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Articles

Emerging issues for international family law: Part 3: Transnational marriage abandonment and the dowry question

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‘I too was sacrificed for the sake of dowry. I think the curse of dowry needs to be removed ... (it) has spread too far into our society. I don’t know how many women and girls are sacrificed to this ... Our society and culture doesn’t think that women are human, but consider us to be worthless, beneath their feet. How long will a woman put up with this? Silently, being sacrificed? Every woman has dreams in her heart. She has aspirations. She wants a home, family, to live happily and freely but when she is married off and lives with these people, she gets nothing. Just this curse and certain death. Nothing else.’ (Kanwaljeet, victim of dowry abuse)

The practice of dowry usually involves the giving of gifts (money, goods or property) by a bride’s family to the groom and his family before, during or any time after a marriage. It is a custom that can be found across the globe since antiquity. A comparable English practice was the ‘marriage settlement’, in use from the Middle Ages until the early twentieth century. It decreased in popularity as struggles for female equality grew, and the Married Women’s Property Act 1882 finally allowed women to control and own property in their own right.

Dowry in India

Nowadays, the practice of dowry is particularly prevalent in South Asian countries (Bradley, T. (2009) *The interfaces between gender, religion and dowry* in T Bradley, E Tomalin & M Subramaniam (eds), *‘Dowry, bridging the gap between theory and practice’*. Zed Books Ltd, London, pp. 87-114), however, in the following sections we focus on the law and practice in India as it is more developed in that country compared to Pakistan and Bangladesh.

In India, dowry was traditionally a wedding gift given by upper-caste North Indian Hindu parents to their daughters, but gradually spread to other castes and religious groups including Sikhs, Muslims and Christians (Anitha, S., Roy, A. and Yalamarty, H. (2016) *Disposable women: Abuse, violence and abandonment in transnational marriages*, Lincoln: University of Lincoln). A related concept of ‘stridhan’ (literally, ‘women’s property’) also developed; consisting of valuable presents given to the bride by her parents and close family voluntarily on the occasion of her marriage, such as

clothes, jewellery, ornaments, and sometimes land and property. As a matter of Hindu personal law (recently confirmed by the Indian Supreme Court in *Krishna Bhattacharjee v Sarathi Choudhury*, Criminal Appeal No 1545 of 2015), the categorisation of a gift as stridhan meant that a woman retained full rights of alienation and disposal during the marriage, and that the property would pass to her heirs. A husband could only make use of his wife's stridhan at times of financial distress or emergency, but was obligated to return or compensate for this as soon as possible. In practice, the concepts of stridhan or dowry have become interchangeable since stridhan is used as a means of getting around the current law on dowry (see below).

The practice and significance of dowry in India has developed and changed over time. In medieval times, it was a means of ensuring that women had some means of financial independence after marriage. In the colonial period, dowry became mandatory upon marriage, particularly as women had extremely limited inheritance rights prior to the Hindu Succession Act 1956 which was extended in 2005 to give Hindu women the right to inherit ancestral property (this Act does not apply to Muslim women).

In contemporary India, dowry practices have become a means of amassing instant capital leading to its inflation and spread amongst all the socio-economic strata of society in both urban and rural areas. Dowry has become an acceptable means of obtaining desired consumer items like refrigerators, television sets, cars, as well as acquiring property and business investment (Bradley, *ibid*; Singh, K. (2013) *Separated and Divorced Women in India*, International Development Research Centre and Sage Publications). In the process, it has come to devalue women's lives; reinforcing and perpetuating their commodification and unequal status in the family and wider society. Paradoxically, against the backdrop of a growing economy and modernisation, dowry has taken on greater rather than less significance, contributing to the maintenance of highly patriarchal family structures and widening gender inequality.

In order to secure the marriage of daughters to suitable men, families are often forced to mortgage their homes, sell personal belongings or perform years and even a lifetime of hard labour to cover the full costs of a wedding and to pay the dowry demanded by the groom's family. Families are frequently compelled to meet dowry demands including the costs of lavish wedding celebrations for fear that a refusal may lead to the cancellation of a wedding or engagement which can bring shame, dishonour, stigma and social and financial ruin upon them. Insufficient dowry often also damages the marriage prospects of other single females in the family. SBS' extensive casework experience shows that this practice is also widely prevalent within the South Asian diaspora.

