory powers over the police.⁴¹

³⁴ Almost all the provisions of this law stand repealed by the APC (Amendment) Act, 1995 and the *Hudood* Act, 1985.

³⁵ Article 189, Constitution of Pakistan, 1973.

³⁶ See Article 198 of the Constitution. In Balochistan, the principal seat of the High Court is at Quetta and the benches at Sibi, Turbat; in Punjab, it is at Lahore, and the benches are at Bahawalpur, Multan and Rawalpindi; in Sindh, it is at Karachi and a bench at Sukkur and circuit courts at Hyderabad and Larkana; and in Khyber Pukhtunkhwa the principal seat is at Peshawar, and the benches are at Abbotabad, D.I.Khan and a circuit bench at Mingora called *Dar-ul-Qaza* in PATA of the Province. The Islamabad High Court, established by the 18th Amendment to the Constitution, has its principal seat at Islamabad. In Kashmir, the principal seat is at Muzaffarabad and circuit courts are at Mirpur and Kotli. The number of benches and circuit courts may be increased according to need.

³⁷ Article 203, Constitution of Pakistan, 1973.

³⁸ This Court is headed by a District and Sessions judge and hears both civil and criminal cases in its original jurisdiction as well as appeals and revisions against the decisions of Civil Courts and Magistrates' Courts falling within its jurisdiction.

³⁹ Following the separation of the executive and the judiciary and the abolition of the posts of Executive Magistrates in 2001, many Civil Judges are now empowered to act as Judicial Magistrates and hear criminal cases.

⁴⁰ Section 25, Code of Criminal Procedure (CrPC), as amended by the Criminal Law Amendment Ordinance, 2002. For details regarding the scope and mode of functions of Justices of the Peace, see *Khizer Hayat and others v. Inspector-General of Police (Punjab), Lahore and others* PLD 2005 Lahore 470 at 558-567.

⁴¹ The Officer In Charge of every police station in the District has to send a daily report to the District *Nazim* regarding all persons arrested without warrant (under Section 62 CrPC). The *Nazim* may inspect a police station to check whether there are any instances of illegal detention (Article 33 (1) of the Police Order 2002). Also see, *Naseem Akhtar Khan v. District and Session Judge* PLD 2005 Karachi 285 at 287. At present there are no elected local governments in Pakistan except in the province of Balochistan. Each province is in the process of introducing new laws for local governments which may

The Federal *Shariat* Court⁴² (FSC) has power to examine if any law or its provision is repugnant to the ‘injunctions of Islam as enshrined in the Holy *Qu’ran* and *Sunnah*,⁴³ and also hears appeals against decisions of trial courts in relation to specific offences under the *Hudood* Ordinances. Appeals against its decisions lie directly to the *Shariat* Appellate Bench of the Supreme Court. Although the FSC does not directly address the issue of forced marriage, some of its decisions regarding validity of marriage and divorce are referred to below where appropriate.

The Supreme Court of Kashmir is the apex court of the state and its decisions are binding on all subordinate courts.⁴⁴ The High Court of Kashmir has jurisdiction to issue writs of *mandamus*, prohibition, *quo warranto*, *certiorari* and *habeas corpus*, including for the enforcement of any fundamental rights, and its decision are binding on all subordinate courts and tribunals.⁴⁵ There is also a *Shariat* Court of Kashmir.⁴⁶

Enforcement of Orders: Kashmir relates as a foreign state in relation to Pakistan for the purposes of enforcement of judgments and decrees.⁴⁷ As noted above, different legal regimes apply in the Tribal Areas. Expert legal advice should be taken in respect of cases from the Tribal Areas or Kashmir, especially when the alleged occurrence has taken place partly in the settled areas of Pakistan and partly in the Tribal Areas or Kashmir. Ordinarily the Supreme Court and High Courts do not exercise their writ jurisdiction in relation to Tribal Areas,⁴⁸ but may do so if the alleged occurrence takes place partly in the Tribal Areas and partly in settled areas.⁴⁹

3. Laws on Marriage

This section first discusses the status of marriage and whether and when it is valid, void or irregular. It then outlines in turn the requirements for a valid marriage, in

entail different designations for the head of the district government. However, these powers are under the CrPC and the Police order which are unchanged.

⁴² Chapter 3- A Constitution of Pakistan, 1973.

⁴³ Article 203 D, Constitution of Pakistan. The Constitution, Muslim personal law, and any law relating to the procedure of a court or a tribunal are excluded from the definition of law which can be examined by the FSC.

⁴⁴ Sections 42 and 42-B, Interim Constitution.

⁴⁵ Section 44, Interim Constitution; for details on writs in Kashmir, see *The Institution of Petitions and Grant of Writs Rules*, 1975 formulated by the High Court under Section 52 of the Azad Jammu and Kashmir Courts and Laws Code, 1949.

⁴⁶ The *Shariat* Court of Kashmir hears references sent by Courts to examine if a law or a provision of a law is repugnant to the *Shari’ah* (injunctions of Islam as laid down in the Holy *Qu’ran* and *Sunnah*). The High Court may hear a reference to examine Muslim personal law on its own motion, on a petition by a citizen or on a reference sent by a court (Section 4 of the *Shariat Act* 1989). The Kashmir *Shariat* Court has appellate jurisdiction both in civil and criminal matters. Appeals against the decision of a District Judge in family suits go to the *Shariat* Court and references by the District Criminal Court in criminal matters are taken by this Court. These cases are dealt with by the Islamic Penal Laws Enforcement Act (IX of 1974).

⁴⁷ *Mst. Maryam Bibi and others v. Muhammad Iqbal and others* PLD 1976 AJK 9.

⁴⁸ Article 247(7), Constitution of Pakistan.

⁴⁹ For guidance see *Sherzada Khan v. Commissioner (FCR) Peshawar and 2 others* PLD 1975 Peshawar 29, *Khaista Gul v. Akbar Khan and 7 others* PLD 1975 Peshawar 146, *Abdur Rahim v. Home Secretary Govt. of West Pakistan* PLD 1974 SC 109. The last case details the nature, scope and limitations of the writ jurisdiction of Superior Courts in relation to Tribal Areas.

particular consent, the situation regarding marriage of minors and registration of marriage and proof of marriage.

3.1 Muslim Law

In determining issues relating to entry into marriage, the MFLO and general principles of the Muslim law of personal status are applicable where both parties are Pakistani Muslims, and in some cases where only one party is a Pakistani Muslim, even where the marriage was contracted outside Pakistan.⁵⁰

3.1.1 Status of Marriage

Under general Muslim law, marriages are defined as valid, irregular or void, depending on the applicable school of law. The definition of an irregular marriage differs among the various schools.

Our discussion here focuses on the requirements of a valid marriage. Any marriage which does not meet these requirements may be considered not valid (either irregular or void) resulting in complications under civil and criminal law, given that a void marriage has no legal status and may leave the parties vulnerable to many legal complications, for example regarding legitimacy of children.

Valid or *Sahih* Marriage: A valid marriage imposes mutual rights and responsibilities on the parties, including to the enjoyment of conjugal relations and inheritance, makes the husband responsible for providing the wife with dower and maintenance, and confers legitimacy on any children.

Irregular or *Fasid* Marriage: An irregular marriage is one which suffers from a temporary infirmity, and may be terminated by either party before or after consummation. It has no legal effect before consummation and only limited effects after consummation, securing the wife's right to dower and the legitimacy of children, but not resulting in mutual rights to inheritance or the wife's right to maintenance. Examples of irregular marriages include those where:

- there are no witnesses (except under *Shia* law, in which the presence of witnesses is not mandatory);⁵¹
- in certain circumstances, the wife marries during her *iddat* period (four months and ten days) after her husband's death;
- the wife is a non-Muslim and a non-*kitabiah* (that is not a follower of a revealed religion i.e. Christian or Jewish (or Parsi, according to the *Shias*);⁵²
- there is some 'unlawful conjunction', for example, if a man marries two women who are so related by consanguinity (blood relationship), affinity (relationship through marriage) or fosterage (for example two

⁵⁰ See Section 1(2), MFLO.

⁵¹ In some cases the Courts have refused to recognize marriages which have taken place in the absence of witnesses. On witnesses, see Hidayatullah and Hidayatullah (eds.), *Mulla's Mohammedan Law*, N.M. Tripathi Ltd, Bombay: 1990 (19th Edn.) ('Mulla'), at paras 252 (*Shia*) and 254 (generally).

⁵² See Mulla, *supra* at para 259.

sisters), that they could not have married each other lawfully if one of them were a man;⁵³ or

- the man marries for a fifth time.⁵⁴

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

Void or *Batil* Marriage: A void marriage is treated as no marriage in the eyes of the law, and creates no civil rights or obligations between the parties, with the children being treated as illegitimate. Examples of void marriages include those where:

- an adult party does not give their consent, or consent is obtained by force or fraud;
- a woman is within her *iddat* period following divorce;⁵⁵
- the parties are within 'prohibited degrees' to each other on grounds of consanguinity, affinity or fosterage;⁵⁶
- the wife is a Muslim but the 'husband' is a non-Muslim;⁵⁷ or
- the 'wife' is already married.⁵⁸

This categorization is not absolute, with different jurists taking different views. For example, according to D.F. Mullah, the marriage of a Muslim female with a non-Muslim male is merely irregular not void.⁵⁹

⁵³ For other such examples, see Mulla, supra at para 263, also Cassandra Balchin (ed.) *A Handbook on Family Law in Pakistan*, Shirkat Gah and Women Living Under Muslim Laws, Lahore:1997 at 38-39.

⁵⁴ See Mulla, supra, at para 255.

⁵⁵ Given Section 7, MFLO procedure (see Section 5 below), a divorce becomes final only 90 days after the receipt of the notice by the Arbitration Council following pronouncement of *talaq*, in the absence of reconciliation between the parties or non revocation of the *talaq* by the husband. Implicitly, therefore, the marriage subsists during the 90 day period following the receipt of notice, and therefore another marriage contracted by the wife during this period would be considered void. The Section 7 MFLO procedure applies to both consummated as well as unconsummated marriages (see *Aziz Khan vs. Muhammad Zarif etc.* PLD 1982 FSC 156 at 157). In case of a divorce through judicial process, the Section 7 MFLO procedure is followed after the issuance of decree by the court.

⁵⁶ Marriages prohibited on the ground of consanguinity (blood relationship) include those between a man and his mother, grandmother, daughter, grand-daughter, sister, niece or grand-niece, and aunt or great-aunt, however highsoever or lowsoever as appropriate. Marriages prohibited on the ground of affinity (through marriage) include those between a man and his wife's mother or grandmother or her daughter or grand-daughter, or the wife of his father or grandfather, and the wife of his son's son or daughter's son. See Mulla at paras 20-262, and Balchin at 37 fn. 10-11 supra.

⁵⁷ *Mohammad Ishaq Yacoob v Umrao Charlie* 1987 CLC 410 [Karachi].

⁵⁸ See Mulla, supra at para 256.

⁵⁹ See Mulla, supra at para 259(2).

3.1.2 Requirements of a Valid Marriage

Under Muslim law, marriage (*nikah*) is a contract, and therefore, any marriage must fulfill the requirements for validity of a contract. In Pakistan, the requirements for validity of a *nikah* include:

- a declaration or offer of marriage by or on behalf of one party and acceptance by or on behalf of the other party, both expressed at one sitting;⁶⁰
- the presence of adult, sane and Muslim witnesses (two men or one man and two women);⁶¹
- free and full consent of both parties if adults (but note that a guardian may give a minor in marriage,);⁶²
- the capacity of the parties to give full and free consent for marriage, the relevant factors here concerning age, gender, mental capacity, religion, relationship to each other and marital status:
 - Age: Under the CMRA, the minimum age of marriage is specified to be sixteen for females⁶³ and eighteen for males.⁶⁴ For marriage under these ages (see Section 3.4 below).
 - Gender: One party must be male and one female.
 - Mental Capacity: The parties must be of sound mind (but see Section 3.4 below).
 - Religion: The parties must be Muslims, or one party may be a Muslim man and the other a *kitabia* woman. Note that the marriage of a Muslim woman to a non-Muslim man, even a *kitab* man, is generally not recognised in Muslim law.⁶⁵
 - Prohibited Degrees: The parties must not be within prohibited relationships to each other.⁶⁶
 - Marital Status: Although the husband may have one or more subsisting marriages, up to a maximum of four, the wife must not have a previous subsisting marriage.⁶⁷
- the fixation of dower (*mehr*), a sum payable by the husband to the wife on marriage being contracted.⁶⁸

3.1.3 Consent

Under Muslim law, a marriage in which an adult sane party does not consent, or where their consent is obtained under force or fraud, is no marriage in law.⁶⁹

⁶⁰ *Dr. A.L.M. Abdulla v. Rokeya Khatoon and another* PLD 1969 Dacca 47.

⁶¹ Statutory laws in Pakistan do not specify the gender of witnesses to a Muslim marriage, and there are several views on this in Muslim jurisprudence, but see Mulla, *supra* at para 252 and also *Dr. A.L.M. Abdulla v. Rokeya Khatoon and another* PLD 1969 Dacca 47 at 50 para A. The government issued nikahnama has two columns for witnesses to marriage.

⁶² *Humaira Mehmood v State* PLD 1999 Lahore 495 at paras 9 and 10, and *Muhammad Aslam v The State* 2012 PCrLJ 11, para 9 at page 17

⁶³ In the province of Sindh, it is eighteen years under Sindh's CMRA, 2013.

⁶⁴ Section 2 CMRA, 1929.

⁶⁵ See para 3.1.1.

⁶⁶ See para 3.1 and fn 13.

⁶⁷ Under Section 6, MFLO, a Muslim man may validly contract a polygamous marriage, subject to obtaining prior permission by way of a certificate from the relevant Arbitration Council.

⁶⁸ This is considered to be an essential ingredient of marriage by the Pakistan courts: *Marina Jatoi v Nuruddin K. Jatoi* PLD 1967 SC 580 at 607; *Bashir Ahmad v Usman Alias Chara and others* 1995 P CrLJ 1909 at 1910 para 3 (exchange marriage or marriage of a relative of a spouse with another cannot be a valid consideration for marriage) and *Dr. Anees Ahmad v Mst. Uzma* PLD 1998 Lahore 52 at 56.

Humaira Mehmood v State PLD 1999 Lahore 495

Humaira Mehmood, 30, married MB of her own free will but without her parents' consent. She fled from Lahore to a shelter home in Karachi and took refuge there. Her influential family (her father was a Member of the Provincial Assembly of Punjab for the then ruling party) in collusion with the police raided the shelter home and took her into their custody. On the intervention of the Governor of Sindh Province, who had been approached by a women's rights activist, Humaira was released from police custody, and put in a *Darul Aman* (government run shelter).

The Karachi High Court allowed Humaira to remain in the Darul Aman till further orders. Her family then registered two cases in Lahore, one against her husband (under Section 16 of the *Zina* Ordinance) alleging that he had enticed her away with criminal intent and another against her of theft alleging that she had stolen money and jewellery from them before leaving home. A women's rights lawyer obtained an order of interim pre-arrest bail for Humaira from the Lahore High Court. The Lahore High Court dispensed with her further presence before the Court in view of the Karachi High Court having dealt with the issue of her custody.

After she obtained pre-arrest bail from Lahore, on Humaira's application, the Karachi High Court allowed her to live at a place of her choice and to appear before the Lahore High Court on a given date. During this period, Humaira and her husband were both arrested by Lahore police from Karachi airport. A women's rights activist filed another petition before the Lahore High Court for Humaira to be produced before the Court, apprehending danger to her life. Humaira was produced before the Court. She filed another constitutional petition for the quashing of criminal proceedings against her and her husband, on the ground that her alleged marriage to the man, MK, with whom her parents had forced her into marriage earlier (the first respondent) was void because it had occurred under duress.

The respondents claimed that Humaira and MK had been married prior to her alleged marriage to MB, and that she had therefore committed an offence under the *Hudood* laws.

In allowing the petitions and quashing the criminal case registered against Humaira, the Lahore High Court held, amongst other things that:

1. It is a settled proposition of law that in Islam a *sui juris* woman can contract a *nikah* of her own free will and a *nikah* performed under coercion is no *nikah* in law. Instances are not lacking from Hadith and Islamic history that the consent of a *sui juris* woman was held to be a sine qua non for a valid marriage in absence of which a marriage was declared void.
2. The term 'consent' means a conscious expression of one's desire without any external intimidation or coercion.
3. The evidence on record *prima facie* led to the conclusion that Humaira's marriage with MB was prior in time and that the later marriage with MK, being performed

⁶⁹ *Matloob Hussain v. Mst. Shahida & 2 others* PLD 2006 SC 489 at 496, Humaira Mehmood's case, supra at 501; Mulla, supra at para 251.

during the subsistence of the earlier one and without Humaira's consent, is void in Islam. As both Humaira and MB have acknowledged their marriage to each other, a presumption of valid marriage arises in their favour.

Consent has been judicially defined as the 'conscious expression of one's desire without any external intimidation or coercion', and as "...suppos[ing] three things -- a physical power, a mental power, and serious use of them".⁷⁰

Underscoring the importance of the bride's consent being made explicit, the standard marriage contract form (*nikahnama*) requires her to affix her signature or her thumb impression; in contrast, the groom's consent may be signified either by himself or his representative.

In practice, the observance of a woman's right to consent remains largely symbolic. In extreme cases, violence or coercion may be used to obtain her consent, marked by a mere nod, or by silence. Further, minors or persons lacking mental capacity to consent may be married off by their guardians (see next section).

3.1.4 Marriage of Minors

The laws concerning marriage of minors are contained in the CMRA, read with the Majority Act, 1875 and the Muslim law of personal status.⁷¹

a) Age of majority for marriage: The general rule is that every person domiciled in Pakistan is deemed to attain majority on reaching 18 years of age.⁷² However, a lower age of majority is determined according to personal law for the purposes of marriage, dower, divorce and custody.⁷³

Traditionally, under the Muslim law of personal status, the age of majority for marriage was considered to be puberty, which was presumed at the age of fifteen for girls.⁷⁴ The CMRA subsequently established the minimum age of marriage for all communities, as 16 for females and 18 for males.⁷⁵

Thus, a Muslim female aged 16 years and a male aged 18 years (or younger, if established to have attained puberty), though still a minor for other purposes, would generally be considered by the Courts to have capacity to contract a marriage of their own free will.⁷⁶

⁷⁰ Humaira Mehmood's case, supra at 501.

