The criminalisation of forced marriage

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At present, the law governing forced marriage is the Forced Marriage (Civil Protection) Act 2007 (the FMCPA 2007) which provides a specific civil remedy of forced marriage protection orders (FMPOs) designed to protect those threatened with or subjected to forced marriages. From November 2008 when the FMCPA 2007 came into force, and June 2011 only 339 FMPOs were recorded. However, these figures do not reflect the full scale of the abuse, as the Government's Forced Marriage Unit dealt with 1,735 forced marriage cases in 2010 whilst many more cases go unreported every year.

Due to public concern that the current legal initiatives are not tackling forced marriage, the Home Affairs Select Committee (HASC) on 17 May 2011 recommended criminalising forced marriage in their Eighth Report of Session 2010–2012. During the prime minister's Immigration speech on 10 October 2011, David Cameron publicly described forced marriage as ‘little more than slavery’. Following the prime minister's emotive speech, a forced marriage consultation was launched by the government on 12 December 2011 to 30 March 2012 to seek the public's views on two significant issues:

1. how criminalisation of breaches of FMPOs should be implemented and;
2. whether a specific criminal offence of forced marriage would help combat the practice.

In view of the government's forced marriage consultation this article first examines the government's proposal to criminalise breaches of FMPOs. Secondly, the article assesses the advantages and disadvantages of criminalisation by drawing upon the author's research findings. The author conducted an exploratory forced marriage research study at Cambridge University during 2010–2011 which was published as a book by Lambert Academic Publishing in 2011, Forced and Arranged Marriage Among South Asian Women in England and Wales: Critically Examining the Social and Legal Ramifications of Criminalisation. Thirdly, the article concludes by analysing whether an aggravated criminal offence of forced marriage could act as a compromise between pro- and anti-criminalisation of forced marriage.

Criminalising breaches of FMPOs

Currently breach of a FMPO is not a criminal offence. Breach is dealt with as a civil contempt of court punishable with a fine or a custodial sentence of up to two years' imprisonment. According to the HASC only five breaches have been recorded and only one breach of a FMPO resulted in a prison sentence. In this case, Lydia Erhire attended a committal hearing at the Royal Courts of Justice on 14 February 2010 and was sentenced to 8 months in prison by Mrs Justice Macur after breaching a FMPO when she refused to sign documents allowing for the repatriation of her son after he was allegedly taken from the UK to Nigeria against his will. With few recorded breaches of FMPOs, the HASC suggested there were inadequacies in the monitoring of compliance with FMPOs and a lack of effective action in cases of breaches. The HASC report stated: ‘it is not at all clear that the Act is wholly effective as a tool in protecting individuals from forced marriage and from family repercussions’.

In an attempt to deter forced marriage the government intends to criminalise breaches of FMPOs. At present the government is consulting on whether to model breaches of FMPOs on breaches of non-molestation orders set out in the Family Law Act 1996 or on the Scottish forced marriage legislation, the Forced Marriage (Protection and Jurisdiction) (Scotland) Act 2011, implemented
on 28 November 2011. Both models make breaches of an order a criminal offence. The main difference between the Forced Marriage (Protection and Jurisdiction) (Scotland) Act 2011 and non-molestation orders pursuant to the Family law Act 1996 is the maximum prison sentence. The maximum prison sentence under the Scottish legislation is 2 years as opposed to 5 years for breach of non-molestation orders. It is highly likely that the government will use breach of non-molestation orders as the model for breach of FMPOs, as the FMCPA 2007 is modelled on the provisions set out in the Family Law Act 1996 for non-molestation orders.

While it is evident that legislative initiatives aimed at preventing such marriages are imperative, the government must also ensure that the current and future breaches of FMPOs are monitored and recorded. After all it is possible that more breaches are being dealt with by the courts but they are not being recorded. To ensure an effective system of monitoring and recording of breaches of FMPOs, the government must work with statutory agencies and voluntary organisations which make third party FMPO applications to assess how they monitor compliance while also ensuring that breaches are brought back to court.

A specific criminal offence of forced marriage

Criminalisation of forced marriage is a provocative subject on which there are a wide range of strongly held views. The government therefore, has launched a forced marriage consultation in order to hear the views of victims and those who work in this area to ascertain whether forced marriage should become a specific criminal offence. In examining a number of competing arguments both for and against the criminalisation of forced marriage, this article draws upon the arguments outlined in the government's forced marriage consultation paper and the author's research findings (above).