Dowry-related violence

The rise in demand for dowries in India is also associated with high levels of violence against women and is now said to be one of the biggest causes of violence against women in India. Dowry related violence is perpetrated by the husband and/or the in-laws in a bid to extract ever increasing amounts of dowry from the bride's family (Singh, *ibid*). The most common forms of dowry-related violence are battering, mutilation, rape, acid throwing and wife burning that can lead to murder or suicide. Other methods are emotional and psychological abuse; neglect and cruelty, including depriving women of food, clothing and medical attention; eviction; extortion; threatening family members and isolating or imprisoning women (Rastogi, M and Therly, P (2006) *Dowry and its link to violence against women in India: feminist psychological perspectives* Trauma Violence Abuse. 2006 Jan;7(1):66-77; Bradley, *ibid*)

Ranjana Kumari, director of the Delhi-based Centre for Social Research, noted that between 2001 and 2012, at least 91,202 women had been killed in incidents relating to dowry demands (*The Independent*, 3 July 2014). This is likely to be an underestimate because crimes against women are misrepresented or underreported. Commentators have noted that the problem of dowry-related violence has grown to the extent that it has increased pressures on families to prefer sons to daughters because the latter are deemed to be a drain on family wealth. This in turn has had led to

‘reversed sex-ratio’ in India, a well-documented problem that has resulted in millions of ‘missing’ females due to increased sex selective abortion and female infanticide in many regions in India (Banerji, R. (2009) *Female Genocide in India and the 50 Million Missing Campaign*, Intersections: Gender and Sexuality in Asia and the Pacific, Issue 22, October 2009). The inability of most women to recover dowry following breakdown of their marriage also leads to extremely high levels of poverty and isolation.

State response to dowry abuse in India

Widespread concerns over dowry and its links to violence against women led to the outlawing of dowry in India by the Dowry Prohibition Act 1961, and in 1986, an amendment to the Indian penal code mandated that any death or violence within the first seven years of marriage would be tried as related to dowry. Section 498A of the Indian Penal Code also criminalises the husband or his relatives for abusing, harassing or driving a woman to commit suicide for failing to provide a dowry. However, the Act has been widely condemned for being ‘totally ineffective’ (National Commission for Women (2005), *Recommendations and suggestions on Amendments to the Dowry Prohibition Act 1961*, India) and criticised for being badly and ambiguously drafted since it criminalises not only the receipt of dowry but also the giving (thus penalising the bride’s family).

Dowry related violence continues to be trivialised or ignored by the wider society and by institutions tasked with protecting women and facilitating their access to justice. Enforcement of the law remains the single most significant barrier for gaining redress. Many police forces simply fail to take domestic violence seriously (Human Rights Watch, (2009) *Broken System: Dysfunction, Abuse, and Impunity in the Indian Police*). Many dowry deaths continue to be ignored or recorded as simply ‘suicides’ or ‘accidents’ (National Commission for Women, *ibid*); due to an entrenched patriarchal mind set, endemic police corruption, the lack of political will and resources. Other difficulties in law enforcement include evidencing dowry payments; the prohibitive cost of litigation for the majority of women; undue delays in court proceedings and the concealment of wealth by husbands and their families.

In spite of these difficulties, the family and criminal courts in India have, albeit inconsistently, acknowledged the need for women to recover dowry/stridhan in view of the dire situation that they find themselves in post-divorce. For example, in *Kusum Sharma vs Mahinder Kumar Sharma* (Delhi High Court, 14 January 2015) Mr Justice Midha described the right to maintenance after divorce as part and parcel of a basic human right and reiterated that ‘delay in adjudication of maintenance cases ... is ... against human rights but also against the basic embodiment of dignity of an individual’. He explicitly noted the consequences for women and children – being driven to return to and rely on parents, or face abject poverty. Midha J introduced a requirement for sworn affidavits of financial status to be filed by husbands and in-laws rather than allow proceedings to be slowed due to lack of financial disclosure.