⁷¹ It may be noted here that the CRC defines the age of majority as eighteen, and that CEDAW expressly prohibits child marriage.

⁷² Section 3, Majority Act, 1875. It is worth considering in this regard that Pakistan has ratified the CRC with no reservations, as noted above.

⁷³ See Section 2, Majority Act, 1875.

⁷⁴ See Mulla, supra, para 251; see also *Bakshi v Bashir Ahmed* PLD 1970 SC 323 at 324 para A and *Zafar Khan v Muhammad Ashraf Bhatti* PLD 1975 Lahore 234 at 235 paras A and B.

⁷⁵ After the 18th Amendment, family laws are exclusively provincial subjects so it became irrelevant.

⁷⁶ See *Usman v The State* 1984 PCrLJ 2908 (where the Court determined the age of capacity for marriage by reference to the *Hudood Ordinance*). In this *habeas corpus* petition, the Court acknowledged the marriage but allowed an abduction case against the husband to continue and further held that the Court's observations in *habeas* proceedings ought not to influence the accused's trial for abduction. In *Mst. Hajra Khatoon and another v. Station House Officer, Police Station Fateh Jang, District Attock and 2 others* PLD 2005 Lahore 316 at 323, the Court held that a marriage contracted by

In contrast, females aged under 16 and males aged under 18 (unless they have actually reached puberty), as well as persons considered to be mentally immature⁷⁷ are generally seen to lack the capacity to marry of their own choice.⁷⁸ Such persons may be married on the basis of consent given on their behalf by their guardians.

b) Consent for marriage of minor: Under general principles of the Muslim law of personal status, the guardian for marriage of a minor is the father, followed successively by paternal relations, including the grandfather, the brother and other male relations, and in default, the mother, or other maternal relations, such as the maternal uncle or aunt.⁷⁹

c) Status of marriage of a minor: If a woman is married off by her father or other guardian before reaching sixteen years of age, she may repudiate the marriage before reaching eighteen, provided the marriage is not consummated.⁸⁰ In case of males, the right to repudiate such a marriage continues until the marriage is ratified expressly or impliedly, for example by payment of dower or by cohabitation⁸¹ (see Section 5 below on option of puberty). Thus, unless and until repudiated, a marriage involving a minor will not be treated as invalid. However, those responsible for contracting a child marriage, or for committing other related offences may be prosecuted (see Section 6 below).

3.1.5 Registration of Marriage

Any marriage contracted by a Pakistani Muslim must be registered in accordance with the terms of the MFLO.⁸²

The *nikahnama* (marriage contract form): The *nikahnama*, or marriage contract form, is available from the Office of the Nikah Registrar.⁸³

Marriage Contract form or *Nikahnama*: The *nikahnama* includes separate columns for, among others, entry of:

- the date and place of solemnization

a girl who had not reached the age of majority as defined 'in law' but had attained puberty as defined in the *Zina* Ordinance, is valid and not void. The girl was aged approximately thirteen years and eleven months; a kidnapping case registered by the girl's father was later quashed in writ proceedings. The *Zina* Ordinance following the amendments effected by the Women's Protection Act has no overriding effect on other laws and may not be referred to by the Courts for determining the age of majority in matrimonial issues. In *Muhammad Aslam v The State* supra, the Court sentenced the accused on charges of kidnapping and Section 10 (3) of *Zina* Ordinance (which dealt with rape before the enactment of the Women Protection Act) rejecting his plea of marriage with the victim. The Court held that a girl who was about just under fifteen years of age did not have legal capacity to enter into marriage.

⁷⁷ See Mulla, supra, at para 271 and *Bibi Khatoon v. Faiz Muhammad and Muhammad Rafique* PLD 1976 Lahore 670 (on mental incapacity).

⁷⁸ But there are exceptions, see fn 63 above.

⁷⁹ Mulla, supra. Note that the particular order may depend on the applicable school of law.

⁸⁰ Section 2(vii), DMMA. It has been subsequently held by the Courts that consummation during minority does not take away the right of repudiation, see *Mst. Ghulam Sakina v. Falak Sher* PLD 1949 Lah. 75, *Behram Khan v. Akhter Begum* PLD 1952 Lah 548.

⁸¹ See Mullah, supra at para 274.

⁸² Section 5, MFLO and Rules 7-13 MFLR are relevant for registration of marriage.

⁸³ See Rules 8, 10, 11 and 12 MFLR. Following registration of a marriage, the marriage contract form (*nikahnama*) serves as both a marriage certificate and proof of marriage.

- the date of registration
- the names, ages and addresses of the parties, witnesses and person solemnising the marriage
- the status of the bride (maiden/divorcee/widow)
- the names of witnesses to the marriage
- the amount of dower
- whether the groom has delegated the power of divorce to the wife
- details of whether the groom is already married and whether he has been given permission by the Arbitration Council to marry polygamously
- whether the groom is divorced or widowed
- whether the groom already has a wife and his number of children⁸⁴
- the signatures of the bride, the groom or his *vakil* (agent), the witnesses and the solemnizer and the seal of the *Nikah* Registrar, containing the name of the Union Council within which the marriage is being solemnised and registered

Process of registration: Marriages in Pakistan: Any marriage contracted under Muslim law must be registered with the office of the *Nikah* Registrar for the Ward/Union Council where the marriage is solemnized. There is no specific time limit for registration.

The person responsible for registration of the marriage must complete the *nikahnama* and obtain all the signatures required thereon. This person may be the *Nikah* Registrar or any other person who has solemnized the marriage; if the latter, that person must submit the completed *nikahnama* to the *Nikah* Registrar for registration.⁸⁵

The *Nikah* Registrar's duties before registering a marriage are to ensure the capacity of the parties to contract marriage, their ages and whether they are acting of their own free will, and he may proceed to register the marriage only after ensuring that its basic requirements have been fulfilled.⁸⁶

After signing and sealing the *nikahnama*, the *Nikah* Registrar is required to retain the original intact in the Register and to give duplicate and triplicate copies to the bride and groom respectively. He is also required to forward a quadruplicate copy of every *nikahnama*, as well as every completed *Nikah* Register, to the concerned Union Council for its records.⁸⁷

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

⁸⁴ Columns about the status of the groom, divorced or widowed, and children from any earlier marriage are in the *nikahnama* of Punjab province only.

⁸⁵ Section 5, MFLO.

⁸⁶ *Shah Din v. State* PLD 1984 Lahore 137, *Farman Ali v. Abid Ali* PLD 1995 Lahore 364 at 376.

⁸⁷ This would be the Union Council within whose jurisdiction the marriage is solemnized, usually that of the wife's residence.

Marriages outside Pakistan: If a marriage is solemnized under the MFLO, outside Pakistan by a Pakistani Muslim, then it must first be registered with the Consular Office of the Pakistan Mission in the country concerned. The *nikahnama* should then be attested by the Mission and sent onto the *Nikah* Registrar in Pakistan for the Ward/Union Council of either the bride's residence, or if she is a non-Pakistani, the groom's residence.⁸⁸ Pakistani nationals marrying outside Pakistan need to check if such a facility is available and whether or not the law of the country in which they are marrying permits solemnisation and registration of marriage in this manner. Laws of some countries, including the United Kingdom, permit solemnisation of marriage only under their own laws.

Registration of Marriage before the National Database and Registration Authority (NADRA): Every marriage is required to be registered by NADRA.⁸⁹ A specific registration form applies for Muslim marriage, which contains entries for the names of the bride and groom with their computerised national identity card (CNIC) numbers, their respective father's names and CNIC numbers, their personal status at the time of marriage, addresses, the dower amount, the marriage registration fee amount, and the name of the marriage solemniser and their CNIC number. This form is not a substitute for a *nikahnama*. Every registered marriage requires a further registration with NADRA.

Consequences of non-registration: Failure to register a marriage does not make it invalid but only makes the persons responsible for such failure liable to payment of a fine⁹⁰ and, may, depending on the circumstances, also lead to cancellation of the *Nikah* Registrar's license if he is found to have failed to implement the provisions of MFLO or the MFLR on registration of marriages.⁹¹

Non-registration of a marriage may result in civil and criminal liabilities and expose those involved to the possibility of arrest and harassment since, in the absence of other evidence, lack of registration may create doubts about the very existence of the marriage.⁹² For example, where the parties dispute the existence of a marriage, non-registration may create difficulties for the person asserting the marriage. In several cases, the Courts have refused to acknowledge the fact of such unregistered marriages.⁹³ In others, they have even refused to acknowledge registered marriages where incomplete entries related to essential requirements of a valid marriage, for

⁸⁸ Rule 12, MFLR.

⁸⁹ Section 20, National Registration and Database Authority Ordinance, 2000.

⁹⁰ Section 5 (4), MFLO provides a maximum penalty of three months' imprisonment or a fine of Rs. 1000 or both for solemnising a marriage but failing to report it for registration.

⁹¹ See the Government of Punjab's directions to local administrators (DCOs) to request the Nazim of every Union Council to ensure implementation of the MFLO requirements on registration, and in default to cancel the license of the *Nikah* Registrar: Notification No.SOR (LG) 38-7/2004 issued on 29 January 2005.

⁹² *Dr. ALM Abdulla v. Rokeya Khatoon* PLD 1969 Dacca 47 at 51 para B.

⁹³ See *Sher Ahmed v. Mst. Zubaida Bibi and others* NLR 1984 SCJ 182 where the Court did not refuse to recognize the validity of a marriage for non-registration, but refused to accept the fact of the marriage *prima facie* in *habeas corpus* proceedings, since it could not determine questions of fact in the writ jurisdiction. If the Court has any doubts, it may direct the parties to approach a competent court (the Family Court) to obtain a finding on the fact of marriage. In *Sher Ahmed's* case, where the wife sought jactitation of marriage, the husband's claim of marriage was rejected by the subordinate court, as the marriage had not been registered. This decision was upheld by the High Court and Supreme Court.

example, the names and addresses of witnesses.⁹⁴ In contrast, in other cases they have held that an oral marriage may be recognised on acknowledgement of both parties and in the absence of any evidence to the contrary. Most of these cases appeared to involve the issue of interference with choice in marriage, and criminal cases against the ‘husband’ of kidnapping of a woman coupled with *zina*, where the prosecution failed to establish the charges or to bring any positive evidence against the couple.⁹⁵

3.1.6 Proof of Marriage

The *nikahnama* provides *prima facie* proof of marriage. If it is lost or otherwise unavailable, either party to the marriage or any other person may inspect the *Nikah* Register or obtain a certified copy of the relevant entry in the *Nikah* Register from the concerned Union Council on payment of a nominal prescribed fee.⁹⁶ In practice, where any person other than the bride/groom wishes to obtain a copy, it may be advisable to obtain a power of attorney authorising them to collect this on behalf of the party concerned.

In the absence of a *nikahnama*, marriage may be presumed from the fact of prolonged and continued cohabitation⁹⁷, acknowledgement of the paternity of children from the marriage, or acknowledgment by the husband of the wife. Proof of the marriage having occurred may be obtained by the evidence of persons present at the marriage, including the solemnizer, witnesses or others, and of cohabitation or acknowledgement from neighbours or relatives.

3.2 Recognition and Consequences in Pakistan of a Marriage in England and Wales or Scotland

A marriage performed in England and Wales or Scotland in accordance with the Marriage Act 1949 is recognised as a valid marriage in Pakistan,⁹⁸ unless it contravenes Muslim Law. So, for example, such a marriage between a Muslim woman and a non-Muslim man would not be recognised as valid in Pakistan. If such a woman comes to Pakistan and is threatened with or forced into marriage, her earlier marriage may not be recognized and its acknowledgment could lead to more legal problems.

A marriage performed in England and Wales or Scotland in accordance with the Marriage Act, 1949 does not impart permanent monogamous status to a Pakistani

⁹⁴ *Qaisar Mahmood v. Muhammad Shafi* PLD 1998 Lahore 72.

⁹⁵ *Arif Hussain and another v. The State* PLD 1982 FSC 42, *Muhammad Ramzan v. The State* PLD 1984 FSC 93, *Muhammad Yousaf and another v. The State* PLD 1988 FSC 22, *Muhammad Ramzan v. Muhammad Saeed and 3 others* PLD 1983 FSC 483 also see Balchin, supra, at p. 51, paras 1.5.1, 1.5.2 and 1.5.3. In these cases (with one exception) both parties were convicted by the trial courts but acquitted on appeal. In an exceptional case (Muhammad Ramzan’s case) the Court directed the prosecution of the complainant for making a false statement in relation to a judicial proceeding (an offence under Section 193 PPC).

⁹⁶ See Rule 19, MFLR. Each Union Council fixes the fee for obtaining a duplicate copy of *nikahnama*; in 2005, this ranged from Rs. 100-300.

⁹⁷ See Mulla, supra, at para 268, *Abdul Majid Khan and another v. Mst. Anwar Begum* NLR 1989 Shariat Decisions 705 (Supreme Court) and *Dr. ALM Abdulla v. Rokeya Khatoon and another* PLD 1969 Dacca 47 at 52 para C (one year’s cohabitation is not sufficient). However, an unregistered marriage has been recognized by the Courts based on other evidence: see *Arif Hussain and Azra Parveen v. State* PLD 1982 FSC 42 (an alleged *zina* case).

⁹⁸ *Mrs. Marina Jatoi v. Nurudin K. Jatoi and The State* PLD 1967 SC 580 at 601.

Muslim man simply because of the law under which it was performed. Once in Pakistan, he may contract a second marriage by seeking the necessary certificate from the Arbitration Council concerned.⁹⁹

4. Constitutional Guarantees and Remedies

The Constitution of Pakistan secures fundamental rights relevant in cases of interference with the right to choice in marriage. Specifically, it guarantees the rights to protection of the law (Article 4) and life and liberty (Article 9) for citizens and non-citizens alike. In addition, it secures for citizens the rights to freedom of movement (Article 15), equality before the law and equal protection of the law, non-discrimination on the ground of sex and special measures for the protection of women and children (Article 25).

The Constitution also provides for Principles of State Policy, which, though not directly enforceable, may be taken into consideration by Courts when interpreting the scope of fundamental rights. One such Principle provides for the State to protect ‘the marriage, the family, the mother and the child’, and has been cited in judgments upholding women’s rights to marry without the consent of their parents (Article 35).¹⁰⁰

A writ petition may be filed before any High Court for enforcement of fundamental rights, under Article 199 of the Constitution.

4.1 Constitutional Petitions under Article 199

Petitions for the issuance of the writs of *mandamus*, *prohibition*, certiorari,¹⁰¹ *quo warranto* and *habeas corpus*,¹⁰² or for the enforcement of any fundamental right¹⁰³ may be moved before the High Court under Article 199 of the Constitution. In each case, the Court must first be satisfied that no alternative adequate remedy is provided by law.¹⁰⁴ As discussed below, the writ of *habeas corpus* is usually the most effective in cases relating to rights of entry into marriage. Exceptionally, and in addition to these remedies, the Courts have directed payment of compensation for breach of a constitutional right in the context of unlawful detention by state agencies.¹⁰⁵ Arguably, therefore, depending on the facts of the case, it may be possible to seek compensation for the failure of state authorities to prevent interference with the right

⁹⁹ Section 6, MFLO, Rule 14 MFLR and Jatoi’s case at 601; also Mst. *Fauzia Hussain v. Mian Khadim Hussain* NLR 1985 Criminal 202, where the husband was prosecuted for contracting a polygamous marriage without obtaining a certificate from the Arbitration Council granting him permission to do so. Both parties were Pakistani nationals and the first marriage was solemnized in Birmingham under English law.

¹⁰⁰ Mst. *Rukhsana v. S.H.O. Police Station Belo, Mirpur Mathelo and other* 1999 PCrLJ 638 Karachi at 644, *Muhammad Tariq Mahmood and others v. Station House Officer, Police Station Millat Park, Lahore* 1997 PCrLJ 758, at 760, *Naziran Bibi v. S.H.O and others* PLD 1996 Lahore 709, at 710.

¹⁰¹ On the application of an aggrieved person.

¹⁰² On application by any person.

¹⁰³ On the application of an aggrieved person.

¹⁰⁴ The Court has defined alternate remedy to be adequate, efficacious, convenient, beneficial, effective, inexpensive and expeditious, see *Khadim Hussain and another v. District Council, Lyallpur and another* PLD 1976 Lahore 1044 at 1046-47.

¹⁰⁵ *Mazharuddin v. The State* P.Cr.L.J. 1998 1035; *Haji Noor Hossain v Khalid Masood, SHO PS B Division, Rahimyar Khan* 1998 PCrLJ 1451.

of an individual to marry of her/his own choice, or for the failure of such authorities to protect their life and liberty.

It is important to remember that in practice:

- while the Courts may exercise their discretion in favour of granting relief in constitutional petitions in accordance with the guidelines provided by established case law, they will not invariably do so. Their reasons for refusal to grant relief in certain cases may well reflect prevailing social attitudes and prejudices.
- the length of proceedings may inhibit women from seeking relief and leave others in limbo. For example, in the celebrated Saima Waheed case, it took seven years for the woman concerned to obtain a final order from the Supreme Court after her family had initially filed a habeas corpus petition in the High Court and also challenged the validity of her marriage contracted out of choice.¹⁰⁶

The available case law clearly reflects that a marriage may face legal challenge if it is contracted without the consent and involvement of the families of the bride and groom. However, if the parties are adult and the marriage is properly registered, they should be able to access legal protection relatively swiftly.

4.2 Habeas Corpus Petitions

A *habeas corpus* petition enables the Court to determine whether any person is being illegally or unlawfully confined or detained, by ordering their production in court, recording their statement and inquiring into the circumstances of their alleged detention. Accordingly, it is frequently used in order to secure the liberty of individuals who may be confined or restrained in connection with the threat of or actual forced marriage.

Such a petition may be filed either in the form of a writ petition under Article 199(1)(b)(i) of the Constitution, as noted above, or as a criminal miscellaneous petition under Section 491 CrPC.