Arguments against criminalisation

The government's forced marriage consultation outlines four persuasive arguments against criminalisation. First, a specific criminal offence of forced marriage might prevent victims from coming forward and asking for help due to fear that their parents or extended family members might be prosecuted. On the other hand, the author's research findings indicated that a victim-centred process of criminal law may empower victims, as it would provide them with a choice of pursuing a civil and/or a criminal remedy.

Secondly, there is a concern that parents may take their children abroad and force them to marry or hold them there to avoid prosecution in England. In reality, if such circumstances were to arise a third party, could apply for a FMPO ordering the return of the children to England where they would be safe from a forced marriage.

Thirdly, if charges for forced marriage could not be pursued or the defendant was acquitted there is a concern that there could be a negative impact on victims who might feel let down by the criminal justice system. It is true that failed prosecutions may negatively impact upon victims, but at present many victims feel terribly let down by the criminal justice system for not having a specific criminal offence of forced marriage which could enable them to gain justice for the wrong that they have suffered. Moreover, all victims involved in criminal proceedings are aware that proceedings may not result in a prosecution. Forced marriage victims however, may still be able to apply for a civil remedy, an FMPO to protect victims from threatened or actual forced marriages.

Fourthly, creating a specific criminal offence of forced marriage could cause duplication with the criminal offences that already exist and cover the criminal aspects of forced marriage, for example, kidnapping, imprisonment, child abduction, assault, rape, etc. Despite the current array of criminal offences they do not provide for victims of forced marriage who experience emotional and psychological force.

Arguments for criminalisation
There are a number of persuasive arguments outlined in the government's consultation 'for' the criminalisation of forced marriage. The arguments 'for' the criminalisation of forced marriage presented in the government's forced marriage consultation support the author's research findings. In fact the research study conducted by the author concluded with a clear preference for criminalisation. All the South Asian women interviewed by the author, several of whom were survivors of forced marriage, were strongly in favour of criminalisation; their arguments are outlined.

The respondents maintained that the legislation would have a symbolic function much like the legislation on Female Genital Mutilation, as it would send out a public message to perpetrators that forced marriage is socially unacceptable. They explained that criminalisation of forced marriage may have a deterrent effect as the prevailing code of honour and shame prevalent amongst the South Asian community may prevent families from breaking the law due to fear that prosecution could result in stigmatisation, shame and dishonour by the community. With key perpetrators fearing the shame and dishonour of criminal prosecution interviewees argued that victims could use the law as a bargaining chip to negotiate with their parents.

According to the respondents, in the longer term, criminalisation will challenge community understandings of forced marriage, as there is currently a fundamental problem in how legitimate consent and force are understood across cultures. The interviewees explained that community understandings of force do not always include emotional and psychological pressure. As a result there was a general consensus among interviewees that criminalisation may challenge the beliefs of those who perceive coercion – whether emotional, physical, financial or otherwise – to be acceptable.

Somewhat surprisingly, the criminal law at present is unable to challenge community perceptions that emotionally coerced marriages are acceptable, as they are sanctioned under current criminal legislation. Existing criminal offences do not provide for all of the aspects of forced marriage including the control, persuasion, pressure, manipulation and threats that many forced marriage victims experience over time and they do not offer justice to all or even to many victims of forced marriage. An interviewee, Aisha, was taken to Bangladesh at the age of 17 and subjected to emotional and psychological pressure over a number of weeks in order to force her to marry her cousin. Aisha's mother pretended to be ill, while her father held a knife to his throat. The immense pressure experienced by Aisha resulted in her capitulating in defeat and entering into a forced marriage. Although some criminal aspects of forced marriage – for example abduction, assault and rape – are already covered by existing criminal offences, Aisha's forced marriage would not be illegal under the current criminal law.

While the FMCPA 2007 and the nullity provisions under the Matrimonial Causes Act 1973 recognise that psychological, financial and emotional coercion gives rise to forced marriages, existing criminal offences do not. It is important to examine the definition of force under the FMCPA 2007 and the classification of duress under the MCA 1973 in order to appreciate the need for a criminal offence of forced marriage that provides for a range of coercive behaviour.

