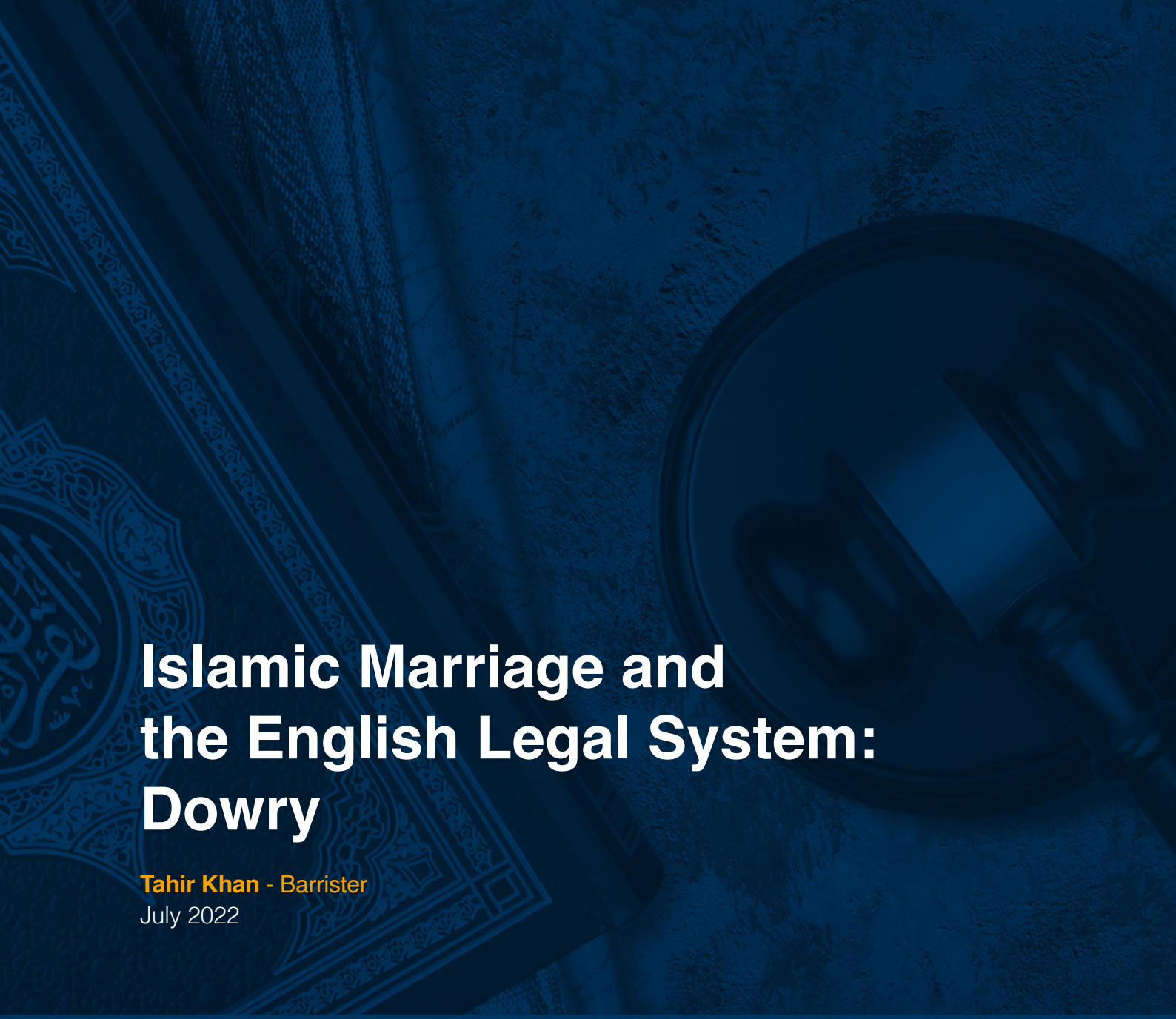

Islamic Marriage and the English Legal System: Dowry

Tahir Khan - Barrister

July 2022

clerksroom

Islamic Marriage and the English Legal System: Dowry

Bismillahir Rahmanir Raheem' بِسْمِ اللهِ الرَّحْمٰنِ الرَّحِيْمِ

Tahir Khan - Barrister
July 2022

Tahir Khan, barrister, provides some useful legal and practical guidance on dowry and its validity and recognition under English Law, together with some of the challenges and difficulties that face practitioners when confronted with such matters.