4.2.1 Habeas Corpus under Article 199 of the Constitution or S491 CrPC?

There is little difference between these two procedures in relation to seeking the liberty of a detained person. While a petition under Article 199 may only be filed before the High Court, one under Section 491 CrPC may be filed before either the High Court or the Sessions Court.¹⁰⁷ The High Court may refuse to issue a writ of *habeas corpus* on the ground that an application should first be filed before the relevant Sessions Court.

¹⁰⁶ *Hafiz Abdul Waheed v Asma Jahangir* PLD 2004 SC 219 also see *Mst. Bakhat Amna v. S.H.O., City Lodhran* 1998 P.Cr.LJ Lahore 1675. An adult woman was lodged in a *Darul Aman* for six months before her petition was taken up by the court and she was ultimately set at liberty.

¹⁰⁷ See Section 491(1A) as amended by the Criminal Procedure (Amendment) Ordinance, 2002 published in the Gazette of Pakistan Extraordinary, 9 February 2002. The Sessions Courts are required to observe the rules of procedure framed by the respective High Court in respect of Section 491 petitions.

In practice, while Section 491 CrPC petitions are more frequent, given the relative ease of the procedure involved, constitutional petitions may be preferred especially if the person confined has already contracted a marriage of choice, as they allow for wider range of directions and orders to be sought, including:

- quashing of any false criminal proceedings against the petitioner;¹⁰⁸
- directions to the *Nikah* Registrar not to register a marriage where the consent of one party was obtained by force or fraud;
- directions to prevent the police from harassing the petitioner.¹⁰⁹ Such orders may be sought pre-emptively even where no FIR has been lodged, given the fear that criminal proceedings may be started by the family in a bid to frustrate or destroy the marriage of choice (many cases indicate that the FIR is filed after some delay);
- directions to the police and other public functionaries to provide protection to the petitioner against harassment by private individuals;
- directions to take disciplinary action against the responsible police officer;¹¹⁰ and
- directions to the police to recover any documents (such as a passport) belonging to the victim.

4.2.2 Why is a *Habeas Corpus* Petition the Most Appropriate Remedy?

In cases regarding interference with choice in marriage, a *habeas corpus* petition has a dual use. First, it is the most effective means of seeking the immediate recovery of a person by ensuring that they are produced before the Court. Second, it makes it possible to bring on record the basic facts involved.

In most cases, information regarding a woman's marital status or whether she is being confined against her will are not clear at the outset, particularly where she is unable to leave her family's or husband's home. In this situation, a *habeas corpus* petition may be used to obtain an order for the allegedly confined woman to be produced before the Court.

¹⁰⁸ See cases of choice marriage where criminal proceedings are launched by the family of the woman against her husband or both of them: *Zarjuma alias Jamna Bibi v. Station House Officer, Police Station Saddar, District Bhakkar* PLD 2009 Lahore 546 (case of kidnapping against the husband quashed), *Mst. Ruqia Batoool & another v The State and 2 others*, PLD 2008 Lahore 66 (girl's parents claimed her to be already married and registered a case of kidnapping and of forged nikahnama against her husband. She denied any earlier marriage and accepted the marriage of her choice, the court quashed criminal proceedings holding that the case based on frustration and malice), *Samina Ali v Station House Officer* PLD 1995 Lahore 629 (holding also that an investigating agency cannot challenge the validity of a lawful *nikah*, only the Court); *Sugran Mai v State* PLD 1980 Lahore 414 (girl reached puberty, marriage of free will); *Bushra Bibi v SHO* 1995 PCrLJ Lahore 401 (girl aged 15 and pregnant, statement of voluntary marriage); Rukhsana supra; *Muhammad Arshad v. Station House Officer and others* 1997 PCrLJ Lahore 928 ; *Muhammad Tariq Mahmood and others v. Station House Officer, Police Station Millat Park*, 1997 PCrLJ Lahore 758 (petitioner *sui juris*, marriage of free will); and even *Mst. Nadia Siddique v. S.H.O. and others* 1997 PCrLJ Lahore 594 (although question of validity of marriage to be decided by competent authority, given statement of voluntary marriage, FIR quashed). But see *Lubna and another v Govt of Punjab* PLD 1997 Lahore 186 (refusal to quash FIR in case of 'runaway marriage').

¹⁰⁹ *Naziran Bibi v S.H.O and others*, PLD 1996 Lahore 709 (petitioner *sui juris*, married of free will); *Muhammad Banaras v SHO* 1995 PCrLJ 94 (writ not to harass the woman was ultimately followed by another to quash criminal proceedings nevertheless brought against her).

¹¹⁰ Humaira's case, supra.

Once she is produced, the Court can determine the circumstances of her ‘illegal confinement’ primarily by recording statements from her and the persons allegedly detaining her. If such persons (usually the husband, parents or any other family member from whose custody she was recovered) claim that she is married, the Court may test that claim by requiring submission of supporting documents such as a *nikahnama*, along with an affidavit (sworn statement) by any witness, the *Nikah* Registrar and *nikah khawan* (marriage solemniser) in case the marriage was not solemnized by the *nikah* registrar.¹¹¹ The detinue can respond to such a claim: if she states clearly that she is being held against her will, irrespective of whether there was a marriage or not, that will often be sufficient for the Court to direct her release. In other cases, if she states that she is being held against her will, has reached the relevant age of majority for marriage and married of her own choice, the Court will also direct her release.

This process is likely to clarify the following issues, which will ultimately determine the outcome of the case:

- the age of the woman/girl (whether or not she is *sui juris*, i.e. competent under the law to contract her marriage). As sometimes there are conflicting claims about her age the Court can, if necessary, verify her age through documentary evidence or a medical examination;
- her ‘marital status’ (whether she is single, married, or divorced, especially when she is being ‘held’ by someone who claims to be lawfully married to her);
- the name and identity of the person(s) holding her;
- the legitimacy of any claim by the person(s) confining her or having her custody.

Based on these factors the Court will then decide:

- whether she is an adult, and if so, that she is to be set at liberty;
- whether she is a minor, and if so, to whom to entrust her custody;
- any other relief the Court deems appropriate.

The Court will not consider the validity of the marriage in any detail, leaving this to be dealt with by the appropriate Family Court.¹¹² The Court will simply make a *prima facie* determination regarding the existence of the marriage and any claim on the basis of such marriage and dispose of the petition accordingly, so that the parties can substantiate their claims before the Family Court.¹¹³

¹¹¹ It is important to remember that in the writ jurisdiction under Article 199, the Court will not examine questions of fact in detail but will generally only consider materials available on affidavit. The court deals with questions of law only.

¹¹² *Farhat Fatima Hashmi v Nadeem Aslam Shah* 1973 PCrLJ Karachi 61, *Hafiz Abdul Waheed* supra.

¹¹³ *Amir Buksh v. Mehar Ali and others* PLD 1962 (WP) Karachi 725 at 726 where the Court acknowledged the marriage on the statement of the parties and did not consider the alleged ground that the marriage was invalid as the woman had married a man who claimed to be illegitimate child of her father. The Court left this controversy to be settled by the Family Court. In *Sardara v. Khushi Mohammad* 1973 SCMR 189 the Court refused to acknowledge the marriage as the woman had allegedly been married against her will. In *Farman Ali v. Abid Ali and others* PLD 1995 Lahore 364 in *habeas* proceedings the Court gave the custody of the girl to the father; it did not accept the marriage as being with free consent of the girl or that she was capable of understanding the effect of the transaction, but left it to the parties to approach the Family Court about the validity of marriage. The girl was 16 years old at the time of the alleged marriage.

4.2.3 Petitioners

Any person or organization may file a *habeas corpus* petition: this includes the detained woman, or any relation, friend or concerned individual or organization (even one beyond Pakistan) applying on her behalf. If any person outside Pakistan applies, they should first execute a valid power of attorney authorising a person in Pakistan to file such a petition on their behalf.¹¹⁴ In such cases, it is usually advisable for the person who executes the power of attorney to also swear an affidavit setting out the facts alleged.

Some difficulties may arise where the detained woman's family has forced her into a marriage being unaware that she has been married or in a subsisting relationship earlier. The man to whom she is already married without her family's knowledge, or her fiancé, or any person interested in her welfare may seek to bring a *habeas corpus* petition. Several reported judgments indicate that while such a person would technically have standing, their petitions may not have positive outcomes, as the Courts are not well-disposed to "paramours" who seek to have women set at liberty through the use of habeas corpus petitions. In one case, the Supreme Court, agreeing with the High Court regarding the supposed tendency of some young men to abuse the provisions of Section 491 of the CrPC to further their illicit love affairs, stated that the courts do not function in a vacuum and must take note of the prevailing social and moral environment. The Court noted, "If a *habeas corpus* petition is filed for furthering illicit love affair and avoiding criminal prosecution for kidnapping/abduction of woman, the relief under Section 491, Cr.P.C. is justifiably refused".¹¹⁵ These observations were followed in another case and a petition challenging police harassment with regard to interference in a marriage of choice was dismissed.¹¹⁶

4.2.4 *Locus Standi* of the Petitioner

Any person interested in the welfare of a person alleged to be illegally detained whether by any public authority or private person can move a habeas corpus petition. However, the Court will scrutinise the standing of the petitioner. This is particularly the case where a man considered to be a 'stranger' i.e. not from the natal family of the detained person, files a petition for the release of any married or unmarried woman. In the case of *Imdad Hussain v. Noor Hassan and 5 others* the Court dismissed a habeas corpus petition and observed:

"...there is no doubt the language of section 491, Code of Criminal Procedure places no restraints as to the person or class of persons who may apply for relief; indeed the person really aggrieved is usually so coerced as to be unable himself to make an application, someone else, therefore, has to seek

¹¹⁴ See the Powers of Attorney Act, 1882. A power of attorney executed outside Pakistan would need to be notarised by a Notary Public and then attested by an official of the Pakistan High Commission/Embassy in the country concerned in order to be admissible in the Pakistan courts.

¹¹⁵ See *Shaukat Ali v. Altaf Hussain Qureshi* 1972 SCMR 398 at 400.

¹¹⁶ *Nabeela Anjum v Rana Mohammad Azam and two others* 1997 PCrLJ 1437 at 1442. For other examples of *habeas corpus* petitions brought by 'paramours', where the Court has denied relief, see *Fahmida Parveen v Muhammad Ibrahim and another* 1984 PCrLJ 2977 (giving custody to the mother, and observing that she would be able to resolve her matrimonial disputes one way or the other 'in consultation with them and with their blessings', based on the woman's statement that she was forcibly given in marriage, and her refusal to support the contention of the 'paramour' petitioner that she was betrothed to him. See also *Fateh Sher v Sarang* PLD 1971 Lahore 128 at 130 para 3.

relief on his behalf. As a general rule, however, any person having special interest, right or authority in or from the person wrongfully detained may seek relief on his behalf, and a stranger has no right to make an application."¹¹⁷

4.2.5 Respondents

The respondents to a *habeas corpus* petition are the persons who are alleged to be detaining the woman against her will. In choice of marriage cases, the respondents are typically family members of the woman, including the father, mother, husband or other relatives, and may also include state authorities such as the police or officials of a *Darul Aman* (government-run shelter home).

4.2.6 Forum

A *habeas corpus* petition under Article 199 may be filed before any High Court and under Section 491 CrPC before any High Court¹¹⁸ or Sessions Court.¹¹⁹

In practice, *habeas corpus* petitions under Section 491 CrPC continue to be filed largely in the High Courts, although in some instances they may not be entertained by the High Court on the ground that a similar remedy is available at the district level. In many cases it has been found that the High Court is a more appropriate forum, given that it has:

- a more extensive territorial jurisdiction (the entire Province) than the Sessions Court (one district). This is particularly relevant in forced marriage cases where there are concerns that the detenué may be moved from one district to the other and thus effectively out of the jurisdiction of any one Sessions Court, frustrating the proceedings;
- plenary powers to ensure strict enforcement of the CrPC provisions and to oversee the functions of all public functionaries required to exercise any powers or to perform any functions under the CrPC; and
- extensive powers under its inherent jurisdiction to fashion appropriate remedies.

4.2.7 Jurisdiction

The High Court's jurisdiction in *habeas corpus* proceedings has been described as 'two-fold' namely:

- "i. to deal with a person within its appellate criminal jurisdiction according to law; and*
- ii. to set him at liberty if he is illegally or improperly detained.*

The question which falls for determination, however is that if the court finds that the person brought before it was not being illegally or improperly confined or detained. What order can be passed regarding the custody of that person?

¹¹⁷ PLD 1974 Karachi 485 at 488.

¹¹⁸ Such a petition may be filed in the Principal Seat or before any of the benches in other cities in the Province where the woman is allegedly confined, so for example, in the Lahore High Court at its Principal Seat in Lahore, or at its benches in Bahawalpur, Multan or Rawalpindi. Note that this discussion does not extend to abductions to the Tribal Areas (FATA).

¹¹⁹ See footnote 106.

If the person is a minor, the court may grant his or her custody to any person who is their guardian and who will be dealing with them in accordance with law. But if the person is a major, the Court can only set her at liberty, whether or not she is illegally or improperly detained in public or private custody. The Court cannot restore the status quo ante against the wishes of the person brought before it. Such a course would lead to curtailment of the liberty of that person, which is not permitted under Sec. 491...it cannot be said that allowing a person freedom of movement is an abuse of the process of the court’. [emphasis added]¹²⁰

The Court prioritises determining whether or not a person has been detained against their will over the question of determining the validity of marriage, as is evident from several leading cases.¹²¹

4.2.8 Evidence

In any *habeas corpus* petition, the petitioner must make an application supported by a sworn affidavit setting out the circumstances in which a *habeas corpus* order is sought. In some (rare) instances, the Courts have allowed a simple letter from the detained person (whether in prison or in other places) to be treated as a *habeas corpus* petition under Section 491 CrPC.¹²²

The petitioner should annex any relevant documents, which may include:

- a letter or other communication from the detained person which mentions her confinement or any such apprehension;
- any earlier report by her to the police or any person regarding any ill-treatment, or expressing her fear of removal or confinement for purposes of a forced marriage;
- (of relevance in cases concerning British Nationals or residents confined in Pakistan) a letter from the detained person requesting a friend, a teacher, an employer, or a government official to take action for her return on her failure to return to the UK within a specified period;
- if the detained person was married earlier, a copy of her marriage certificate.

4.2.9 Court Proceedings

a) Admission: Usually, the High Court treats a *habeas corpus* petition as an ‘urgent matter’, giving it priority over any pending caseload. In particularly urgent situations, where the Court considers that there is a possible danger to the life of the detained person, it may hear the petition on the day it is filed. In such cases, the petition should be filed before the cut off time for the urgent petitions to be heard on the same day, and be accompanied by the standard form requesting, with supporting reasons, a hearing on the same day. It is important to seek advice before filing a writ petition in relation to the exact amount of revenue tickets required for the petition (different tickets are used for *habeas corpus* petitions under Section 199 and under Section 491 CrPC), the number of copies of the petition to be made (for the State, and for each

¹²⁰ *Mohammad Rafiq v. Mohammad Ghafoor* PLD 1972 SC 6 at 8.

¹²¹ Farhat Fatima’s Case supra. See also the Supreme Court’s judgment in *Hafez Abdul Waheed v Asma Jahangir* 2004 PLD SC 219 at para 24, and compare with the High Court’s comments in the same case.

¹²² *Shahnaz Akhtar v. Nazir Akhtar* Criminal Misc. 64-H-2001 Lahore High Court (unreported).

respondent) and to ensure that a certified copy of the order to be challenged (if any) is available.

b) Orders for production: Unlike other petitions, the High Court does not need to hold preliminary hearings before admitting a *habeas corpus* petition. As soon as it admits the petition, the Court issues an order for the production of the individual allegedly detained, along with a notice for appearance on the respondents. Depending upon the circumstances and requirements of each case, the Court may:

- Order the Court's Bailiff to raid the place where the detained person is allegedly confined (if necessary with the help of the police);
- Issue a notice to the respondents to produce the detained person before the Court; or ;
- Order the local police to recover the detained person and produce her before the Court.¹²³

Payments at time of issuance of Order: If the Court deposes a Bailiff for the production of the detinue, the petitioner will usually be required to deposit, in advance, an amount equal to the calculated expenses for the Bailiff's journey.¹²⁴ However, the Court may order the State to bear such expenses when the Court has taken notice of an event *suo motu* (of its own volition) or where it has acted on the basis of treating a letter or other communication received by a High Court Judge as a *habeas corpus* petition.

In some cases, it has been found that parties deliberately file *habeas corpus* petitions based on false allegations regarding the threat of forced marriage, in order to publicly humiliate the woman or girl concerned or her family. To check this tendency, the Court may, at its discretion, require the petitioner to deposit, in advance, an amount which is fixed by the Court to be paid to the alleged detinue and/or respondents as compensation if she appears in Court and makes a statement denying the allegations of illegal confinement, and the petition is dismissed accordingly.¹²⁵ The order to pay this amount will be made alongside an order for production of the detinue; the amount must be deposited before implementation of the order for production of the detinue.¹²⁶

c) Recovery: Parties concerned may accompany Court officials or the police, with the permission of or as directed by the Court, in order to help identify the detained person and the location where they are held.¹²⁷

¹²³ The same procedure is followed if the *habeas petition* is filed before the Sessions Court.

¹²⁴ Rule 10, Chapter IV F, Rules Framed under Section 491(2) of CrPC, 1898, to regulate procedure in Cases under Section 491, Rules and Orders of the Lahore High Court, Lahore, Vol V (Amendments) as notified in the Punjab Gazette Part III, 8 August 2002.

¹²⁵ Ibid, Rule 16, Rules under Section 491(2) of the CrPC. The old Rule 16, which specifically referred to frivolous petitions made for recovery of women to humiliate them or their family, was amended in 2001: although the words 'in relation to women' have been deleted, the purpose of the Rule still appears to be to check frivolous petitions.

¹²⁶ One such example is the case of *Mst. Mumtaz Begum v Zawar and another* PLD 1976 Lahore 1076. The petitioner's (the girl's maternal aunt) claims of illegal confinement were proved false and contradicted by the alleged detinue. The Court ordered the petitioner to pay Rs.1000 as compensation to the alleged detinue.

