

## THE PHENOMENON OF FORCED MARRIAGE

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Abducted, abused, threatened and fearful for their lives and future, victims of forced marriage are facing these horrors every single day in many countries around the world. Coerced and betrayed by their closes relatives, they have no real chance of escape and no hope for freedom. They are forced into marriage without the right to say “no”. The institution of marriage, which everyone associates with new life and happiness, for them turns into a life sentence for the sake of tradition and community honour. Forced marriages constitute a grave violation of fundamental human rights recognised by numerous international instruments and treaties. Everyday, under the cover of culture and traditional practice, thousands of young women and girls are forced to live in conditions of servitude and sacrifice their life. They are promised, sold or given into a marriage, which often amounts to servitude and a contemporary slave practice and so has nothing in common with marriage as such. Therefore it is crucial to scrutinize this problem and explain why this kind of practice can still be present on such a large scale.

### DEFINITIONS OF FORCED MARRIAGE

The term “forced marriage” is used as an umbrella term, which covers different forms and practices. Therefore, for a better understanding of the

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problem of forced marriage, it is essential to look first at the institution of marriage as such. There are several singular definitions and conceptions of marriage, which can be found in different cultures, regions and religions but the core of the issue always signifies the union between two cohabiting spouses. Union seems to be one of the most important and fundamental institutions of civil societies around the world. The Parliamentary Assembly of Council of Europe (CoE) defines the institution of marriage as “a solemn act whereby two persons found a union between themselves, the conditions, effects and dissolution of which are governed by statutory provisions in each country”<sup>1</sup>. Union, which should be understood as an act displaying consent and commitment, on the part of both future spouses, to the building of a life-long relationship, with love being a fundamental component of the institution<sup>2</sup>. From the legal point of view marriage is understood as a legal contract between two spouses creating the basic unit of every society. The classical jurist Modestinus defined marriage as “the union of men and woman, a lifelong community, the sharing of that which is subject to human law and that which is subject to divine law”<sup>3</sup>. The same definition can be found in key texts of Roman law and in the institutes of the Emperor Justinian, which form the core of medieval canon law, and were spread in the Christianized West and colonised America<sup>4</sup>.

When we try to define forced marriage, we can find several definitions, depending of the different elements and factors involved. Nevertheless, all these definitions contain the core of the problem: namely lack of free and full consent. The first international human rights instrument which provided that rule was the Universal Declaration of Human Rights (UDHR) of 1948 which in Art. 16 (2) explicitly says that “Marriage shall be entered into only with the free and full consent of the intending spouses”<sup>5</sup>. The

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<sup>1</sup> CoE, Parliamentary Assembly, Report of Committee on Equal Opportunities for Women and Men *Forced marriage and child marriage*, doc. 10590, June 2005 para II A 11.

<sup>2</sup> Ibidem.

<sup>3</sup> G. Lind, *Common Law Marriage, A Legal Institution for Cohabitation*, Oxford University Press, New York, 2008, p. 32.

<sup>4</sup> R. A. Edwige, *Forced Marriage in Council of Europe Member States, Comparative study of legislation and political initiatives.*, CoE, CDEG (2005) 1, Strasbourg, 2005, p.13.

<sup>5</sup> See: Universal Declaration of Human Rights, G.A., art 16 (2), UN Doc. A/810 (Dec.12.1948).

same principle is reiterated in International Covenant on Civil and Political Rights (ICCPR) at Article 23(3)<sup>6</sup>. However the complex legal definition of this phenomenon has been expressed in the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages which provides in Article 1 that “no marriage shall be legally entered into without full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law”<sup>7</sup>. Concluding, we should define forced marriage as a union between two individuals, of whom at least one has not provided valid and free consent for this life-long commitment. However, there are several other elements, which might be added to the definition of forced marriage and are inseparably linked with this phenomenon, mainly coercion and duress<sup>8</sup>. Duress is defined, as strictly physical confinement, when due to the threat of harm the person is compelled to do something against his or her will<sup>9</sup>. Similarly coercion is described as compulsion by physical force or threat of physical force<sup>10</sup>. Therefore, an act such as signing a will cannot be legally valid if done under coercion. Consequently, since a valid marriage requires voluntary consent, duress or coercion are grounds for invalidation of the marriage<sup>11</sup>. Moreover, this practice includes fraud, threat, deception and “abuse of power or of a position of vulnerability” which Art. 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) defines as any situation in which the person involved has no real or acceptable alternative other than to

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<sup>6</sup> International Covenant on Civil and Political Rights Art 23(3), “*No marriage shall be entered into without the free and full consent of the intending spouses*”, December 1966, 999 U.N.T.S. 171.