Force is defined widely in s 63A(6) of the FMCPA 2007 as meaning 'to coerce by threats or other psychological means'. The Act also recognises the cultural peculiarities of forced marriage, for instance, force may be directed at the victim, the perpetrator him or herself or another person (FLA 1996, s 64A(5)); thus an FMPO could be made where the victim's parents threatened to kill themselves, as in occurred in Aisha's situation. A broad definition of force reflects the fact that threats of familial exclusion and social ostracisation can be as powerful as physical abuse.

Interestingly, an examination of case law over the last twenty years reveals the judicial liberalisation of duress as a ground for nullity under the MCA 1973. The petitioner no longer needs to show that his or her will was objectively overborne by an immediate threat to 'life, limb or liberty' (Szechter (or se Karsov) v Szechter [1971] 2 WLR 170). A subjective test of whether the actual force destroyed his or her consent is now implemented by the courts (Hirani v Hirani [1983] 4 FLR 232, Mahmood v Mahmood [1993] SLT 589, Mahmud v Mahmud [1994] SLT 599, Sohrab v Khan [2002] SCLR 663, P v R (Forced Marriage Annulment: Procedure) [2003] 1 FLR 661 and NS v MI [2006] EWHC 1646 (Fam), [2007] 1 FLR 444). In
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NS v MI Munby J (as he then was) set out that very little pressure may be required where it was applied by a parent or other close relative using arguments based upon person affection or duty, religious beliefs, powerful social or cultural conventions or asserted social, familial or domestic obligations.

A wide definition of duress employed in nullity provisions under the MCA 1973 and a broad meaning of force under the FMCPA 2007 was motivated by an appreciation of the vast array of behaviour by which a person can be forced into marriage. Recognising the seriousness of psychological and emotional coercion, the government launched its consultation on whether the current cross-government definition of domestic violence should be widened to incorporate coercive control, which includes emotional abuse, psychological control, forced social isolation, financial control and verbal abuse.

Considering the seriousness of psychological and emotional coercion, a specific criminal offence of forced marriage is needed in order to encompass the wide spectrum of coercive behaviour that may be exerted over a long period of time rather than as a one-off violent attack. Ultimately this will fill the current gap in criminal law by enabling the prosecution of perpetrators for emotionally forcing victims into marriage. This wide definition of force would be comparable to the broad classification of ‘force’ currently employed by the FMCPA 2007 and the liberal meaning of ‘duress’ in nullity proceedings. More importantly, Norway’s innovative legislation highlights that it is possible to include emotional coercion as a key element of a criminal offence of forced marriage. The Norwegian Criminal Code (Art 222 2) defines forced marriage as involving ‘recourse to violence, deprivation of liberty, undue pressure or other unlawful behaviour, or through the threat of such behaviour’. A specific criminal offence of forced marriage that provides for emotional and psychological coercion will provide justice for victims who do not have access to existing criminal law remedies due to a prioritisation of physical and sexual violence.

Aside from the failure of existing criminal offences to recognise emotionally coerced marriages as a crime, according to the interviewees current criminal legislation also fails to recognise the gross abuse of human rights caused by the act of forced marriage itself. The difficulty with labelling what is otherwise a forced marriage as another criminal offence, for example imprisonment or assault, is that it is distorts and conceals the nature of the victim’s forced marriage experience. Interviewees argued that the suffering of women subjected to forced marriage is qualitatively different from those not labelled ‘wife’ or ‘wife to be’. By labelling a woman ‘wife’ or ‘wife to be’ the perpetrator is expressing an ongoing marital relationship which carries cultural implications of ownership and control, including control of the wife’s sexuality, her movements and domestic labour including child rearing and pregnancy. Often women and girls are forced to associate with and in some cases live together with men who they may fear or despise. Serious psychological and moral suffering follows actual and threatened forced marriages. It is possible to compile a list of the effects on victims that are specific to the conduct contemplated within threatened forced marriages or carried out within actual forced marriages:

- distress caused by the acts to force the victim into marriage, for instance threats of social isolation or threats of violence against the victim or the victim's family;
- rearing a child produced from the forced marriage, including children from forced pregnancies;
- binding the victim for life to a person who has committed grave crimes, such as rape during the course of the marriage;
- depriving the victim of the opportunity for consensual marriage as a fundamental human right and the corresponding psychological injury to the victim;
- fear of being ostracised from the victim's community if the victim refused to enter a forced marriage or left a forced marriage.