¹²⁷ Ibid, Rule 5, Rules under Section 491(2) of the CrPC.

The period between the filing of a petition and recovery of the detained person can be a dangerous one for the detained person, especially if the respondent comes to know that the petition has been filed and has an opportunity to change the place of confinement. In practice, it seems that families who confine women in these cases use a number of stratagems to prolong and frustrate *habeas corpus* proceedings. For example, instead of producing the detinue before the High Court, they may produce her signed statement or her statement recorded before a local Magistrate under Section 164 CrPC confirming that she is not detained and/or has not made any complaint. In many cases, though it was later found that the woman/girl had been coerced into making such statements, her family gained an important advantage of time through such means to further coerce her into denial of her situation, sometimes resulting in a negative outcome and the dismissal of the petition.¹²⁸

If the respondents state that they are unable to produce the detinue, but the Court has reason to believe that they are concealing her whereabouts, it can issue a search warrant. The search warrant is executed by the Bailiff, or if specifically directed by the Court, a police officer.

When a Bailiff is deputed for recovery of a detinue, he is required on his return to submit a written report to the Court, including his findings, and, where relevant, the circumstances under which the detained person was found.

If any person obstructs the Bailiff or fails to comply with the Court's notice for the production of the confined person, the Court may issue a notice of contempt upon them for obstructing its process.¹²⁹

d) *The Age Factor:* The age of the detinue, together with her marital status, are key determinants of the outcome of habeas corpus petitions in cases concerning marriages of choice. The interplay of Muslim laws of personal status – regarding marriage of minors by their guardians, and establishing the age of majority for marriage at 16 for girls (or puberty) – together with criminal laws on kidnapping and abduction are particularly relevant here.¹³⁰

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

¹²⁸ See *Shaukat Ali v. Altaf Hussain Qureshi* 1972 SCMR 398.

¹²⁹ The consequences of contempt can be imprisonment of up to six months and a fine or both. Each Court has inherent powers to seek compliance with its orders. Contempt proceedings are initiated under the Contempt of Court Act, 1976 as amended by the Contempt of Court Act, 1997 and subsequent amendments.

¹³⁰ It is also relevant to consider Section 12, Guardians and Wards Act 1890 which prohibits the grant of custody of a minor to anyone claiming to be entitled to such custody on the basis of being the minor's husband. Note: the Guardians and Wards Act has no application in *habeas* proceedings, see *Mst. Bibi Khatoon v Faiz and another* PLD 1976 Lahore 670 and *Mst. Bakhshi's Case* PLD 1970 SC 323. For application of the Guardians and Wards Act see *M.Sadiq v Mst. Sidiq Safora* PLD 1963 Lahore 534 (though the Act was only applied here because a question arose regarding the father's application for guardianship before the concerned Family Court under section 25, see discussion in *Bibi Khatoon supra*).

is a married female aged fifteen and over, the Courts have found that she is entitled to contract a marriage of her own free will – even when the parents have opposed such a marriage — and have almost invariably set her at liberty to go with whomsoever she chooses. In contrast, where she is an unmarried female aged between fifteen and 18 years, the Courts have been less clear regarding the question of who has the right to custody, and have often not considered determining the age of the person concerned before making a decision. In the case of girls aged under fifteen, the Courts have almost always (with a few exceptions) returned them to their parents’ custody, even when they claim to be married.¹³¹

i) Woman aged 18+: The Courts have upheld *habeas* petitions and set at liberty women aged eighteen years and over who have been detained for forced marriage:

- where the woman herself or her close relatives or those interested in her welfare have filed *habeas corpus* petitions claiming that she faces the threat of forced marriage and the woman concerned has supported this claim on being produced in Court and has expressed her fear of being married against her will¹³² or is being prevented from marrying of her own choice¹³³ states that she has been forcibly married;¹³⁴ or
- where it is alleged that a woman has been detained by her husband and denied freedom of movement (the Court has declared that a husband cannot confine or detain his wife against her will).¹³⁵

The Court takes the statement of an adult woman very seriously. Even when the respondent is a husband claiming to be a woman’s lawful guardian by virtue of being married to her, if the woman has stated that she was forced into the marriage, the Court has set her at liberty, declaring that the validity of such a marriage is doubtful.¹³⁶

¹³¹ See Amir Buksh supra, Hajra case supra, *Ghulam Haider v The State* Cr. Misc. No.990-H (1975) (unreported): in the last case, a girl claimed to be married and both her father and her husband claimed her custody, but as she was found to be under fifteen she was placed in a *Darul Aman* for six months, to be set at liberty on reaching fifteen years of age.

¹³² *Muhammad Aslam v. Ghulam Muhammad Tasleem* PLD 1971 Lahore 139; *Shahmaz Akhtar v Nazir Akhtar* etc. Criminal Misc. 64-H-2001 Lahore High Court (unreported): in the first case the girl aged less than eighteen expressed her desire to be married to the person of her choice; she was then placed in a *Darul Aman* for a week where she did so marry, and the petition was disposed after recording a statement about the marriage having taken place.

¹³³ *Mst. Giran Naz alias Shagufta Bibi v. The State and 2 others* PLD 2010 Quetta 61. The woman took refuge in the *Darul Aman*, Quetta as her brother opposed her marriage and wanted her custody. She filed a petition in the High Court from the *Darul Aman* asking for directions upon the Superintendent *Darul Aman* to arrange her marriage in the *Darul Aman* with the person she wanted to marry and to let her leave with him after marriage. The Court gave directions as prayed by the petitioner.

¹³⁴ Humaira’s case, above.

¹³⁵ *Muhammad Qasim v. Haji Saleh* 1997 PCrLJ 1014, citing *Muhammad Tufail v. Muhammad Hanif* 1984 MLD 1489; *Haji Hafiz Ali v. Noor Muhammad & Others* 1983 PCrLJ 204 and *Ms. Bibi v Hussain Baksh alias Hussainia* 1983 PCrLJ 141. In all these cases, respondent husbands sought to invoke the few cases where *habeas corpus* petitions were not allowed in respect of detainees who were married women, but the Court distinguished those cases on facts and clearly stated that an adult woman cannot be confined against her will regardless of whether she is being detained by her husband.

¹³⁶ In a leading case, *Sardara v Khushi Mohammad* 1973 SCMR 189, the woman refused to go either with her father or with Sardara, who claimed to be her husband, because she stated that she had been

However, in a few cases concerning women aged over 18, the Courts have denied relief, referring to the need to consider the Pakistani ‘social context’, and directed the petitioner to seek other remedies. This has occurred in cases where a male petitioner claimed to be the husband of the detained person, but was not able to establish that she had been ill-treated, or where it appeared that she was already married to another man.¹³⁷ In these cases the petitioners were directed to seek other remedies such as a suit for restitution of conjugal rights in the Family Court. Similarly the Court failed to grant relief in respect of a male petitioner who was neither a close relative nor had any *prima facie* legitimate claim, where the woman’s parents were respondents.¹³⁸

Even though these cases are routinely cited by the respondents in *habeas corpus* petitions, it must be noted that they may be distinguished on the facts, and the courts generally do not accept them as precedents. In Sahi Bi’s case¹³⁹ although the Supreme Court (Full Bench) referred to ‘paramour’ cases (eg the Fateh Sher and Shaukat Ali cases) it nevertheless granted relief. While allowing the woman to go with another person instead of her husband the Court noted:

“The observation of the learned single Judge of the High Court that if Mst. Irshad Begum is set at liberty she will lead [an] immoral life is irrelevant for the decision of the case under section 491, Cr.P.C. Under section 491, Cr.P.C., if a sui juris (of full capacity) detenue is unwilling to go with her husband or guardian, the Court cannot compel her to go with them. She must be set at liberty and allowed to move freely. This position was made clear in the above mentioned case decided by this Court and the learned Single Judge should have set at liberty the detenue and allowed her to move freely according to her wishes.”¹⁴⁰

It is important to be aware that despite the established precedents, individual Courts and judges may refuse to exercise their discretion, based on their perceptions of the character or antecedents of the woman or girl concerned.¹⁴¹ There have been

married to him against her will by her father. The Court set her at liberty and allowed her to go with a male first cousin.

¹³⁷ *Muhammad Saddique v Fateh Muhammad and another* 1968 PCrLJ SC 1758 although the woman supported the contention of the petitioner, the latter failed to produce a *nikahnama* to substantiate his claim of marriage while the respondent produced a registered *nikahnama*, and the petition was dismissed.

¹³⁸ See *Fateh Sher and Fahmida Parveen*, supra, *Ramzan v. Ch. Mohammad Aslam Magistrate 1 Class, Sahiwal and 3 others* PLD 1972 Lahore 809. See also *Mohammad Rafiq v Mohammad Ghafoor* PLD 1971 Lahore 343 giving custody of a woman to her ‘husband’, despite her statement in court that she had been forced to sign the *nikahnama* after being beaten by her father, where the petitioner was her brother-in-law. Note: The last case was overturned by the Supreme Court in appeal see *M. Rafiq v. M. Ghafoor* PLD 1972 SC 6 and the Supreme Court set clear directions to deal with *habeas* petitions for adults and minors.

¹³⁹ *Mst. Sahi Bi v. Khalid Hussain and 6 others* PLD 1973 SCMR 577.

¹⁴⁰ At 580.

¹⁴¹ See *Zubaida Bibi v. Incharge Darul Aman* PLD 1996 Lahore 339, *Mukhtar Ahmad v. Ghafoor Ahmed and 3 others* PLD 1990 Lahore 484 and *Shahida Parveen v. District Sialkot and another* PLD 1980 Lahore 7. In the first case, a *sui juris* woman’s petition for release from a *Darul Aman* was rejected as she did not want to go with her mother but instead to join her ‘paramour’: the ‘paramour cases’ of Fateh Sher and Shaukat Ali supra were relied upon by the Court. In the second case, the custody of a twenty-two year old woman was given back to her father holding, “under the circumstances the court is not persuaded to exercise its powers and discretion to defy the parental

decisions where either the reference to ‘social norms’ and apprehensions about ‘morality’ or such other claims in almost identical cases been rejected by the Court and woman’s will been preferred.¹⁴² In others, while granting relief, the Court has nevertheless commented on the parent’s rights to make decisions for their children (including decisions regarding marriage), and denounced the girl’s recalcitrance in thwarting her parents’ wishes.¹⁴³

ii) Girl 15-18 and married: In the overwhelming majority of cases where a woman aged fifteen or over contracts a marriage of her free will and states before the Court that she has done so and that she wishes to join her husband, the Court has set her at liberty and permitted her to join her husband.¹⁴⁴ It has done so even where the respondents were her parents and claimed her custody on the basis of her being a minor (under 18), or challenged the validity of the marriage on the ground that it was contracted without their consent.¹⁴⁵

A serious problem in such cases concerns the determination of the exact age of the girl, which in turn would determine the validity of the marriage and the outcome of the case. There are usually conflicting claims about the age of the girl. In some cases, the Court has determined age by directing that an ossification (bone) test be carried out, or directing a medical examination, but in others it has declined to do so, in particular in writ proceedings.¹⁴⁶

authority...” The petitioner who claimed to be husband could not provide any concrete evidence about existence of a marriage. In the third case, the girl claimed to be married but there were conflicting claims about her age, and the Court declined to intervene in the criminal proceedings launched against her and her ‘husband’ by her father.

¹⁴² See *Mst. Aziz Mai v. S.H.O, Police Station Jalalpur Pirwala, District Multan and another* PLD 1977 Lahore 432 at para 6, *Mst. Jamila Bibi v. District Magistrate and 3 others* 1985 MLD 485 in the latter case the woman was allowed to go with the distant male relative despite registration of a case against by her husband and three others under Sections 10, 11 and 16 of the *Zina* Ordinance.

¹⁴³ See *Hafiz Abdul Waheed v. Miss Asma Jehangir and another* PLD 1997 Lahore 301. Also see the Supreme Court judgment in this case where the Court held that the High Court was to confine itself to the issue of custody of the alleged detainee.

¹⁴⁴ *Allah Nawaz v Station House officer, Police Station Mahmood Kot, District Muzafargarh*, PLD 2013 Lahore 243. The girl, about fifteen years of age, contracted a marriage of her choice; her father filed a *habeas corpus* petition and challenged the validity of the marriage. He asserted that she being under sixteen years of age could not contract marriage and was being subjected to rape. The Court on statement of the girl set her at liberty and allowed her to join her husband. *Said Mahmood and another v. The State* PLD 1995 FSC 1. This was a case of option of puberty. The girl was given in marriage in her minority by her father. She contracted marriage of her own choice and then faced a case of *zina* being registered against her and the husband; *Sugharan Mai v. The State* PLD 1980 Lahore 386; *Muhammad Ashiq v. Superintendent of Darul Aman Lahore and three others* 1973 P.Cr.LJ 79, *Abdul Latif v. M. Shafi*, 1973 P.Cr.LJ Lahore 1012, *Mauj Ali v. Safdar Hussain* 1970 SCMR 437, *Zafar Khan v. Muhammad Ashraf Bhatti and another* PLD 1975 Lahore 234 at 237 and *Mst. Bakhshi supra*. For a contrary view, see *Farman Ali v. Abid Ali* PLD 1995 Lahore 364 at p 376.

¹⁴⁵ *Usman v. The State & Another* 1984 P.Cr.L.J. Karachi 2908, the Court determined the question of adulthood according to *Zina* Ordinance, although given the provisions of the Majority Act, there was a responsibility to look after minors; *Muhammad Ashiq v. Superintendent of Darul Aman* 1973 P.Cr.L.J. Lahore 79; *Abdul Latif v. Muhammad Shafi* 1973 P.Cr.L.J. Lahore 1012; *Bushra Bibi v SHO* 1995 P.Cr.LJ Lahore 401 (where the girl was aged fifteen and was pregnant).

¹⁴⁶ See *Mst. Bushra Bibi v.S.H.O supra*, *Muhammad Banars v. SHO and others* 1995 P.Cr.LJ Lahore 94 (in both cases there were serious disputes about the age of the girl and the matter was resolved through ossification tests). Similar age disputes were contested in *Nabila Anjum v. Rana Muhammad Azam and 2 others* 1997 P.Cr.LJ Lahore 1437, and *Mst. Fahmida Parveen v. Muhammad Ibrahim supra* but the Court declined to accept the plea for ossification to determine the ages of the girl and their petitions were dismissed.

Courts have in some instances refused to examine the question of validity of the marriage and instead give greater emphasis to the importance of preventing ‘illicit affairs’.¹⁴⁷

iii) Girl 15-18 and unmarried: Where the girl is aged fifteen and over but under 18 and is unmarried, the Court is likely to give greater weight to her parents’ claim to her custody, unless it is established very clearly that she will face a serious threat to her life or liberty in their custody. The Court will usually not set her at liberty, because of her age and because of the apprehension that she is not in a position to look after herself.

However, the Court may not return her to her parents’ custody if she expresses any fears or concerns regarding the appropriateness of her remaining with them. In many cases, the Courts may disregard such apprehensions. Where they are more responsive, the Courts may allow the girl to go with relatives or others such as her counsel or (rarely) a non-government organization, whom it considers to be genuinely interested in her welfare.¹⁴⁸ Where the circumstances indicate an imminent threat to the life or security of the girl, the Court may direct that she be placed for a certain period in a government-run shelter home, or any other refuge to which she is willing to go (though not in cases involving paramours). One factor which may weigh with the Court in making such an order is the girl’s inability to maintain herself alone.¹⁴⁹ It may be noted that practitioners have expressed serious concerns regarding the conditions in such government-run shelters (*Darul Amans*, see below, 7.2.2).

iv) Girl aged under 15:

The Pakistani/UK Judicial Protocol

1. This Guidance is issued to all judges on the instruction, and with the approval, of the President of the Family Division of the High Court of England and Wales.
2. The Judicial Protocol was agreed in January 2003 at a conference in London between judges of the UK and Pakistan. The conference was followed in September 2003 by a second judicial meeting in Islamabad, at which further Guidelines were agreed.
3. The Protocol has been drawn to the attention of judges and practitioners in Pakistan and there is a commitment to its implementation.
4. Liaison judges have been appointed in both the UK and Pakistan.
5. Use of the Protocol may arise in a number of contexts including applications for leave to take a child temporarily to Pakistan for a holiday and abductions to or from Pakistan. The precise nature of the application will determine which level of court is

¹⁴⁷ See Nabeela Anjum and Fahmida Perveen Cases, supra.

¹⁴⁸ In *SH v NB* (Marriage: Consent) [2009] EWCH 3274 Fam, the British High Commission in Pakistan filed a *habeas corpus* petition regarding the confinement of an eighteen year old woman who had allegedly been married for over a year, and the Chief Justice of Pakistan heard the matter and ordered that the police ensure she boarded a flight to the UK.

¹⁴⁹ *Fahmida Parveen v Muhammad Ibrahim and another* 1984 PCrLJ 2977.

appropriate.

a. Applications for temporary removal of a child from the jurisdiction (whether contested or not) may be heard by a High Court judge or, with the leave of a High Court judge, by a Deputy High Court Judge or a Circuit Judge. [Note that this supercedes the decision of Thorpe LJ in *Re K* (removal from jurisdiction: practice) [1999] 2 FLR 1084.]

b. Applications concerning abduction are likely to involve the inherent jurisdiction and/or wardship and should only be listed in the High Court before a Judge of the Division or, with the leave of a High Court judge, before a Deputy High Court judge.

6. The Protocol itself applies within the relatively narrow parameters set out in its paragraphs 2 and 3 i.e. where the "left behind" parent has a residence order and has not consented to the child being removed to/retained in Pakistan, or the removal/retention is in breach of section 13 of the Children Act 1989, or the removal is in breach of a prohibited steps order/injunction, or there is a care order and the removal/retention is in breach of section 33(7) of the Children Act 1989.

7. In analogous cases which do not fall within the strict terms of the Protocol, it would be consistent with the predominant approach of the Court of Appeal similarly to apply the presumption of return "in the spirit" of the Protocol, provided it is not contrary to the best interests of the child. An example of such a case would be where there is no pre-existing court order and no breach of section 13/section 33 but the child is habitually resident in England and Wales and the removal/retention was unilateral and appears to be in breach of the Child Abduction Act 1984.