In respect of obtaining evidence, the courts have also taken other creative approaches to dowry cases and the rules on evidence, such as admitting evidence of dowry demands made on social media. *Bobbili Yadav v State of Andhra Pradesh* (Criminal Appeal No 45 of 2016, 19 January 2016) demonstrated further signs of progress. Here the Supreme Court’s progressive reading of the Dowry Prohibition Act allowed it to rule that husbands and in-laws must hand over the dowry to the wife within three months of the marriage or face prosecution. In addition, the Protection of Women from Domestic Violence Act 2005 – the first domestic violence specific legislation in India – gives women access to a broad range of civil remedies including protective injunctions and compensation orders. The definition of domestic violence in the Act includes emotional, sexual and economic abuse (including deprivation of stridhan) as well as dowry harassment.

In spite of these positive moves, a worrying backlash against dowry laws in the Indian legal system is also evident although it is unclear to what extent this is now representative of the judicial

approach to dowry cases. In *Arnesh Kuman v State of Bihar* (Supreme Court of India (Criminal Appeal No 1277 of 2014, 2 July 2014), the Supreme Court stated that anti-dowry laws are being 'misused' by 'disgruntled wives'. Unfortunately, this view is gaining credence amongst many students and lawyers (Jha, P. (2016) *Why the backlash against dowry laws in India?* 25 July 2016, Open Democracy website). This illustrates just how difficult it is to shift the deep rooted patriarchal mindset of the state and the wider society.

Dowry and transnational marriage abandonment

Many of the migrant women from South Asia who approach Southall Black Sisters (SBS) report dowry related violence and harassment from their British national husbands and in-laws. In the vast majority of cases, they are forced to flee or are abandoned without their dowries/stridhan which are retained by their abusive husbands and in-laws. They often describe how financial gain or free domestic labour is often the main purpose of their marriage and how they are abused and abandoned when they can no longer meet the demands. The following is a typical scenario:

'Sabah' came to the UK upon marriage but suffered domestic abuse, dowry related harassment and domestic servitude at the hands of her British national husband and in-laws. She was eventually abandoned in Pakistan and separated from her baby son. She had no money as her dowry and her property had been retained by her in-laws. Her parents were her only source of financial and emotional support but she feared that they would not be able to continue to support her given the hostility faced by abandoned women:

'Each second was so difficult – what should I do? How could I get my child? I didn't want to die but I had no interest in living ... I did try to get my dowry and my own belongings back but my in-laws only returned the cheaper things ... If I had been able to get my more valuable things back, at least I could have had some financial security. My parents found it so difficult. For a divorced woman there is no respect ... People feel there must be some fault in the woman. A woman can't afford to take a wrong step ... Indian and Pakistani families shouldn't get their daughters married in the UK – women are just treated like domestic servants.'

These experiences echo the findings of research by Anitha et. al. (ibid) which highlights the close links between dowry abuse, deception and abandonment. In their study in India, 100% of the participants reported dowry demands made by their in-laws whilst 68% reported having suffered dowry related violence or harassment. 93% of these women reported abuse to the police but only 5% of those managed to recover their dowries/stridhan (Anitha et. al, 2016, ibid, p. 8).

Women's families were compelled to meet dowry demands and consequently accrued significant debts. Women who were not considered 'good looking', considered over the normative marriageable age or divorced were met with more onerous dowry demands from future in-laws, to 'compensate' for their 'low marriageability'. Other women reported that dowry was used to fund their husband's further education or business ventures abroad. Deception and threats were commonly used by men and their families to extort dowry or further payments, often well into a marriage. Once these had been extracted and used to pursue their plans, women were abandoned, their visas revoked and they were divorced without their knowledge or consent.

Abandoned women were left with no choice but to try and return to their own families, although not all were accepted back because they were perceived to be a financial drain on their family's wealth. Many also found that their husbands could not be traced abroad and so were deprived of their right to pursue financial remedy proceedings or claim their rights of settlement under the Domestic Violence Rule in immigration law in the UK, even if they had previously entered and lived in the UK as a spouse. In addition, they were unable to secure a financial settlement or the return of their dowry or initiate divorce or criminal proceedings in India. Such women were left destitute, at the mercy of their own families and the wider society and at risk of further abuse or harassment. Some

women also fell under pressure to formally renounce their inheritance rights, in return for the continued protection and support of their male relatives (Anitha et. al, *ibid*).

English law and dowry

English law makes no specific provision for dowry in either criminal or civil (including family) law and practice. However, in a limited number of cases, the courts have tried to grapple with the need to help women recover their dowries/wedding gifts following divorce. In *Shahnaz v Rizwan* [1965] 1 QB 390, it was established that a wife could sue for breach of contract if the husband refused to pay the agreed sum of dowry as set out in their marriage contract. A similar approach was taken in *Uddin v Choudhury* [2009] EWCA Civ 1205, a case involving a claim and counterclaim between the father of the groom and his daughter-in-law.