<sup>7</sup> Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, 9 December 1964, 521 U.N.T.S. 231.

<sup>8</sup> D. Bradley, *Duress and Arranged Marriages*, “The Modern Law Review”, Vol. 46, no 4, July, pp. 500-501.

<sup>9</sup> Black’s Law Dictionary, B.A. Garner, Eight Edition, 2004, p. 542.

<sup>10</sup> *Ibidem* p. 275.

<sup>11</sup> *Ibidem*.

submit to the abuse involved<sup>12</sup>. This article outlines that many people who are abducted, deprived of freedom or trafficked are under the influence of someone to whom they are vulnerable. It might be person who has influence over the victim such as parents, who often play a crucial role in case of forced marriages. The victim is not able express her or his will and often is subjected to direct physical violence or stress, emotional pressure and moral blackmail which are used as tools to coerce them into a commitment which they do not desire.

Forced marriage is certainly not a new phenomenon. Marriages arranged by families or marriage contracts without the free will of spouses have been a custom all over the world for centuries<sup>13</sup>. The issue of forced marriage has appeared on the public agenda in Western Europe at the end of last century and has gradually been recognised as an abuse of human rights in many United Nation (UN) treaties and other international documents<sup>14</sup>. In 1995 the UN General Assembly for the first time introduced this subject to the agenda and framed it in the context of trafficking in human beings<sup>15</sup>. Subsequently this issue was mentioned in several international documents<sup>16</sup>. In 1997 forced marriage was also included in the resolution of the Commission on the Status of Women in Resolution No 41/5. Two years later the Commission on Human Rights recognised forced marriage as an issue of trafficking in human beings and similar recognitions were made in the following year<sup>17</sup>. Since 2000 forced marriage has been of-

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<sup>12</sup> See: Protocol to Prevent Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted by GA Resolution A/RES/55/25, November 2000.

<sup>13</sup> S. Huda, *Report of the UN Special Rapporteur on the human rights aspect of the victims of trafficking in person, especially women and children*, A/HRC/4/23/2007, January 2007, para 29.

<sup>14</sup> UN, Economic and Social Council, *Forced Marriage of the Girl Child, Report of Secretary General*, E/CN.6/2008/4, December 2007, para 10.

<sup>15</sup> See: UN General Assembly Resolution *Traffic in women and girls* A/RES/50/167, December 1995.

<sup>16</sup> Ibidem.

<sup>17</sup> See resolutions 1999/40, 2000/44, 2001/48, 2002/51 and 2004/45, UN, Economic and Social Council, Commission on status of woman, *Forced marriage and girls marriage*, Report of Secretary General, E/CN.6/2008/4.

ficially classified as a form of violence against women and has been included within the framework of the elimination of violence against woman<sup>18</sup>. Recently this issue has provoked much controversy and is a subject of heated discussion all over the world.

In order to better understand the phenomenon of forced marriage it is crucial to see this practice as a part of a dynamic process of cultural transformation and implementation of new and changing environments<sup>19</sup>. First and foremost, it must be underlined that this phenomenon is strictly related to tradition and a sense of identity in many communities<sup>20</sup>. Even if it was usually thought that forced marriage mainly affected South Asian communities, research undertaken by Bristol University has shown that this problem actually involves a wide range of communities outside the South Asian Diaspora and has a trans-national aspect.<sup>21</sup> Forced marriages are taking place within different traditions, cultures, religions and nationalities around the world. We can find cases of this practice inside fundamental religious communities in the UK, but also in some mainland Chinese, Eastern European, Turkish or Armenian communities<sup>22</sup>. This issue also occurs within African communities, particularly in Sierra Leonean<sup>23</sup>, Su-

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<sup>18</sup> UN Commission on Human Rights resolutions 2000/45, 2001/49, 2003/45, 2004/46 and 2005/41 (see Official Records of the Economic and Social Council, 2000, Supplement No. 3, and corrigendum (E/2000/23 and Corr.1), chap. II, sect. A; *ibid.*, 2001, Supplement No. 3 (E/2001/23), chap. II, sect. A; *ibidem.*, 2003, Supplement No. 3 (E/2003/23 and Corr.1); *ibidem.*, 2004, Supplement No. 3 and corrigendum (E/2004/23 and Corr.1), chap. II, sect. A; *ibidem.*, 2005, Supplement No. 3 and corrigendum (E/2005/23 and Corr.1), chap. II, sect. A.