8. It is important when drawing orders to distinguish between cases to which the Protocol applies strictly and cases where the order is made in the spirit of the Protocol. The specimen orders appended to this Guidance are designed for the following situations: Orders granting leave for temporary removal to Pakistan where the Protocol will apply strictly if the order is breached; Private law cases between parents where the Protocol applies strictly; Public law cases where the Protocol applies strictly; Cases where the Protocol may be applied in spirit.

The specimen orders are for illustrative purposes only, and for use subject to adaptation to meet the circumstances and findings in each case.

9. Each specimen order is accompanied by notes setting out important features to which attention must be paid.

10. Where a judge makes an order to which the Protocol relates or may relate, including orders granting leave temporarily to remove a child from the jurisdiction, or makes an order in the spirit of the Protocol, a copy of the order must be sent to both:

Head of International and Family Justice, Royal Courts of Justice DX 44450 Strand
RCJ

Telephone: 020 7947 7432 Fax: 020 7947 6408

Head of Consular Division Foreign and Commonwealth Office Spring Gardens,

London SW1A 2PA
Telephone: 020 7008 0212 Fax: 020 7008 0152

The order will then be transmitted to the liaison judge in Pakistan. It would be helpful if the solicitors for the left behind (or at-risk) parent could send to both addresses a brief note concerning the effect of the Protocol on the case, once the outcome is known, to enable the collation of an overview of the Protocol's operation.

11. It is important to note that the Protocol differs from the Hague Convention in that there is no system of enforcement through a central authority. Furthermore, there is no automatic procedure for a mirror order to come into existence in Pakistan when a UK court order is made. Accordingly, if a child is wrongfully taken to or detained in Pakistan in contravention of a UK order, it will ordinarily be the responsibility of the aggrieved party to institute proceedings in the Pakistani courts to obtain compliance. Both the liaison judge in the UK and the FCO should be informed and the FCO can assist in providing a list of solicitors' firms in Pakistan but it is the enforcing party who has to instruct Pakistani lawyers and obtain an order from a Pakistani court.

e) When the Court refuses to set a woman at liberty: Arguments by respondents (especially the parents) that a woman set at liberty will lead an immoral life will carry little weight if she clearly states in Court that she is being held against her will. Indeed, the Court has held that such an argument is irrelevant to deciding a petition under Section 491 of the CrPC, and that if a detained person who is *sui juris* is unwilling to go with her husband or guardian, she cannot be compelled to do so and must be set at liberty and allowed to move freely,¹⁵⁰ unless she is found not to have sufficient mental capacity for this purpose.¹⁵¹

However, in a few cases, the Court has declined to set at liberty the detained woman where:

- she is married, and the petitioner seeking her release is a man who is neither her husband nor her father;¹⁵²
- the petitioner claims to be the detained person's husband but the fact of marriage is disputed by her;¹⁵³ or
- the detained woman is unmarried, and the petitioner, a man, claims to be in a relationship with her (that is to be her 'paramour', in the language commonly used by the Courts).¹⁵⁴

In cases involving petitions by 'paramours', especially with false claims of marriage, Courts have been very cautious in granting relief and repeatedly made observations to take note of the moral and social environment.¹⁵⁵

¹⁵⁰ *Mst. Sahi Bi v. Khalid Hussain and 6 others* 1973 SCMR 571 at 579-80.

¹⁵¹ *Bibi Khatoon v Faiz* 1976 PLD Lah 670.

¹⁵² *Muhammad Saddique v. Fateh Muhammad and another* supra.

¹⁵³ *Muhammad Khan v. Alam Khan and 4 others* 1973 P.Cr.L.J. Lahore 559: the girl aged 21 alleged the nikahnama was forged and refused to go either with the 'husband' or with the father.

¹⁵⁴ *Shaukat Ali v. Altaf Hussain Qureshi and another* 1972 SCMR 398; *Fateh Sher v. Sarang* PLD 1971 Lahore 128; *Fahmida Perveen v. Muhammad Ibrahim* 1984 P.Cr.L.J. Lahore 2977.

¹⁵⁵ See *Zubaida Bibi v. Incharge Darul Aman*, Fahimada Parveen, Shahida Parveen and Nabila Anjum supra.

Practitioners have expressed concerns regarding cases in which the Courts have declined relief, despite the existing trend of decisions, or granted relief but made comments regarding the woman's character and the nature of her relationships with her parents in such cases (see further below at 4.2.11).

In one case of marriage of choice,¹⁵⁶ the Court declined to interfere under the writ jurisdiction with criminal proceedings which had been started to frustrate the marriage. The petition was dismissed with the following observations:

*"...Though the present proceedings... are not the kind ... where I would consider it appropriate to give a declaration about the existence or the legality of the alleged marriage, yet the fact remains that such a marriage which is generally known as a 'run-away marriage' in our society, is not an appreciable act and thus the ones involved in such an act are not the kind of persons who could be found entitled to a relief in equity or to a relief as a result of exercise of the discretionary jurisdiction of this Court."*¹⁵⁷

Najma's Case: Habeas Corpus for Recovery of Dual National Aged Over 18¹⁵⁸

Najma (pseudonym), aged 18, lived in the UK. When her parents found out that she had a white boyfriend, John, they demanded that she stop seeing him or leave home. She left home and started to live with him. When her family found out that she was pregnant, they tricked her into going to Pakistan to visit her 'dying' grandmother. On arrival, and at the hospital, they drugged Najma and when she woke up, she found out that she had undergone an abortion.

Najma telephoned John, on a mobile phone, which she had managed to hide from her family and told him that she was being held against her will and would not be allowed back to the UK. John telephoned the Forced Marriage Unit (FMU) in London. The FMU informed the British High Commission (BHC) in Islamabad and together they decided that the best way forward was to file a habeas corpus petition in the Pakistan Courts. They did so using local lawyers in the High Court of the Province.

The High Court Judge refused to accept the petition saying that a habeas petition could be heard in the Sessions Court. The BHC filed a new petition in the Sessions Court. When the family found out, they tried to evade service of the Court's order by moving Najma to another location. So when the police went to serve the Court's order, they found the Najma was not at the location mentioned in the Court documents. The Court then dismissed the petition, but stated that it could be resubmitted, once Najma's whereabouts were determined.

In the meantime, Najma telephoned John and gave the new address. The BHC filed another *habeas corpus* petition, this time before the High Court. It was argued that it was necessary to approach the High Court directly, to pre-empt the possibility of Najma's being moved again by her family, as the High Court's order would be

¹⁵⁶ *Lubna and another v Govt of Punjab* PLD 1997 Lahore 186 (refusal to quash FIR in case of 'runaway marriage').

¹⁵⁷ At 188.

¹⁵⁸ Case Study from the Forced Marriage Unit

effective throughout Pakistan. If a person is removed from the jurisdiction of the High Court, which is the entire province, the court's order will be effective throughout the country wherever the detainee is kept. In contrast, a petition filed in a Sessions Court would have to be ratified by another Sessions Court if Najma was moved to another part of the country. The High Court then issued an order directing that Najma be produced before the Court within a specified period.

This time Najma and her family members were at the address when the order was served so the family had to produce her before the Court on the following day. They turned up with their lawyers and insisted that Najma should remain in Pakistan, where they had brought her for marriage, because she had been living with a man in the UK and this had brought dishonour to the family. The Judge, however, observed that although liberal western values could be "devastating" for families, the Court could not detain a mature adult. He held that the family was holding her illegally and that the Court had no choice but to release her.

f) Fresh petition: Even if the Court dismisses a *habeas corpus* petition, it is possible to file a fresh petition, stating a change of circumstances. The Court has held that this is permissible "as illegal confinement is a continuous wrong. Also, as the Court's decision on an application under Section 491 of the Cr.P.C. is not a judgment as such, there is no question of the bar of Section 369 Cr.P.C. [which prevents a Court from reviewing its own judgment after it is signed] being applicable. Where the question of liberty of a citizen or legality of their custody is involved, the Court cannot refuse to perform the duty merely on technical grounds."¹⁵⁹

4.2.10 Burden of Proof

In a *habeas corpus* petition, the respondents must prove that they are not detaining the person 'illegally' or in an 'improper manner'. On many occasions, though the Court may not consider the custody of the detainee to be 'illegal' as such, it may nevertheless deem that it is 'improper' or that the person is held in an 'unlawful manner' affecting her fundamental rights. For example, while a husband's custody of his wife may not be 'illegal', the Court may, in certain circumstances, find that it is 'improper' or being exercised in an 'unlawful manner'.¹⁶⁰

4.2.11 Failure to Comply with Court Orders

The respondents in a *habeas corpus* petition -- whether state agencies such as the police or court officers, or private persons -- are responsible for complying with the Court's orders.

The Court may punish any person for contempt of court for disobeying its orders. In the case of state functionaries, the Court may direct suspension of an individual from service and forwarding of the matter for relevant departmental action. For example, in one case where the Supreme Court's directions to a police officer to recover a young girl from private detention were flouted, and she was subsequently killed by her family, the Court reprimanded the police officer concerned and directed the

¹⁵⁹ *Ajmal Khan v. Lt. Col Muhammad Shaffat* PLD 1976 Lahore 396, referred to and relied on in *Mst. Farrukh Naheed Hashmi v Syed Shah Ibrar Qadri* 1994 PCrLJ 1361.

¹⁶⁰ *The State v. Ashfaq Ahmad Sheikh* PLD 1967 Lahore 1231 at 1237 para 3.

Inspector General of Police of the Province to investigate and to take necessary and appropriate remedial steps.¹⁶¹

4.2.12 Appeal

If a petition under Article 199 is dismissed by the High Court, a first appeal lies to an appellate bench of the same High Court (intra-court appeal), and if that fails, a second appeal lies to the Supreme Court.

If a petition under section 491CrPC is dismissed by the High Court, an appeal lies directly to the Supreme Court. If the petition was before the Sessions Court, the order can be challenged before the High Court and subsequently in the Supreme Court depending on the case.

5. Civil Remedies

Civil law remedies in cases of interference with choice in marriage are primarily available under Muslim personal law from the Family Court. Other remedies available from the civil courts, though rarely used, are injunctions to prevent forced or child marriages (the latter under the CMRA) or damages for any loss or injury suffered in such cases by way of tort actions.

5.1 Muslim Family Laws

In cases of forced marriage, the most useful remedy is a declaration that a marriage is void in a suit of jactitation. Where this remedy is not available, divorce may also be an option.

5.1.1 Declaration that ‘Marriage’ is Void

In general, the Family Court may not examine validity of a marriage registered under the MFLO.¹⁶² However, any aggrieved person may obtain a declaration from the Court that such a marriage is void, if s/he is able to prove that the marriage did not take place as alleged or that it was contracted on the basis of consent obtained through misrepresentation, force or fraud, for example where the victim’s signature on the alleged *nikahnama* was allegedly forged.¹⁶³

5.1.2 Jactitation

Jactitation of marriage is the most useful means for having a marriage declared void, particularly where there are no children of the marriage. A suit for jactitation may be filed after an initial *habeas corpus* petition in the High Court. In such cases, the High Court may ask the parties to approach the Family Court for a declaration regarding validity of the marriage and to determine whether a marriage factually or legally exists or not.

¹⁶¹ *Ata Rasool v. Station House Officer, Police Station Jauharabad and others* PLD 1990 SC 968.

¹⁶² Section 23, FCA 1964. This bar on questioning the validity of registered marriage is relevant where all the conditions of marriage have been complied with and the marriage is otherwise valid under Muslim Law. Marriages through fraud, coercion or claims of marriage through forged *nikahnama* are not exempted from scrutiny: see *Mst. Sakina and 5 others v. Mst. Zainab and 2 others* 1989 MLD 3609 Karachi and *Nazar Qasim v. Mst. Shaista Parveen* 1979 CLC 462.

¹⁶³ *Mohammad Azam v. Mohammad Iqbal* PLD 1984 SC 95.

Any person affected by a false claim of marriage by another person may file a suit for jactitation of marriage in the Family Court in order to obtain a declaration that no marriage exists or existed between them and that the person claiming marriage be restrained from making such claims.¹⁶⁴ Third parties – such as the “actual” husband, child or any parent of the woman concerned – may also file such a suit wherever their rights are directly affected by a claimed marriage.¹⁶⁵

In a ‘forced marriage’ situation, if a false claim of marriage is made by a man either on the basis of a forged *nikahnama* or in the absence of any form of marriage having taken place, then the woman concerned may file a suit for jactitation to silence such a claim (even after the man has obtained a decree of restitution of conjugal rights),¹⁶⁶ and may also seek an order for cancellation of such a *nikahnama*.¹⁶⁷

It is possible to appeal against a decree of jactitation.¹⁶⁸

5.1.3 Divorce

Under Muslim Law as enforced in Pakistan, a marriage may be dissolved unilaterally by the issuance of divorce by the husband, or the wife if she has been delegated the right to divorce, or through mutual agreement. Divorce may be obtained extra-judicially or by court order, subject in each case to compliance with the procedures provided under Section 7, MFLO.

a) **Extrajudicial Divorce** may be effected in three ways as follows:

- By a man, by pronouncing a verbal or written *talaq* (unilateral termination of marriage);
- By a woman if she is delegated the right of *talaq* (*talaq e tawfiz* which may be conditional or unconditional) by her husband in the *nikahnama* (at column 18 in the standard form) or any subsequent agreement, by pronouncing *talaq* on behalf of her husband;¹⁶⁹
- By both parties through *mubarat* (mutual agreement).¹⁷⁰

b) **Judicial Divorce** by way of a decree of dissolution of marriage from a Family Court may be sought by a woman on the basis of *khula*¹⁷¹ (the most common option) or on any of the grounds set out in the DMMA:

¹⁶⁴ *Amina Begum v. Ghulam Nabi and 2 others* PLD 1974 Lahore 78 at 80.

¹⁶⁵ *Mohammad Azam v. Mohammad Iqbal* PLD 1984 SC 95.

¹⁶⁶ *Mohammad Rafiq v Family Court* PLD 1985 Lahore 613.

¹⁶⁷ *Nazar Qasim v. Mst. Shaista Parveen* supra.

¹⁶⁸ For issues dealt with in jactitation suits, see *Mst. Zohra Bibi v. Manzoor Ahmad and 2 others*, PLD 1975 Lahore 312, *Mst. Sakina and 2 others v. Nasir Ali*, PLD 1976 Quetta 97, *Malla v. Mst. Jawai* etc. 1981 CLC 1097 and *Younis v. Mst. Nazeeran and others* 1992 CLC Karachi 42.

¹⁶⁹ Section 8, MFLO.

¹⁷⁰ Dissolution of Muslim marriage through mutual consent of the spouses on mutually agreed terms and conditions. The offer for such dissolution can be initiated by either spouse.

¹⁷¹ Dissolution of marriage through *khula* has been practiced in Muslim societies for centuries but its form, grounds and procedures have varied. In Pakistan the law on *khula* divorce through judicial pronouncement was given a definite meaning in *Khurshid Bibi's* Case 1967 PLD SC 97 following *Bilquis Fatima v Najmul Iqram Qureshi* PLD 1959 (West Pakistan) Lahore 566 which concerned a divorce through judicial proceedings initiated by the wife and on condition of returning to the husband any benefits received from him, if required by the Court. The return of benefits and forgoing dower is not a pre-requisite for obtaining a decree of *khula*. The 2002 amendment to the FCA, 1964 has

- *Khula*: Since October 2002 *khula* has been specifically mentioned in the Schedule of the FCA and the Court may now grant a decree of *khula* where any pre-trial attempt at reconciliation¹⁷² of the parties fails, and wife has to return to her husband the *haq mehr* (dower) received at the time of marriage, if any.¹⁷³ Dower received by wife at any other time after marriage is not included in the dower to be returned to husband for a decree of *khula*.¹⁷⁴
- For Kashmir, where no similar amendment has been made, the pre-2002 concept of and procedure for *khula* is in operation. The Family Court may grant a decree of dissolution of marriage through *khula* if the wife can establish irretrievable breakdown of the marriage.¹⁷⁵ In practice, the extent of evidence required to prove such breakdown varies, with the trial courts demanding more extensive proof than the superior courts.¹⁷⁶
- *DMMA*:¹⁷⁷ The Family Court may grant a decree of dissolution of marriage under the DMMA on various grounds, the most pertinent in forced marriage cases being cruelty (which may include mental or physical violence) and attempting to force the woman to lead an immoral life. In case of the marriage of minors, the Family Court may endorse the repudiation of the marriage by a woman who exercises the 'option of puberty' (see below on Minors, para 5.1.4).

It should be noted that suits for dissolution of marriage by *khula* have tended to be more successful than those under other grounds provided in the DMMA, given the greater burden of producing evidence in the latter.

eliminated trial in *khula* cases and the wife has to return *mehr* given to her at the time of marriage. If *mehr* was fixed but no part of it was paid at the time of marriage she does not have to return any. A decree of *khula* cannot be effected on the ground that wife did not return *mehr* as ordered in the Court decree. before this amendment a decree of *khula* was generally granted with a direction that the wife pay compensation to the husband by way of '*zar-e-khula*' (price or compensation for *khula*). This was usually in the form of remitting the dower if unpaid, or giving up of any other material benefit that she had received from the husband at the time of or during the marriage. If the *khula* decree given by the Court provided for return of any benefit to the husband by the wife, and she did not return those, then the *khula* decree was not affected and the husband could file a separate suit for a recovery of those benefits.

¹⁷² Section 10 FCA provides that the Court must attempt to reconcile the parties at the pre-trial stage (for *khula* cases) and at both pre- and post trial stages (all other cases). The 2002 amendment in the Family Courts Act, 1964 is not applicable to Kashmir.

¹⁷³ Section 10 (4), FCA, as amended by Ordinance No. LV 2002, see *Khadim Hussain v. Judge, Family Court, Kharian and another* PLD 2005 Lahore 99, see *Rana Shahnawaz*.