Some women have also made civil claims for the return of goods. In 1997, in an unreported case, following 18 months of an abusive marriage, Dwinderjit Kaur became the first British woman to successfully sue for the return of her dowry through the civil courts (*The Independent*, 17 October 2014). Another unreported dowry case in 2000 – *Rakesh Verma v Bobita Verma* – was hailed in the media as ‘unprecedented’. Here, the husband and in-laws were ordered to return the dowry given to the bride by her family at the time of marriage (*The Independent*, 11 April 2000).

The body of family case law in this area is limited. In *Otobo v Otobo* [2002] EWCA Civ 949, the Court of Appeal accepted that it could take account of the parties’ cultural mores in making decisions on divorce and financial relief. It was held that where the court was dealing with a family with only secondary attachment to this jurisdiction and culture, due weight should be given to relevant cultural factors and the trial judge should not ignore the differential between what the wife might anticipate from a determination in London as opposed to a determination in her home country.

In *A v T (Ancillary Relief: Cultural Factors)* [2004] EWHC 471 (Fam), [2004] 1 FLR 977 the parties were Iranian. As per Iranian culture, the wife was given a marriage portion; a provision of capital for the wife from her husband which should, on marriage and thereafter, be her sole property, although part may be ‘returned’ to the husband on divorce. Mrs Justice Baron gave consideration to the settlement (including the marriage portion) that the wife would have received had the parties divorced in Iran, as well as the wife’s needs as considered under s 25 of the Matrimonial Causes Act 1973 (MCA 1973) including her need for financial independence and her ability to make a fresh start. This arguably led to a more generous settlement than might otherwise have been anticipated given the brevity of the parties’ marriage (a few months with only 7 weeks’ cohabitation).

Legal remedies: the way forward in England and Wales

Understanding and addressing dowry abuse in the context of abandonment – the harsh realities for women in countries like India and Pakistan – and reflecting on the ways in which other legal systems have addressed the problem, is vital. The status of marriage as a primary marker of women’s identity and the severe economic and social consequences of divorce and abandonment in India and Pakistan provide the social context within which women in those countries may receive favourable financial and maintenance decisions upon divorce. Conversely, financial remedy decisions in England and Wales are based upon factors such as the length of marriage, the parties’ needs and contributions. Under a strict approach, therefore, wives abandoned in their home countries often after very short periods of marriage, are unlikely to receive significant financial remedy awards in the English courts.

Evidently, there are significant gaps in English law when it comes to the recovery of dowry and abandonment. Making claims for breach of contract does not assist all women because not all religions or cultures treat marriage as a contract. Equally, pursuing civil claims (whether for breach

of contract or the return of goods) can be expensive and legal aid is unlikely to be available. Given that dowry represents a form of ‘pre-mortem inheritance’, sometimes the only significant financial endowment that women will receive from their parents, it should have a special significance for divorce settlements in England and Wales as it does in India where certain forms of dowry are recoverable – despite the illegality of dowry. In England and Wales, dowry/stridhan has no legal recognition and there appears to be no reported cases in which dowry/stridhan has been included in an application for financial relief under the MCA 1973.

To plug the ‘justice gap’ in England and Wales for women who have been unable to recover their dowries, the courts should give proper recognition to transnational marriage abandonment and to the unique status of dowry and stridhan as women’s property when addressing divorce and financial matters. The following measures/steps are suggested to safeguard women’s rights to financial remedies:

- Specialist training on dowry abuse for family law practitioners and the judiciary.
- Where property is established to be dowry/stridhan, there should be a non-rebuttable presumption of the return of the goods or equivalent value to the wife.
- Careful gathering of evidence for dowry/stridhan cases. For example the use of photos/videos of gifts and of wedding ceremonies where dowry/stridhan was given; statements from family members or other witnesses to the giving of dowry; receipts of gifts or expert valuations especially if the gifts consist of jewellery or land.
- In Muslim marriages, the dowry given is likely to be recorded in the *nikah nama* (marriage certificate) so this will be the evidential starting point.
- Making use of s 37 of the MCA 1973 where the dowry/stridhan has been retained by the husband or in-laws and the wife fears disposal of the assets. The courts should consider granting an injunction preventing the husband/family from disposing of the asset, or setting aside the disposition. The inherent jurisdiction of the High Court could also be invoked, particularly if the assets are abroad.
- Using expert evidence to establish which marital assets actually constitute dowry/stridhan and the social and economic consequences of the ‘loss’ of dowry/stridhan for the wife. This is likely to be highly significant if the woman is abandoned in her county of origin and there are no prospects of returning to the UK. We would submit that that judicial consideration of ‘needs’ and ‘fairness’ under s 25 of the MCA 1973 mandates consideration of these consequences.
- Recognising that a woman may only be in a position (emotionally, practically or financially) to pursue financial remedies months or years after separation, particularly if she has been the victim of long term abandonment. Currently there is no ‘limitation period’ for financial remedy applications, though delay may be taken into account by the court when determining an award.
- Where one party remains abroad, giving careful thought to the enforcement of any order of the English court through the reciprocal maintenance arrangements which exist between the UK and a number of countries including Pakistan and India;
- The Married Women’s Property Act 1882 may also have some residual significance where MCA 1973 applications cannot be made. One scenario is where the parties’ marriage is not recognised under English law.

More generally, in all abandonment cases, we would like to see an amendment to PD12J: Child Arrangements and Contact Orders: Domestic Violence and Harm so that it explicitly recognises transnational marriage abandonment as domestic violence, primarily because it occurs within a continuum of domestic violence that involves controlling and coercive forms of behaviour intended to deprive a woman of her financial and other rights. Cases must be allocated to the appropriate level of the judiciary throughout the duration of the case (see Anitha et. al., *Emerging issues for international family law Part I: Transnational marriage abandonment as a form of domestic violence* October [2016] Fam Law 1247).

In relation to divorce, the procedural rules governing the service of divorce petitions should be tightened. Greater judicial scrutiny must be brought to bear on cases where the petitioner claims that his foreign national wife has been served with the divorce petition or has failed to respond. Extending the time for the acknowledgment of service of a divorce petition would also be useful since it would allow sufficient time for an abandoned woman to seek legal advice and representation.

In addition, given the clear links between dowry and violence, the existing family law legislation on domestic violence can and should also be used to protect a woman from further abuse through the grant of a non-molestation order, occupation order and injunction under the Protection from Harassment Act 1996 (with a claim for damages).

Family law practitioners may also wish to encourage and assist clients to engage with police if there is prima facie evidence of criminal offences relating to dowry including but not limited to theft, fraud, blackmail, or the offence of holding another person in slavery or servitude under s 71(1a) of the Coroners and Justice Act 2009 (see *R v Safraz Ahmed* [Woolwich Crown Court, 1 April 2016]). The Criminal Injuries Compensation Scheme should also be considered.

Conclusion

Transnational marriage abandonment is an emerging and growing problem due to globalisation and increased flows of migration overlapping with marriage. This opens up transnational spaces within which perpetrators can commit, often with impunity, new forms of violence against women. The cross-jurisdictional nature of the phenomenon brings with it specific challenges in respect of protecting vulnerable women and children and safeguarding their fundamental rights and freedoms under international human rights law. All three articles in this series have highlighted the unique problems that arise for family law practitioners, and have made suggestions for the way forward. There is an urgent need to recognise transnational marriage abandonment as a form of domestic violence at all levels within the family justice system and for greater awareness of the issues raised (see Anitha et. al., *Part 1*, *ibid*). This includes the specific problem of dowry (discussed above) and the abandonment of women with and without their children and case law developments in this area (see Jahangir et. al, *Emerging issues for international family law: Part 2: Possibilities and challenges to providing effective legal remedies in cases of transnational marriage abandonment*, November [2016] *Fam Law* 1352).

Finally, and significantly, we are mindful that addressing the ‘justice gap’ in respect of the recommendations made in this series also depends on the co-operation of the immigration authorities and reform of immigration law and policy. The authors of these articles, together with other immigration and family law practitioners, are working with the Home Office to achieve this. Ultimately, if we are to take violence against women and children seriously and shorten the gap between prescription and reality, it is vital that that we develop a co-ordinated and holistic approach that brings together the state, the legal system and civil society organisations.

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