<sup>19</sup> Y. Samad, J. Eade, *Community Perception of Forced Marriage*, Community Liaison Unit, University of Bradford and University of Surrey Roehampton, 2002, p. 35.

<sup>20</sup> *Ibidem.*

<sup>21</sup> M. Hester, K. Chantler, G. Gangoli, J. Devgon, S. Sharma, A. Singleton, *Forced marriage: the risk factors and the effect of raising the minimum age for a sponsor, and of leave to enter the UK as a spouse or fiancé(e)* University of Bristol 2008, p 3.

<sup>22</sup> *Ibidem.*

<sup>23</sup> In May 2004, the Special Court for Sierra Leone included forced marriage in its statute as a crime against humanity as a response to the thousands of women who were abducted and forced to become “*bush brides*”. After a four-year trial, in February 2009 the Special Court for Sierra Leone convicted three former leaders of the Revolutionary United Front (RUF) of war crimes and crimes against humanity, and forced marriage. The court

danese, Mozambiquean and Afro-Caribbean communities<sup>24</sup>. In many cases these marriages are conducted to limit or prevent children from traditional backgrounds or communities being influenced by the 'western' model of life. In the past few decades the phenomenon of forced marriage has come to the attention of numerous states worldwide. Each of them has chosen different strategies to address this problem. Some governments undertook the leading role and adopted specific legislation in order to restrain the practice of forced marriage, while others have relied only on specialised NGOs providing support for the victims<sup>25</sup>. However research on the UK initiatives appears to be the most accurate for addressing the core of the problem due to the involvement and commitment that UK authorities undertook in investigating and combating the problem of forced marriage in that country. Despite the range of communities that practice forced marriage, UK policy predominantly focuses on South Asian and Muslim communities.<sup>26</sup> The majority of cases concerning that dilemma in this country concern women from Bangladeshi and Pakistani communities<sup>27</sup>. In 2003 the British government established the Forced Marriage Unit (FMU) at the Foreign and Commonwealth Office to provide assistance to the residents of the UK who are at risk of being forced into marriage with

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set legal precedent by considering forced marriage as a crime against humanity, separate from other forms of sexual violence and specifically sexual slavery. See: Integrated Regional Information Networks (IRIN), "*Sierra Leone: 'Forced Marriage' Conviction a First*," 26 February 2009. In January 2009 The Customary Marriage and Divorce Act was approved by Sierra Leone's President. This new law promotes women's rights by recognizing customary or traditional marriages that have not been registered by the state. The main aim of this new regulation is the protection of women from the abuses that occur as a result of marriages not being registered by giving them the same legal recognition as civil, Christian, and Muslim marriages. The Act also makes forced marriage illegal and sets 18 as the minimum statutory age for marriage. See: AfricanLoft, *Sierra Leone Endorses Marriage Act*, 27 January 2009.

<sup>24</sup> Y. Samad, J. Eade, *Community Perception of Forced ...* op. cit., p. 35.

<sup>25</sup> N. Dostrovsky, R. Cook, M. Gagnon, 2007, *Annotated Bibliography on Comparative and International Law Relating to Forced Marriage*, Canada Department of Justice, August 2007, p. 3.

<sup>26</sup> G. Gangoli and M. McCarry, *Criminalising Forced Marriage: Debate in the UK*, Justice Matters, "Criminal Justice Matters" Issue 74, December 2008, p. 44.

<sup>27</sup> Many of those victims are dual nationals of both countries.

a spouse overseas<sup>28</sup>. In 2007 the government also implemented the civil regulation Forced Marriage (Civil Protection) Act that will be scrutinized below.