¹⁷⁴ See *Rana Shahnawaz Khan v. Judge, Family Court*, Lahore PLD 2009 Lahore 227, where it was explained that dower to be returned is the amount of dower received at the time of marriage and entered in column 15 of the *nikahnama*. In this case wife had received Rs. 50,000/ as dower in a reconciliation proceeding after marriage. Court rejected husband's plea for return of this dower received after marriage. Also see *Mushammad Kalim Asif v. Additional District Judge* PLD 2009 Lahore 484, *Khalid Mahmood v. Anees Bibi and 2 others*, PLD 2006 Lahore 626.

¹⁷⁵ *Khurshid Bibi's Case* PLD 1967 SC 97 at 144, where the Supreme Court stated: "If its objects cannot be served by a marriage, should it continue, though it be purposeless and even harmful, or is it not better that it be dissolved, so that the evil consequences of an impossible relationship are avoided?"

¹⁷⁶ See *Safia Begum v Khadim Hussain* 1985 CLC 1869, *Syed Muhammad Rizvan v Mst. Samina Khatoon* 1989 SCMR 25, *Rashidan Bibi v Bashir Ahmed*, PLD 1983 Lahore 549.

¹⁷⁷ The DMMA as enforced in Kashmir has the same grounds for dissolution of marriage as in Pakistan, except for two grounds only available in Pakistan (the first is if the husband has taken an additional wife in violation of procedure provided in MFLO for polygamous marriage and the second is unequal treatment to one wife, where there is more than one wife).

c) Procedure for Divorce: Under Section 7 MFLO, any man wishing to obtain a divorce is required, after a verbal or written pronouncement of *talaq*, to issue a notice to the Chair of the Union Council (called *Nazim*) of the area where the wife is residing at the time, with a copy to her.¹⁷⁸ Similarly, following issuance of divorce through any other means, whether delegated divorce by the wife, *mubarat*,¹⁷⁹ or a Court decree of dissolution, the Section 7 MFLO procedure must be followed.¹⁸⁰

On receipt of the notice, the Chair of the Union Council is then required to constitute an Arbitration Council and to take steps for the reconciliation of the parties. It is not necessary for either party to respond to such steps. If no reconciliation takes place, or the husband does not revoke *talaq* expressly or otherwise, then the divorce will become effective on the lapse of 90 days from the receipt of the notice by the Arbitration Council (or, if the woman is pregnant, on completion of 90 days or delivery which ever is later) or if there is a Court decree, then on completion of 90 days from receipt of Court decree by the Union Council.¹⁸¹ During these 90 days, *talaq* may be revoked and reconciliation could be effected between the spouses after the Court decree is issued.¹⁸²

A pronouncement of *talaq*, verbal or written, that is not followed by adoption of the section 7 MFLO notice procedure is not legally effective.¹⁸³

Note: When a Local Government System is not in place, the functions of the Chairperson of the Arbitration Council under the MFLO are performed by Administrators appointed by the Provincial Government. Since completion of tenure of Local Government in 2009, no new elections have taken place except in the

¹⁷⁸ Section 7, MFLO. The notice is issued to the Chair of the Union Council in his/her capacity as chair of the Arbitration Council under the MFLO.

¹⁷⁹ *Muhammad Shahbaz Ahmed v. Sher Muhammad* 1987 CLC 1496.

¹⁸⁰ Section 8 MFLO. Read with Section 21, FCA, this requires the court decree for dissolution of marriage to be forwarded to the Union Council of the area where the woman is residing at that time for further proceedings to be taken under Section 7, MFLO.

¹⁸¹ Section 21(2) FCA provides that the Court is to send by registered post its decree to the Union Council within seven days of passing it: see *Muhammad Ishaque v. Ch. Ahsan Ahmad, Judge, Family Court, Lyallpur and another* PLD 1975 Lahore 1118, *Khadim v. Judge, Family Court Samundari, District Faisalabad and another* PLD 1991 Lahore 1250 and directions of the Lahore High Court to the Family Court vide Memo No.6419/MIT/HC dated Lahore, 29 May 1975.

¹⁸² Section 21(3)(b) FCA. In this event, it will not have legal effect.

¹⁸³ *Syed Ali Nawaz Gardezi v Lt. Col Mohammad Yusuf* PLD 1963 SC 51, *Malik Javid Ali and another v. Abdul Kadir and another* 1987 SCMR 518, *Major Muhammad Hayat Tarrar v. District Collector, Gujranwala and 5 others* 1993 CLC 219 and *Muhammad Siddique v. Mst. Noor Jahan and another* 1994 CLC 1674. However, see contra as cited in Women Living Under Muslim Laws, *Knowing Her Rights*, 2003 at p. 265 (holding that a *talaq* which does not comply with section 7 MFLO has been recognized as valid): *Muhammad Sarwar v State* PLD 1988 FSC 42; *Noor Khan v Haq Nawaz* PLD 1982 FSC 265; *Alladad v Mukhtar* 1992 SCMR 1273, *Mohammad Rafique v Ahmad Yar* PLD 1982 Lahore 825. In all of these cases, husbands registered cases of *zina* against wives who had remarried after having been divorced without complying with the section 7 MFLO procedure. These were decisions in criminal cases in first and second level appeals after convictions by trial courts. For decisions in civil proceedings regarding *talaq* having been pronounced in the absence of compliance with the Section 7 MFLO procedure see *Mukhtar Ahmad v Ghaffoor Ahmad* PLD 1990 Lahore 484, *Muhammad Hanif and others v. Mukarram Khan and others* PLD 1996 Lahore 58, *Muhammad Rafique v. Ahmad Yar and another* PLD 1982 Lahore 825. For details on this conflict see 'Confusion Worse Confounded: A Critique of Divorce Law and Legal Practice in Pakistan' Sohail Warraich and Cassandra Balchin in Shirkat Gah, *Shaping Women's Lives: Laws, Practices & Strategies in Pakistan*, Shirkat Gah, Lahore, 1998.

province of Balochistan,¹⁸⁴ and the system is run by the Administrators appointed by the government.

5.1.4 Minors

An individual who was married off as a minor may repudiate such a marriage on reaching the age of majority for marriage or obtain a declaration that it was void.

Option of Puberty: A woman who had been married off while aged under 16 years by her father or other guardian may repudiate the marriage before she is 18, provided that the marriage has not been consummated (unless she can prove that consummation was by force¹⁸⁵ or during minority).¹⁸⁶ A man married as a minor may exercise the option on reaching puberty, provided that he has not ratified the marriage either expressly or implicitly, for example by payment of dower or consummation.¹⁸⁷ A person who had been married off due to lack of mental capacity may also exercise this option on acquiring such capacity.

The Courts have held that it is not necessary to obtain a declaration to confirm the repudiation of the marriage, noting that the fact of remarriage by a woman is sufficient to demonstrate repudiation in practice. In *Irfana Tasneem's* case, the Court held "... it is by now a settled proposition of law, that a girl can exercise her option of puberty even without intervention of the court".¹⁸⁸ Although there is consistent case law in support of this position¹⁸⁹ it will be safer in most cases to obtain a declaration to avoid any criminal prosecution or civil litigation regarding her personal status.

Declaration: If a female who was married as a minor can establish that she was a minor at the time of marriage and if the marriage has not been consummated in the meantime, she may repudiate¹⁹⁰ the marriage and seek a declaration from the Family Court of her having done so.¹⁹¹ The Courts have also found that consummation may not be sufficient to validate the marriage.¹⁹² In cases where the entry in the *nikahnama* regarding the age of the bride is deliberately falsified, and her age is shown as higher than in reality for the purposes of registration, filing a suit of jactitation of marriage may be most appropriate remedy.¹⁹³

¹⁸⁴ Local government elections were held in December 2013 in the province of Balochistan only.

¹⁸⁵ S.2 (vii), DMMA; see also *Ghulam Quadir v Judge, Family Court Murree* 1988 CLC 113.

¹⁸⁶ See *Mst. Ghulam Sakina v. Falak Sher Behram Khan v. Akhter Begum, Allah Diwaya v. Mst. Kammon Mai* supra.

¹⁸⁷ Mulla, supra, at paras 273-4; Balchin, supra, at p. 40, para 1.7.2.

¹⁸⁸ *Irfana Tasneem v SHO* PLD 1999 Lahore 479 at 483.

¹⁸⁹ See *Muhammad Baksh v. Crown and others* PLD 1950 Lahore 203, *Ala-ud-Din v. Mst. Farkhanda Akhtar* PLD 1953 Lahore 131, *Mst. Sarar Jan v. Abdul Majid* PLD 1965 Peshawar 5, *Mst. Sardar Bano v. Saifullah Khan* PLD 1969 Lahore 108, *Noor Muhammad v. The State and another* PLD 1976 Lahore 516 (bigamy case on remarriage after exercising option of puberty quashed by the High Court) and *Said Mahmood and another v. The State* PLD 1995 FSC 1 (conviction under *Zina* Ordinance set aside).

¹⁹⁰ The law does not provide for any specific mode to repudiate marriage of minority. It can be in any form recognised under Muslim law, like a clear statement of the girl, a notice to the husband.

¹⁹¹ Marriage of minority is not dissolved by the Court in a suit of option of puberty rather by the action of the girl herself and the Court only endorses her action. See *Mst. Munni v. Habib Khan* PLD 1956 Lahore 403

¹⁹² *Ghulam Sakina, supra; Behram Khan v Akhter Begum* 1952 PLD Lahore 548.

¹⁹³ *Ghulam Quadir v. The Judge, Family Court Murree* 1988 CLC 113.

Such a suit should be filed as soon as possible after the individual concerned has reached the age of majority. It may be heard *ex parte* (in the absence of the other party) or contested. The costs of filing this suit are minimal.¹⁹⁴ The proceedings should take no longer than six months.¹⁹⁵ However, if they exceed this period, then either party may approach the High Court to seek necessary directions, for example, for the case to be heard expeditiously.¹⁹⁶

5.1.5 Divorce relating to Marriage in the UK

Under Pakistani law, a Muslim husband may issue *talaq* in Pakistan in compliance with the MFLO to terminate a civil marriage performed in England and Wales or Scotland and the Pakistani Courts will recognize such a termination of marriage as valid.¹⁹⁷

5.2 Tort Actions

Cases involving interference with the right to choice in marriage may result in claims for the torts of false imprisonment, assault, battery or conspiracy to injure, as appropriate, with the possibility of seeking damages (compensation) for the affected. However, no such claims have ever been brought. First, such proceedings tend to be very lengthy, taking up to several years to conclude. Second, any claimant would be required to give evidence against their parents or other family members, which they are often reluctant to do in practice, given the need to maintain family ties on the one hand, and fear of reprisals on the other.

6. Criminal Offences and Remedies

Criminal law remedies available include prosecution and punishment of persons responsible for various offences which may be committed in the course of acts of interference with choice in marriage or threatened or actual forced marriage. They may also include other forms of preventive relief, such as recovery of any person who has been detained for this purpose, and awards of compensation or disciplinary action against State officials for failing to comply with their statutory and constitutional duties to ensure the protection of individuals against violence.

6.1. Criminal Offences

Cases involving interference with the right to choice in marriage may result in the commission of specific criminal offences such as:

- abduction, assault, kidnapping, wrongful confinement, or in extreme cases, hurt, or murder (under the PPC),
- kidnapping or abduction for the purpose of forced marriage (under the PPC),¹⁹⁸ and
- coercing or compelling a woman to enter into marriage (under the PPC)¹⁹⁹

¹⁹⁴ At the time of writing, the Court fees for a suit for a declaration regarding the validity of marriage were Rs. 15.

¹⁹⁵ Section 12A, FCA.

¹⁹⁶ Section 12A, FCA.

¹⁹⁷ Jatoi case, *supra*.

¹⁹⁸ Section 365B of the PPC (as inserted by the amendment of 2006); see also Sections 361, 363, 365, 368, PPC. A real parent can not be prosecuted for kidnapping of his/her own child under section 363 PPC, see *Kausar Parveen v. The State* PLD 2008 Lahore 533 at 541

- compelling, arranging or facilitating marriage of a woman with the Holy Quran or taking oath by a woman on Holy Quran to remain unmarried for the rest of her life (under the PPC),²⁰⁰ and
- contracting or solemnizing or failing to prevent the solemnizing of a child marriage, or taking part as an adult in a child marriage (under the CMRA, see para 3.1.4 above).

It is important to note that except in the provinces of Balochistan and Sindh, where laws on domestic violence have been enacted, there may not be a separate offence of domestic violence, although acts amounting to domestic violence may constitute other offences (such as hurt, criminal intimidation), and that forced sex within marriage (marital rape) does not constitute a crime.²⁰¹

Any person may make a complaint alleging that such an offence has occurred to the Police Station House Officer (SHO), who is then required to record it in writing in the form of a First Information Report (FIR). Alternatively, a complaint may be made directly before a Magistrate (under Section 200 CrPC). Based on the FIR, the police can investigate any cognizable offence without a further order of a Magistrate. If it appears that no offence can be determined, the ensuing police investigation will result in the filing of a 'final report' indicating the termination of the investigation. Where the prosecuting authorities determine that there is sufficient evidence to prosecute, the case will then proceed to trial.

The police may arrest without warrant any person who is concerned or is reasonably suspected of being concerned in a cognisable offence, or if any complaint has been made against them. After making an arrest, the police must bring the person concerned before a Magistrate without unnecessary delay and within a period of 24 hours.²⁰² There are restrictions on women being held overnight in police stations and on Magistrates remanding women to police custody (with certain exceptions), as well as special rules regarding any arrest of a woman being carried out in the presence of a responsible male relative or local officials, and of any search being conducted by a woman and 'with decency'.²⁰³

The role of the police is often critical in such cases, since it is the agency responsible for execution of court orders, including search warrants and directions for recovery of the survivor. It is also responsible for investigations of allegations of criminal offences which may arise in relation to interference with choice in marriage.

In cases where the police appear reluctant to take action, the High Court may grant orders in the nature of *mandamus* or prohibition directing the police to take specific steps or to refrain from harassing certain persons.

¹⁹⁹ Section 498-B of the PPC, imprisonment from three to seven years and fine of rupees five hundred thousand.

²⁰⁰ Section 498-C of the PPC, same punishment as under Section 498-B supra.

²⁰¹ A Bill on domestic violence was passed by the National Assembly in 2009 but it lapsed in the Senate as no action was taken within the 90 days time limit provided in the Constitution.

²⁰² Article 10 of the 1973 Constitution and section 61 of the CrPC.

²⁰³ See section 167(5)(6)(7) Cr.P.C (women being placed in remand), and section 52 CrPC (mode of searching women), Rule 26.18-A and Rule 24.12, Police Rules 1934, and also Hina Jilani and Enam M. Ahmed, 'Violence against Women: The Legal System and Institutional Responses in Pakistan', in Savitri Goonesekere, *Violence, Law and Women's Rights in South Asia*, Sage, 2004, at 184-185.

Family Courts are also empowered to hear cases of spousal violence related to hurt and wrongful restraint.²⁰⁴

Impact of the Zina Ordinance

The introduction of the Zina Ordinance 1979 introduced new complexities regarding women's personal status and right to contract marriages of choice, and also restricted their opportunities to decide where to reside of their own will. The 'criminalisation' of acts of choosing to marry, and the imposition of stringent penalties, shifted the dimensions of disputes over women's custody from being the concern purely of civil or family law to those of criminal law. Earlier, women had faced many obstacles in making choices regarding marriage, and conflicting claims²⁰⁵ regarding their custody and contested in the courts but such contests took place in the form of *habeas corpus* petitions or suits before the civil courts. The framework for the adjudication was around a primarily civil dispute and criminal proceedings, if any,²⁰⁶ did not overshadow the outcome of the case. In many cases, in *habeas* petitions filed by one side or the other, the Courts set women at liberty to go with whomever they wished, despite there being pending charges of kidnapping against those men. Such orders were passed on the basis of statements by the women denying charges of kidnapping and asserting that they were living with someone of their own free will with someone or had contracted a marriage of choice. The Courts would not always give any judgment on the concerned criminal proceedings which, would ultimately come to an end.²⁰⁷

In stark contrast, after the *Zina* Ordinance came into force, in cases of marriages of choice or of women leaving their parents' homes, the 'husbands' began to face serious criminal charges and the risk of double jeopardy (being tried twice for the same offence). The woman would be made a prosecution witness against the person whom she had married or wanted to marry, and in many instances would also be made the co-accused with him in a case of adultery.²⁰⁸

The State's role also changed in such cases. Earlier, the State was a respondent to *habeas* proceedings filed for the release of a woman. After the *Zina* Ordinance, the State became responsible for her prosecution, and would be engaged on two fronts. On the one hand, it could be party to a petition where it and private persons (the family) would be respondents. Constitutional writs could be filed to seek protection against State agencies acting on behalf of family members who had initiated cases of kidnapping and *zina*. In many instances, the combination of actions by the victim's family and the police left no opportunity for couples who had contracted marriages of

²⁰⁴ See Section 5(2) FCA 1964 and Part II of the Schedule to the FCA (as amended in 2002).

²⁰⁵ See *Muhammad Zakir v. Taj Mohammad* 1978 CrLR 176 Lahore, a case with its own complexities, where a reluctant girl was ultimately handed over to her mother in preference over a husband (marriage was without performance of the *rukhsati*, therefore presumably prior to consummation) while she wanted to go with the father of her deceased 'paramour', murdered by the girl's grand father and uncle at the girl's house. In fact she was returned to her family's custody, although she was the only witness against them of the murder.

²⁰⁶ Cases under allegations of kidnapping, enticement of married woman or retaining a married women with criminal intent.

²⁰⁷ See Mst. Bakhshi supra and *Usman v. The State and another* 1984 PCrLJ 2908 supra.