Clearly, forced marriage forms a distinct inhumane act of sufficient gravity that it should be considered as a separate crime distinct from existing criminal offences which can be prosecuted separately. Considering the ramifications of forced marriage upon victims, interviewees demanded
that perpetrators be brought to justice by prosecuting them for the act of forced marriage itself along with any other offence that took place. The focus should therefore be on a lacuna in the law which a specific criminal offence of forced marriage can address.

Statistics suggest that a criminal offence of forced marriage would not be superfluous and would result in a number of prosecutions. The approximate number of defendants who would be prosecuted for forced marriage in the first year of the offence would be 20 according to the CPS data (see the Forced Marriage Criminalisation Consultation Impact Assessment, 9 December 2011, p 13). Successful prosecutions are likely to materialise because criminalisation will clarify what steps need to be taken in forced marriage cases by public sector employees while also making it easier for them to take action against perpetrators for the act of forced marriage. For example, prosecuting other criminal offences separately from forced marriage itself recognises that the perpetrator of violence within the marriage is not necessarily the person responsible for the forced marriage; often third parties – family members of the proposed spouses – can be the perpetrators of the forced marriage. A specific criminal offence of forced marriage will be more effective than making use of a patchwork of laws that are not specifically designed to tackle forced marriage.

To ensure that a criminal offence of forced marriage is effective and enforceable in practice, it is essential that the legislation, if implemented, provides for a threatened and an actual forced marriage, and of course it must provide for defendants who aided and abetted the forced marriage. Further, the offence must be extra-territorial to enable the prosecution of defendants for threatened and actual forced marriages that occur abroad. Recognising the importance of an extra-territorial offence, the Austrian Government announced plans in November 2011 to amend their existing forced marriage offence to make it extra-territorial. Affirming the importance of an extra-territorial offence of forced marriage, evidence in England indicates that forced marriages occur transnationally. For instance, 21 applicants out of the 116 FMPO applications, were already abroad at the time of the application. Fortunately FMPOs obtained under the FMPA 2007 (and even non-molestation orders obtained under the Family Law Act 1996) extend to conduct outside England and Wales. Ultimately an extra-territorial offence of forced marriage would enable the prosecution of defendants who are ‘ordinary residents’ of the UK and have engaged in unlawful conduct to bring about a forced marriage abroad. In the event that an extra-territorial offence of forced marriage was implemented the government may consider working with key countries where transnational forced marriage is rife to implement protocols or treaties that will place a duty on other jurisdictions to return perpetrators of forced marriage to England. This may inadvertently make forced marriage a priority to combat in other jurisdictions.

**Aggravated offence**

A proposed compromise between pro- and anti-criminalisation of forced marriage may be an aggravated criminal offence of forced marriage. This would provide the courts with enhanced sentencing powers, reflecting the gravity of forcing a person to marry against their will. However, an aggravated offence does not assist victims who are emotionally pressurised into marriage, as there is no existing criminal offence to enable the prosecution of perpetrators for emotional coercion.

**Conclusion**

It will be interesting to hear the public’s views on how to enforce the criminalisation of breaches of FMPOs and to discover whether the public are in favour of the creation of a specific criminal offence of forced marriage. However, this article argues that a specific criminal offence aimed at preventing such marriages is imperative. Criminalisation is important to many victims, as it can provide a measure of redress, serve as a public acknowledgement of a wrong committed, deter the practice and fulfil a loophole in the law by enabling the prosecution of perpetrators for emotionally coercing victims into marriage. Although it is essential that before the government reach any decision regarding the criminalisation of forced marriage, more research is undertaken
to ascertain the impact of criminalisation in Germany, Norway, Austria, Belgium and Denmark as well as in many other countries where forced marriage has been outlawed.

To generate an effective legal response to combat the causes and consequences of forced marriage, relevant professionals including teachers, social workers and the police force, must be provided with the relevant knowledge of existing legislation. Moreover, more work must be done to challenge the practice within communities, to support education and awareness and to ensure the provision of refuge spaces. It is imperative that the government's response towards legal intervention is accompanied by a diverse range of responses to the problem of forced marriage, including providing specialist services with additional funding. Criminalisation of forced marriage will only tackle the problem if criminalisation is supported by a multi-faceted approach.

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