Introduction

In recent years there has been a proliferation of dowry cases that are being presented in front of English Courts today. The concept of Mahr has been replaced with that of dowry because of the synonymous usage of the words. Especially in South Asia, giving dowry is heavily practiced.

According to the Encyclopaedia Britannica's definition, dowry is the money, goods, or estate that a woman brings to her husband or his family in marriage and this practice has a long history in Europe, South Asia, Africa, and other parts of the world.

In Indian society, this practice has been responsible for many estranged marriages, violation of rights, and in some cases resulted in the bride's death. Despite the Dowry Prohibition Act 1961, Dowry is still widely practiced in India today. It is a "demanded gift" by the groom's family with the compliance by the bride's family who gives it to ensure that their daughter is taken care of in her new home. This abolished custom is only scope to extracting more dowries after marriage, resulting in mental and physical harassment and even suicide or murder of the bride. Dowry has become a burden on not only the bride but also her parents who often go out of their way to arrange for it.

Like with the absorption of other rituals and customs of Indian marriages, dowry is given and taken by Muslims. Indian Muslims, unfortunately, have been following this practice instead of giving Mahr. Since the practice of dowry, marriages are being prevented by guardians because of their inability to pay such huge dowries that are demanded. So even if one wants to get married, he cannot afford to and this really defeats the entire purpose of marriage.

The Prophet (peace be upon him) said: "The best of marriage is that which is made easiest," (Narrated by Ibn Hibbaan, classed as Sahih by al-Albaani in Sahih al-Jaami', 3300.) He also stated: "The best of mahrs is the simplest (or most affordable,") narrated by al-Haakim and al-Bayhaqi, classed as Sahih by al-Albaani in Sahih al-Jaami', 327. Therefore, even an iron ring can be Mahr.

The Asian dowry tradition in England is more prevalent amongst the Sikh community. In the Gujarati community, it seems to be the exception rather than the rule. In the Muslim community, the bridegroom's family provide gifts (Jahaiz) for the bride that are not usually reciprocated. Historically inhabitants of the Punjab, one of the most prosperous and fertile states in India and with a high Sikh population, enjoyed a high standard of living, irrespective of their caste and religion, and could afford to give a dowry. Today in the Punjab land prices are high, hence the importance of keeping the land within the family and avoiding its dissipation through the operation of the inheritance laws incorporated through the Hindu Succession Act 1956. In England, as Asians' standard of living has risen, coupled with their desire to advance in their community, the dowry has remained intact and very much part of the current traditions.

English Law and dowry

English law makes no specific provision for dowry. 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 his family, 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 difference between what the wife might anticipate from a determination in England / Wales as opposed to 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 considered 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 is a primary marker of women's identity. 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 the marriage, the parties' needs and contributions. Under a strict approach, therefore, wives abandoned in their home countries 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, therefore 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/stridhan as women's property when addressing divorce and financial matters.

The following measures 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. Another suggestion is the 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 Nikkah Nama (marriage certificate) so this will be the evidential starting point. Further, use should be made of s. 37 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.

Additionally, using expert evidence to establish which marital assets constitute dowry/stridhan and the social and economic consequences of the losses of dowry/stridhan for the wife can prove useful. 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 judicial consideration of 'needs' and 'fairness under s. 25 MCA 1973 mandates consideration of these consequences. It should be recognised 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 spouse 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 spouse 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 spouse 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 the 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(la) 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 transnational spaces within which perpetrators can commit, often with impunity, new forms of violence against their spouse. The cross-jurisdictional nature of the phenomenon brings with it specific challenges in respect of protecting vulnerable spouses 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 author of this article, together with other immigration and family law practitioners, is looking to work 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 we develop a co-ordinated and holistic approach that brings together the state, the legal system and civil society organisations.

Tahir M. Khan

contact the author:

Tahir M. Khan (2009)
Barrister

Contact:
Email: **khan@clerksroom.com**
Call: **01823 247 247**

Join Tahir on LinkedIn

clerksroom.com