²⁰⁸ See Mst. Bushra Bibi supra, Muhammad Banaras supra and Rukhsana supra.

choice, especially women, to seek protection through writs for enforcement of fundamental rights. Instead, they ended up being tried and sentenced by criminal courts, though ultimately they might be acquitted by the appellate courts.²⁰⁹

With the Women's Protection Act, 2006 amendments to the *Zina* Ordinance and the PPC, special procedures have been introduced in respect of *zina* and the offence of 'fornication'. These make it more difficult to bring complaints regarding such offences. However, the provisions of the *Zina* Ordinance (Sections 11 and 16) which were earlier used to criminalise many persons engaging in marriages of choice have not been repealed, but rather incorporated in the PPC, and therefore continue to serve as a potential tool of harassment.²¹⁰

6.1.1 Offences under the PPC

In December 2012, forced marriage was declared an offence. A new chapter²¹¹ ('Of Offences Against Women') was added to the Penal Code and Section 496-B of this chapter describes the punishment for forced marriage as follows:

Section 496B Pakistan Penal Code

Prohibition of Forced Marriage: Whoever coerces or in any manner whatsoever compels a woman to enter into marriage shall be punished with imprisonment of either description for a term, which may extend to seven years or for a term which shall not be less than three years and shall also be liable to fine of five hundred thousand rupees.

The other most relevant offence in cases of forced marriage of kidnapping/abduction/inducing a woman to compel marriage is defined under Section 365B of the Penal Code.

Abduction for Forced Marriage

*"Whoever kidnaps or abducts any woman with intent that she may be compelled or knowing it to be likely **that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment which may extend to life and shall also be liable to fine; and whoever by means of criminal intimidation as defined in the Pakistan Penal Code (Act XLV of 1860), or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.**"²¹² (emphasis added)*

²⁰⁹ *Allah Bux and another v. The State* PLD 1982 FSC 101, *Bakhsha and another vs. The State* 1999 PCrLJ 740.

²¹⁰ For effect of section 365 B PPC (previously Section 11 of *Zina* Ordinance) and collusion of police and parents to harass a woman for her choice marriage see *Muhammad Afzal v. Sessions Judge Multan and 3 others* PLD 2008 Lahore 479.

²¹¹ Chapter XXA was inserted pursuant to the Prevention of Anti-Women Practices (Criminal Law Amendment) Act, 2011,.

²¹² See Rukhsana's case, *supra*, at 646.

There are several other offences defined in the PPC which may be of relevance in relation to cases of interference with choice in marriage, such as:

- in more extreme cases, murder, attempted murder, causing grave bodily harm, or hurt;²¹³
- kidnapping from lawful guardianship, punishable by imprisonment of up to seven years and a fine (Section 361 PPC);
- kidnapping or abducting with intent secretly and wrongfully to confine a person (Section 365 PPC);
- wrongfully concealing or keeping in confinement a kidnapped or abducted person, punishable with imprisonment of up to seven years and a fine (Section 368 PPC), and
- rape.²¹⁴

In practice, survivors or victims rarely lodge FIRs or make complaints regarding such offences. One reason is that a prosecution for kidnapping cannot be brought against the parents or guardians of the person concerned. More importantly, perhaps, very few young people are willing to give evidence against their immediate family members or to see them punished for such offences.

However, if a victim or any person on her behalf (a cognizable offence can be reported by any person) does wish to make a complaint of any such offence, and the police refuse to register it, then directions may be sought from the High Court; Magistrates, JPs and senior police officials can also be approached to issue a direction to the police officer concerned.

6.1.2 Offences under the *Zina* Ordinance

The *Zina* Ordinance defines the offence of *zina* (extra-marital intercourse) as ‘willful sexual intercourse’ by a man and woman who are not married to each other.²¹⁵

The law has been amended to make it more difficult to make complaints regarding *zina*: such complaints can only be made to a Sessions Court, and may only be accepted after the Court examines the complainant and at least four adult eye-witnesses on oath. The Court may reject such a complaint if in its opinion there is no

²¹³ See Section 300, 302, 306 PPC (murder), Sections 332 to 337 PPC (various levels of hurt). In such cases, the penalties include variously the death sentence, imprisonment upto 25 years in case of murder and blood money (*‘diyat’*). For hurt, the punishment is imprisonment for various periods and the quantum of compensation is determined based upon the extent and intensity of hurt. All offences relating to bodily hurt including murder can be compromised between the parties and if the compromise is accepted by the Court, the perpetrators shall be acquitted. For the foregoing right of retribution and compromise, see Sections 309, 310, 311 and 338-E PPC and section 345(2)(6) CrPC. For a detailed discussion on Pakistani law related to murder and bodily hurt, in the case of ‘honour’ killings see Sohail Akbar Warraich, ‘Honour Crimes and Law in Pakistan’ in Lynn Welchman and Sara Hossain (Eds), *Honour: Crimes, Paradigms and Violence against Women*, Zed Publishers, London 2005.

²¹⁴ Rape has been defined in Section 375 of the PPC as occurring when a man has sex with a woman i) against her will; ii) without her consent; iii) with her consent, if the consent is obtained by putting the victim in fear of death or hurt; iv) with her consent, when he knows that he is not married to her and that the consent is given because she believes the man to be another person to whom she is or believes herself to be married; or v) with or without her consent when she is under sixteen years of age.

²¹⁵ Section 4, *Zina* Ordinance.

sufficient ground for proceeding, and without recording any further evidence, can convict the complainant and witnesses of making a false allegation of *zina*.²¹⁶

The sentence for *zina* varies depending on the marital status of the accused. Thus, if an adult married Muslim man or woman is found guilty of *zina*, on the evidence of four male Muslim witnesses, or based upon the accused's confession, the penalty is stoning to death, while for an unmarried Muslim or for a married or unmarried non-Muslim the penalty is one hundred lashes.²¹⁷

It is worth noting that these provisions do not recognize marital rape as an offence. In some cases, however, it may be possible to bring rape charges against men who have abducted their wives, where such women were married off as minors but never cohabited with their husbands (for example, due to a delay in the performance of *rukhsati*, the traditional formal departure to the husband's home). In general, though, Courts have acquitted men in such situations, finding that there is a subsisting relationship of husband and wife.²¹⁸

In practice, victims/survivors of such offences rarely seek to invoke these provisions. Instead, as noted above, they have been deliberately misused by parents or guardians, often acting in complicity with the police, to curtail or frustrate the exercise of young people's right to choice regarding marriage. Such misuse has been exacerbated by the application of existing laws of personal status (which restrict rights of choice in marriage, and also allow child marriages).

Typically, the parents of the woman/girl concerned accuse the man of having committed abduction, enticement coupled with concealment with criminal intent, or rape, or even both parties of committing *zina*.²¹⁹ The police then arrest the man and detain the woman or girl in 'protective' custody, often in a shelter home. If the woman refuses to cooperate with the investigation, or claims that she is validly married to the man, then she may be accused of *zina*.²²⁰ Although either a woman or a man may be exempted from charges of *zina* if they 'believe themselves' of being married to the other person,²²¹ they may nevertheless be subjected to considerable

²¹⁶ Section 203-A, CrPC.

²¹⁷ *Hadd* penalties (fixed sentences for certain crimes derived from the Holy *Qu'ran* or *Sunnah*) are applicable in cases where there is evidence of four male Muslim witnesses or a confession. *Hadd* penalties cannot be imposed on children; however, the definition of child itself is differentiated by gender, with a male being treated as a child if below eighteen or not reached puberty, and a female only if she is below sixteen or has not reached puberty.

²¹⁸ Jilani and Ahmed, 'Violence against Women', supra at p. 173 and fn. 47.

²¹⁹ Prior to the 2006 amendment, such complaints would be made under Section 11 (abduction to compel marriage) or Section 16 (enticing a woman with criminal intent). Now, following the amendment, such complaints are made under Section 365-B PPC (abduction etc to compel marriage), section 496-A (enticing a woman with criminal intent) or section 375 PPC (rape). see *Mst. Rabia Khizer & others v Station House Officer & others* PLD 2009 Lahore 223, *Zarjuma alias Jamna Bibi v. Station House Officer, Police Station Saddar, District Bhakkar & 4 others* PLD 2009 Lahore 546.

²²⁰ Jilani and Ahmed, 'Violence against Women' supra at p. 171, and fn. 43, citing *Double Jeopardy, Police Abuse of Women in Pakistan*, Report of Asia Watch and the Women's Rights Project Division of Human Rights Watch 1992, at pp. 42-43. Out of twenty reported cases of *zina* studied by the Commission of Inquiry for Women in 1997, it was found that 'fifteen pertained to people who had married against the wishes of their families. Five were baseless accusations against married people ...', Jilani and Ahmed at 72.

²²¹ Section 5, *Zina* Ordinance, see Arif Hussain and Azra Parveen supra.

harassment by the authorities if a complaint is made by any third party challenging the validity of their marriage.

Instances of alleged abuse of process in such cases involving state officials are legion. Such abuse of process was particularly facilitated by the provisions of the *Zina* Ordinance prior to its 2006 amendment. The scope for the police or the courts to change a charge of *zina-bil-jabr* [rape] into one of *zina*, or mere consensual extra-marital sex, used to provide a serious threat. In many cases, the police investigating a woman's complaint of rape would begin by examining her character and history, and if they believed her to be of 'bad character' or to have not 'resisted' rape or delay in filing the complaint of rape, they could conclude the investigation by accusing her of having committed *zina*. In other cases, the Courts found that the 'loose character' of the woman, or her failure to resist or the lack of signs of struggle indicated consent; again, consent did not merely serve as a defence to a charge of rape, but resulted in converting the charge to one of *zina*.²²² The amendments in the *Zina* Ordinance provide a safeguard against such abuse, as no case of *zina* can be converted into a case of fornication or a case where complaint of rape is made can be converted into a case of fornication. Similarly, no complaint of fornication can be converted into a case of *zina* or an offence of similar nature under any law for the time being in force.²²³

It is to be noted that the Women Protection Act has not been extended to FATA and PATA, Khyber Pukhtunkhwa and Balochistan. In Kashmir too, there are no similar amendments, leaving open the scope for abuse of this law.

6.1.3 Offences under the CMRA

Although the CMRA does not invalidate child marriages,²²⁴ it penalises those responsible for such marriages (where the groom is below eighteen years and the bride below sixteen years)²²⁵ with a maximum sentence of one month's imprisonment and a fine of Rs. 1000 or both.²²⁶ The persons liable include the parent/guardian who does any act to promote a child marriage or permits it to be solemnized or negligently fails to prevent it being solemnized,²²⁷ any male adult party to the marriage or any person who performs, conducts or directs the marriage.²²⁸

Prosecutions under the CMRA are rare, and given the very lenient penalty applicable have little potential deterrent effect.²²⁹

²²² See cases of *Jehan Mina v The State* PLD 1983 FSC 183, *Mst. Safia Bibi v The State* PLD 1985 FSC 120, *Zafiran Bibi v The State* PLD 2002 FSC 1

²²³ Section 5-A inserted in the *Zina* Ordinance by Women Protection Act, 2006.

²²⁴ See *Bakshi v Bashir Ahmed*, supra; *Zafar Khan v Muhammad Ashraf Bhatti*, supra at 325, para B.

²²⁵ In Sindh province, the age for females is raised to eighteen years.

²²⁶ In Sindh province, after the enactment of CMRA, 2013 the punishment is two to three years rigorous imprisonment and fine. A male above eighteen years of age contracting a child marriage, a parent or guardian connected with child marriage and marriage solemniser can be prosecuted (Sections 3, 5 & 5). All offences under CMRA, Sindh are cognizable.

²²⁷ Section 6, CMRA.

²²⁸ Sections 4 and 5, CMRA.

²²⁹ In the National Assembly Bill No 37 of 2009 enhancement of sentences for offences under this law and strengthening of mechanisms to prevent a child marriage, making violations cognizable offences has been proposed.

6.2 Remedies

In addition to prosecution for the above offences, remedies available under the CrPC include those which would enable release of the survivor from confinement, or provide her with compensation or enable action to be taken against any officials responsible such as:

- orders of *habeas corpus* (Section 491 CrPC, see above),
- search warrants (Section 100 CrPC),
- orders for restoration of an abducted female (Section 552 CrPC),
- compensation (Section 544 CrPC),
- directions regarding the administration and discharge of police functions (Section 22(6) CrPC), and
- orders for contempt of court for disobedience to Court or intimidating or abusive behaviour in Court;

6.2.1 Habeas Corpus Petition (Section 491 CrPC)

See above, Section 3.

6.2.2 Search Warrant (Section 100 CrPC)

An application for a search warrant may be made to a First Class Magistrate to secure the release of any person who is allegedly illegally confined or detained within any area under their jurisdiction.²³⁰ The Magistrate may then direct the police to execute the search warrant, and bring the person confined before the Magistrate to be dealt with in accordance with law. On production of the person, the Magistrate would initially take a statement from them under Section 164 CrPC, and based upon that, determine the action to be taken, i.e. whether to set them at liberty or, if they are found to be minors, to hand them over to the custody of any other person.

Why is a *habeas corpus* petition preferred to a search warrant? The primary advantage of a search warrant over a *habeas corpus* petition is that it is obtainable from a more accessible forum, that is the Magistrate, rather than the more remotely located High Court or Sessions Court. In every other respect, however, a *habeas corpus* petition before the High Court is more effective in cases of interference with marriage, given that the High Court:

- has more extensive territorial jurisdiction than a Magistrate's Court (each High Court has jurisdiction over a province, while a Magistrate's jurisdiction is limited to a district or an area within it).
- has wider powers to deal with issues which may arise in cases of forced marriage. Being the apex court in each province, it has supervisory powers over all courts in the province, and can remand a case to any subordinate court, or executive or judicial body as the case demands.

²³⁰ Until 2001, the magistracy included both judicial and executive magistrates, and only executive magistrates could issue such orders; thus, applications for search warrants would be refused if made to judicial magistrates: see *Mst. Kausar Parveen and 3 others v. Ahmed Ali Zaffer, Judicial Magistrate, Kabirwala District Khanewal and 2 others* PLD 1997 Lahore 208. However, since 14 August 2001, the executive magistracy stands abolished except in the Capital, Islamabad, and the functions of Magistrates under the Code of Criminal Procedure now vest with the Judicial Magistrate: see Code of Criminal Procedure (Amendment) Ordinance, 2001.

- is empowered to enforce its orders against a public functionary or private person of whatever level or status he/she may be.

It should be noted that many *habeas corpus* petitions have involved a challenge to a Magistrate's order made in respect of the custody or liberty of females especially where there are claims by their family of her alleged abduction/kidnapping and contrary claims by her and another that she has exercised her right to choose to marry.²³¹

6.2.3 Order for Restoration of Abducted Female (Section 552 CrPC)

Any person may make a complaint to the Sessions Judge regarding the alleged abduction or unlawful detention for an unlawful purpose of a woman or a girl aged under 16 years of age.²³² The Sessions Judge may then make an order to set the woman at liberty, or if she is found to be a minor, to restore her custody to her husband, parent, guardian or other person having lawful charge of her, and may direct the use of necessary force to ensure compliance with this order. In practice however, this remedy is little used.

6.2.4 Compensation (Section 544A CrPC)

If the Court finds that a person has suffered hurt, injury, mental anguish or psychological damage, it may in the course of convicting the person responsible order them to pay compensation to the victim, and in default to be imprisoned for upto six months.

6.2.5 Complaint regarding Police Action/Inaction (Section 22 (6) CrPC)

Any person may make a complaint regarding any action or inaction by the police regarding a case concerning interference with the choice of marriage. Such a complaint should be made to a JP (who is a Sessions Judge or Additional Sessions Judge).²³³

An ex-officio JP may issue appropriate directions to the police authorities concerned on a complaint regarding:

- non-registration of a criminal case;
- transfer of investigation from one police officer to another;²³⁴ and
- neglect, failure or excess committed by a police authority in relation to its functions and duties.²³⁵

²³¹ See Zafar Khan, Mst. Bakhshi and Mst. Jamila Bibi supra (in this last case the woman was placed in a Darul Aman by order of a Magistrate in proceedings under Section 552 CrPC and the High Court declared this order as illegal and set the woman free). The High Court has also noticed the actions taken under section 100 CrPC and issued instructions to Magistrates (see Manual of Instructions and Forms, Lahore High Court, 1989, Ref. No. 10758/MIT/HC.696-74) for expeditious disposal of applications made under Section 100 CrPC.

²³² Since 14 August 2001, this function has vested in the Sessions Judge rather than the District Magistrate as earlier: see Code of Criminal Procedure (Amendment) Ordinance, 2001 supra. However, the office of District Magistrate continues to exist in Islamabad. In Kashmir this power is with the District Magistrate as no amendments to the CrPC such as the Criminal Law (Amendment) Ordinance have been made.

²³³ Section 22(6) CrPC, as amended by Code of Criminal Procedure (Third Amendment) Ordinance, 2002, dated 15 November, 2002.

²³⁴ This power is limited in view of article 18 (6) of Police Order 2002, also see Khizer Hayat case supra and *Muhammad Bashir v Station House Officer*, PLD 2007 SC 539.

In cases concerning interference with choice in marriage, any of the issues mentioned above may arise. In such cases, it may be appropriate to seek a remedy at the district level before a Justice of the Peace if the case falls within his/her jurisdiction, rather than moving a constitutional petition before the High Court. Indeed, the High Court may itself refuse issuance of a writ where such issues arise, on the ground that the law provides an alternative and adequate remedy which should be exhausted prior to seeking relief under the Constitution.

6.2.6 Contempt Orders

In an appropriate case, the High Court may find either private individuals or State officials in contempt of court for disobeying an order of the Court (for example for failure to produce an allegedly detained person in Court in a *habeas corpus* petition). The Family Court may also find any person in contempt for any misbehaviour or use of abusive language or physical force or intimidation in the courtroom. In each case, a fine will be imposed as a penalty.²³⁶

7. International Issues

This section mainly addresses issues which are relevant in cases with an international element, and considers first the recognition of judgments and orders of foreign courts in Pakistan, and second particular concerns relating to British/Pakistani dual nationals.

7.1 Recognition of Foreign Judgments

In some cases, it may be useful to enforce a favourable foreign judgment (for example a nullity decree) rather than seek to engage in separate legal proceedings in Pakistan. If the foreign judgment has been passed by a superior court in the UK or any 'other reciprocating territory' then a suit could be filed in a Pakistan Court for its recognition and enforcement.²³⁷ Such a judgment would be recognized by a Court in Pakistan as conclusive in respect of any matter directly adjudicated upon between the same parties litigating under the same title, and may be executed, unless the Court is satisfied that it falls within certain exceptions, namely:

- it has not been pronounced by a court of competent jurisdiction;
- it has not been given on the merits of the case;
- it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Pakistan in cases in which such law is applicable;
- it was obtained in proceedings which were opposed to natural justice;
- it has been obtained by fraud;
- it sustains a claim founded on a breach of any law in force in Pakistan.²³⁸

²³⁵ Section 22(6), CrPC, as amended by Code of Criminal Procedure (Third Amendment) Ordinance, 2002., dated 15 November, 2002

²³⁶ See Section 16(bb), Family Courts Act, 1964 (as amended in 2002 by Ordinance No. LV of 2002). The penalty for contempt is a fine which can extend up to Rs 2000.

²³⁷ Superior courts with reference to the United Kingdom mean the High Court in England, the Court of Session in Scotland, the High Court in Northern Ireland, the Court of Chancery of the County Palatine of Lancaster, and the Court of Chancery of County Palatine Durham.

²³⁸ Section 13, Code of Civil Procedure 1908.

It may be noted that Pakistan and Kashmir for the purposes of enforcement of judgments and decrees relate as foreign states to each other.²³⁹ Therefore orders of both foreign courts and Pakistan courts may only be enforced in Kashmir on the same basis, *mutatis mutandis*, as provided above.²⁴⁰

7.2 Dual Nationality

7.2.1 Recognition of Dual Nationality

Under Pakistan law, a person may be a citizen of Pakistan and also of any other state notified by the Federal Government in the official gazette.²⁴¹

Any person who is already a citizen of Pakistan ceases to be citizen of Pakistan if at the same time they acquire citizenship of or become nationals of another state unless they make a declaration according to the laws of that other state renouncing their status as citizen or national thereof.²⁴² This restriction upon dual nationality does not apply to countries for which dual nationality is permitted, or to persons aged under 21 years of age or to Pakistani women married to foreign nationals.²⁴³ It also does not apply to a person who being, or having at any time been, a citizen of Pakistan, is also the citizen of the United Kingdom or of such other country as the Federal Government may, by notification in the official Gazette, specify in this behalf.²⁴⁴ Thus, a person who holds only a British passport, and has never applied for a Pakistani passport, or even for Pakistani citizenship, may still be deemed to be a Pakistani by operation of law (see 8.2.2 below).

7.2.2 Acquisition of Pakistani Nationality

A person may acquire Pakistani nationality:

- a) by birth in Pakistan;²⁴⁵
- b) by descent, if born before April 2000 to a father who is a Pakistani citizen by birth, or if born after April 2000 to a father or a mother who is a Pakistani citizen by birth;²⁴⁶

²³⁹ *Mst. Maryam Bibi and Others v. Muhammad Iqbal and Others* PLD 1976 AJK 9.

²⁴⁰ *Tariq Mahmood v. Mst. Zarda Begum and Another* 1995 CLC 1102 (Shariat Court Kashmir).

²⁴¹ Section 14(3), Citizenship Act 1951 as amended by Act XVII of 1972, published in the Gazette of Pakistan Extraordinary Part 1, dated 25 September, 1972, see PLD 1973 Central Statutes 11. To date, the Federal Government of Pakistan has notified thirteen countries with whom dual nationality is permissible, being: the United Kingdom, France, Italy, Belgium, Iceland, Australia, New Zealand, Canada, Egypt, Jordan, Syria, Switzerland, Netherlands, U.S.A, Sweden and Ireland. See website of Directorate General of Immigration and Passports, Government of Pakistan. To be certain it is advisable to check the latest list of countries in respect of which dual nationality may be held.

²⁴² Section 14(1), Citizenship Act, 1951.

²⁴³ Section 14(1A) and (4) of the Citizenship Act, 1951.

²⁴⁴ Dual nationality for Pakistanis was permitted in 1972 through amendments to the Citizenship Act by Act XVII of 1972. Section 14 (3), also inserted then, provided savings for those Pakistanis who had acquired the nationality of any other country before enforcement of the amendment. Thus, they could retain Pakistani nationality along with the nationality of another country as specified by gazette notification.

²⁴⁵ Section 4, Citizenship Act, 1951.

²⁴⁶ Section 5, Citizenship Act, 1951, as amended by the Pakistan Citizenship Act 1951 (Amendment) Ordinance 2000 (Ordinance No. XIII of 2000) dated published in the Pakistan Gazette as a notification being SRO No. 210 (1)/2000 dated 18 April 2000.

- c) by descent, if born outside Pakistan before April 2000 to a father who is a Pakistani citizen by descent and after April 2000 to a father or a mother who is a Pakistani citizen by birth, and the birth being duly registered with the Pakistan Consulate or Mission in the country of birth;²⁴⁷
- d) by descent if child's parent is, at the time of the birth, in the service of any Government of Pakistan (Section 5(b));
- e) on an application made by the parents while still a minor;²⁴⁸
- f) by naturalisation (Section 9);
- g) by migration (Section 6);
- h) through marriage, for a woman married to a Pakistani male citizen (Section 10).

Thus a person who holds only a British passport may nevertheless be deemed to be a Pakistani national by birth or by descent and treated as such by the Pakistani/British authorities if the above requirements are met.

Also, while a British-Pakistani dual national may not hold a Pakistani passport, their British passport may be endorsed with stamps exempting them from the requirements of obtaining a Pakistan visa, or registering with the police respectively. They can obtain Pakistan Origin Cards.²⁴⁹ This makes it easier for dual nationals to travel in and out of Pakistan, but conversely, makes it harder to track the movements of such dual nationals, a concern in cases of abduction of such persons from Britain to Pakistan for forced marriage.

7.2.3 Loss of Pakistani Nationality

A Pakistani national resident outside Pakistan is required to register annually at a Pakistan Mission or Consulate, indicating their intention to retain citizenship of Pakistan.²⁵⁰ Residence outside Pakistan for over seven years combined with failure to register may result in loss of Pakistani citizenship, either on application by the person concerned, or by the Government on its own motion.²⁵¹ In practice, it seems that in most cases, such action is rarely taken by the Government. Arguably, a person wishing to renounce their Pakistani nationality could apply to the concerned authorities (the Home Ministry) for cancellation of their citizenship on the grounds that they have resided outside Pakistan for over seven years and have not registered themselves as required.

7.2.4 Renunciation of Pakistani Nationality

A citizen of Pakistan residing outside Pakistan and who is not a minor can renounce Pakistan nationality on acquiring the nationality of another country as discussed above. If such a renunciation is made by a man, then any minor child of his residing outside Pakistan also ceases to be citizen of Pakistan unless within one year of

²⁴⁷Ibid.

²⁴⁸ Section 11, Citizenship Act, 1951.

²⁴⁹ Section 11 NADRA Ordinance, 2000 and NADRA (Pakistan Origin Card) Rules, 2002, Rule 4 defines a foreigner of Pakistani origin.

²⁵⁰ Rule 22, Citizenship Rules 1952.

²⁵¹ Section 16(4), Citizenship Act 1951 read with Rule 25(4)-(6), Citizenship Rules, 1952.

reaching 21 years the child makes a declaration to resume Pakistani citizenship.²⁵² The nationality of a minor residing in Pakistan is not affected by renunciation of nationality of its father as mentioned above.²⁵³

7.2.5 Nationality and the Court's Jurisdiction

Under the Constitution, every individual has the right to be dealt with in accordance with the law and to enjoy protection of the law, and every individual clearly includes every person for the time being in Pakistan.²⁵⁴ Thus even non-nationals may file writs for enforcement of certain fundamental rights.

With respect to access to the Family Court, the MFLO applies even if only one party to the proceedings is Pakistani Muslim citizen.²⁵⁵ The MFLO has also been applied by the Courts where both parties were dual nationals (British and Pakistani) and the marriage was held before a Registrar.²⁵⁶ If both the parties are not Pakistani Muslim citizens, suits related to matrimonial disputes may be filed before the civil Court within whose jurisdiction the parties are residing at that time of institution of suit (Section 20 CPC). Such a suit will be tried and determined by the proper law applicable to the parties.²⁵⁷

In some cases, there may be restrictions regarding access to the Family Courts concerning the domicile and residence of either or both the parties.²⁵⁸ In a case where one of the parties was a Pakistani citizen and the other British, the Court held that the Family Court had jurisdiction²⁵⁹ to try a suit for dissolution of a marriage, as it was solemnised in Lahore and the plaintiff was a Pakistani National. In another case of maintenance by minors who were British citizens by birth, the father's objection regarding the lack of jurisdiction of the Pakistani Family Court was overruled by the High Court, which held that British born minors of Pakistani nationals were Pakistani nationals by descent.²⁶⁰

In the Family Court, suits may be filed through a representative or nominated agent by granting them a power of attorney for this purpose, unless for some specific reason the Court requires the personal attendance of the plaintiff. This provision can be useful for a plaintiff who is a woman who for some compulsion or having been subjected to forced marriage cannot be present personally in Pakistan.²⁶¹

²⁵² Section 14-A(2)(a) of the Citizenship Act and Rule 19-B of the Pakistan Citizenship Rules, 1952, as amended.

²⁵³ Section 14-A(2)(b) of the Citizenship Act.

²⁵⁴ Article 4(1), Constitution of Pakistan. There is no distinction between citizens and non-citizens with respect to fundamental rights as guaranteed by Articles 9 to 14 and 21 to 24, which are applicable to any 'person': see *Al-Jehad Trust* case supra at 1392.

²⁵⁵ *Farah Khan v. Tahir Hamid Khan and another* 1998 MLD 85 Lahore.

²⁵⁶ *Mst. Fauzia Hussain v. Mian Khadim Hussain* NLR 1985 Criminal Lahore 202. The husband had contracted a polygamous marriage in violation of Section 6 MFLO and the High Court allowed criminal proceedings against him to continue, rejecting his plea that the MFLO was not applicable.

²⁵⁷ *Masood Ahmad Malik v. Mst. Fouzia Farhana Quddus* 1991 SCMR 681 at 687-688.

²⁵⁸ See Section 2, Divorce Act, 1869.

²⁵⁹ See *Anil Mussarat Hussain v. Muhammad Anwar Naseem and 2 others* 1996 CLC Lahore 1406 at 1409.

²⁶⁰ See *Muhammad Younas v. Shahzad Qamar and others* NLR 1982 CLJ Lahore 35 at 37.

²⁶¹ For guidance and detail see *Naazreen Akhtar v. Family Judge, Lahore and another* PLD 1996 Lahore 394 and *Khalid Mahmood Syed v. Razi Abbas Bokhari, Judge, Family Court, Lahore and*

Gilgit Baltistan System: The Gilgit-Baltistan (Empowerment and Self Governance) Order, 2009 has given this area the status of a province. As the areas falling in Gilgit-Baltistan are constitutionally not part of Pakistan, in a technical sense these areas cannot be made into a province like the other provinces. These areas are under the administrative control of Pakistan. Under this Order there is a 33 member elected Legislative Assembly and a Gilgit-Baltistan Council. Both the Council the Legislative Assembly have powers to enact laws with respect to the subjects mentioned in their legislative lists,²⁶² which relate to local laws and law and order issues. The Council has the power to adopt any amendment in the existing laws or any new law in force in Pakistan.

The Government of Pakistan has the exclusive power to make laws in respect of any matter not enumerated in the Council Legislative list or the Assembly Legislative list by Order notified in the official Gazette.

The Fundamental Rights mentioned in the Pakistan Constitution are mentioned in the Gilgit-Baltistan Order. The higher courts established under this Order have powers to hear petitions for the enforcement of these rights. The Chief Court has powers to issue writs²⁶³ of a similar nature to a High Court in Pakistan and the Supreme Appellate Court to hear a writ directly in a case of general public importance for the enforcement of fundamental rights.²⁶⁴

Barriers to Choice Marriages: While an adult Muslim woman in Pakistan has a right to enter into a marriage of her choice, the attitudes within society and among state functionaries create barriers to exercising this right.

***Muhammad Afzal v. The Sessions Judge Multan and 3 others* PLD 2008 Lahore 479**

HB, 22/23 years, married MA of her own choice. Her father registered a case of kidnapping for zina against her husband, and several of her in-laws (under section 365-B PPC previously section 11 of the *Zina* Ordinance). The Investigation Officer produced her before the Area Magistrate who recorded her statement. She stated that no one kidnapped her, that she had freely married her husband and that she apprehended violence by her father. She also expressed her wish not be sent to a *Darul Aman*, but instead to go with her husband.

Despite this clear statement, HB was taken back to the police station. The Police arrested her husband, and several in-laws, noting there was sufficient evidence against them of abduction and *zina*.

another PLD 1979 Lahore 217. Also see Section 22 of the Legal Practitioners and Bar Council Act, 1973 and Section 18 of the FCA.

²⁶² Article 47 of the Order and schedules of subjects for legislation under this article.

²⁶³ Article 71 of the Order.

²⁶⁴ Article 61 of the Order.

On the same day, MA's brother filed a *habeas corpus* petition before the Sessions Judge, Multan. The Court Bailiff recovered all the detenues including HB. The Sessions Judge held, that the question of custody or liberty of the detinue was an awkward one, as her father and husband were opposed to each other. The Court issued a direction on the husband to file a suit of conjugal rights before the Family Court, which would resolve the question of the legality of marriage. But it refused to free HB and sent her to the *Darul Aman* against her wishes.

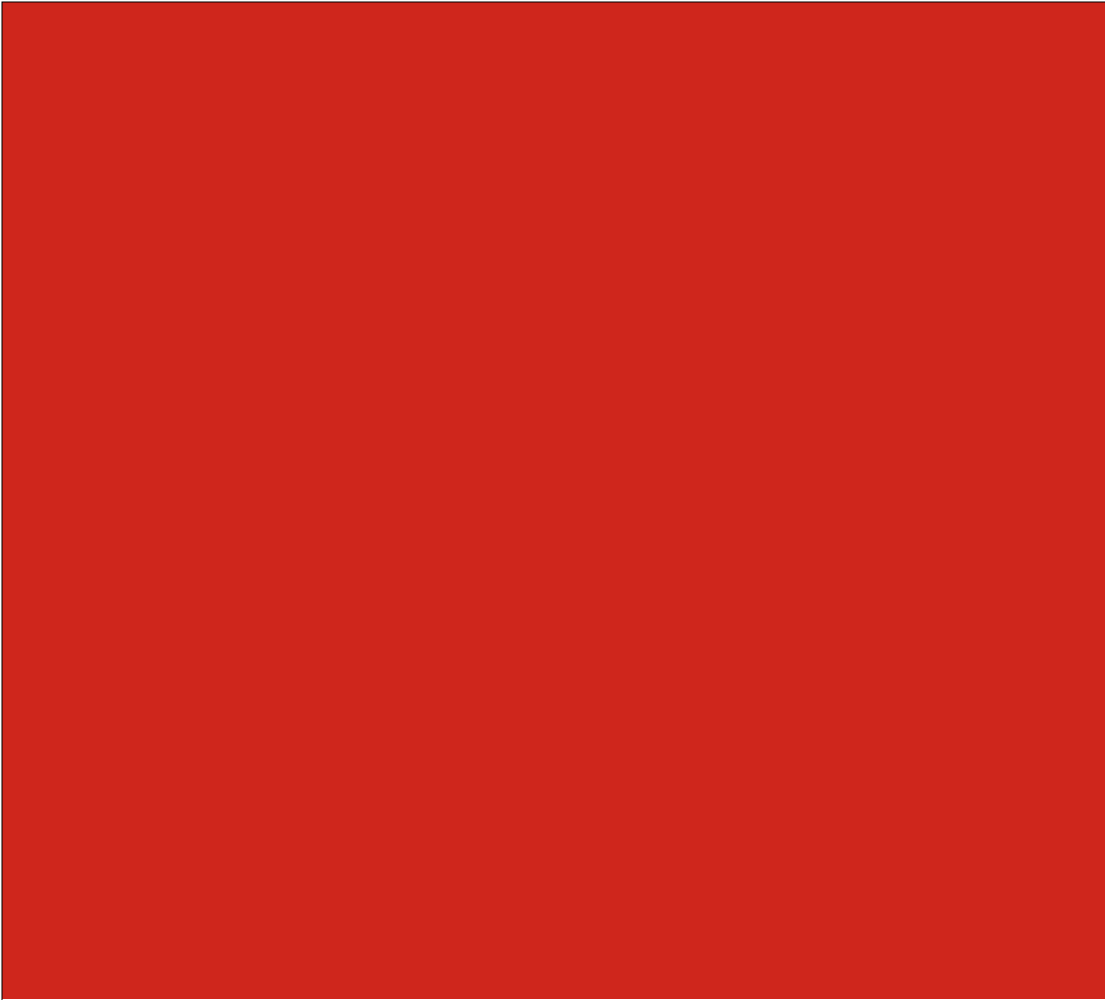
The husband then filed a petition in the High Court under Section 561A of the Code of Criminal Procedure praying for quashing the FIR and also challenged the order of the Sessions Judge. The High Court immediately set HB at liberty and directed her to appear in person on the next date on which the Court summoned the Investigation Officer, HB's husband and her complainant father. HB stated that she had married of her free will and owned the nikahnama produced.

The Court referred to earlier cases (see Saima Waheed, Muhammad Ramzan, Mauj Ali) and held the Sessions Judge's order of confining HB in *Darul Aman* to be illegal. It described the Sessions Judge's decision as "self styled procedure unwarranted in law".

It further held:

"... proceedings under section 491 are summary in character. These proceedings are not intended to go beyond the summary consideration of the questions essentially relevant to the alleged detention i.e. whether the detinue is to be set at liberty and as a consequence thereof be permitted to go with the person of his or her choice or to drop the proceedings when the detention is found legal. The Court while deciding an application under section 491 CrPC is not required to go into the question of status of relationship of the parties by holding full fledged trial of counter claims and it should concern [itself] with the free will of the detinue". [para 5 at page 483].

The Court quashed the FIR and ordered release of the arrested persons. It reprimanded the Investigating Officer and fined him Rs. 50,000/ and directed that this be paid to the arrested persons. It further observed that the language used by the Sessions Judge Multan's language was offensive. It sent a copy of the judgment to the Inspection Judge of the Sessions Division, Multan directing him to deal with the issue of comments by the Sessions Judge at his discretion.



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