## VICTIMS OF FORCED MARRIAGE

Forced marriage should be understood as a manifestation of discrimination against women and a violation of their fundamental rights. Women are the group under the greatest risk of being coerced into marriage against their will<sup>29</sup>. However both men and women can be forced into marriage. Latest surveys conducted by the British government have shown that young girls and women constitute the overwhelming majority of victims<sup>30</sup>. This group is generally more susceptible to family pressure and will suffer more severe consequences if they try to resist the family will. They may find it hard to defend themselves against pressure and duress, which they are subjected to. As opposed to men, women have a smaller chance of being able to resist forced marriage and stand up for their rights. According to FMU only 15% of the cases involve men as victims<sup>31</sup>. The majority of male cases concern young boys and gay people being forced to marry to uphold the family's honour and cover the true sexual orientation of the groom<sup>32</sup>.

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<sup>28</sup> The Forced Marriage Unit (FMU) conducts research and consultation, compiles statistics, proposes legislation and supports victims of forced marriage. The FMU works both outside of the UK with embassy staff to help and rescue victims held captive, raped, or forced into having an abortion, as well as in the UK by providing extensive guidelines for, police, educators, social and health workers on how to provide services for cases of forced marriage. The FMU also cooperate with UK visas and Immigration Service to prevent visas being granted on the basis of forced marriage. See also: British Home Office, *Marriage to Partners from Overseas: A Consultation Paper*, London: Home Office, 2007 p. 5.

<sup>29</sup> M. Enright, *Choice, Culture and the Politics of Belonging: The Emerging Law of Forced and Arrange Marriage*, "The Modern Law Review", Vol. 72, No.3, May 2009, p. 332.

<sup>30</sup> British Home Office, *New guidance issued as reports of forced marriage increase*, Foreign and Commonwealth Office, London 2009, p. 4.

<sup>31</sup> British Home Office, *Dealing with Cases of Forced Marriage: Guidance for Education Professionals*, Foreign and Commonwealth Office, London, 2005, p. 3.

<sup>32</sup> Tendler, S., *Bridegrooms Who Marry in Fear*, "The Times", 21 March 2005.

The surveys conducted by FMU in July 2009 report approximately 300 cases per year primarily among the Muslim and Shih communities. 70% of the reported cases involved people of Pakistani origin, 11% were of Bangladeshi origin and others are linked to countries such as India, Turkey, Middle-Eastern and African origin<sup>33</sup>. Although 90% of reported cases of forced marriages involve Muslims it should be stressed that it is not just a Muslim problem<sup>34</sup>. We can hear more about these particular communities because the taboo is beginning to be broken and more victims are speaking out; other communities from China, the Balkans or Africa are only now facing up to the same reality<sup>35</sup>. 85% of the cases are concerning females between the ages of 16-24. As the reports show, 33% of them involved young people under the age of 18, many of whom have been promised into marriage at ages as young as eight<sup>36</sup>. However due to the clandestine nature of the activities in question it is difficult to find reliable and accurate statistics on the scale of forced marriage anywhere in the world. The UN General Assembly highlighted forced marriage as an under-documented form of violence against the women<sup>37</sup>. The numbers of cases, which are reported each year are the tip of the iceberg and the majority of cases still go unreported and remain in the grey zone<sup>38</sup>. While the full scale of the problem is not known, reported cases are rising year on year. In 2008 the FMU provided advice or support in 1618 cases, which rose to 1682 in 2009 and totaled 1735 in 2010<sup>39</sup>.

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<sup>33</sup> British Home Office *New guidance issued as reports of forced marriage increase*, Foreign and Commonwealth Office London, 2009 p. 10.

<sup>34</sup> T. Bouquet, *Running away from a forced marriage*, The Times, 8 March 2008.

<sup>35</sup> British Home Office, *New guidance issued as reports of forced marriage increase*, Foreign and Commonwealth Office, London 2009, p. 4.

<sup>36</sup> Ibidem.

<sup>37</sup> UN General Assembly, *In-depth study of all forms of violence against women*, Report of the Secretary-General, A/61/122/Add.1 and Corr.1, para. 222.

<sup>38</sup> UN, General Assembly, *Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children*, A/HRC/4/23 and Corr.1 para. 29.

<sup>39</sup> British Home Office, *Forced Marriage Consultation*, London, December 2011, p. 5.



## FACTORS CONTRIBUTING TO FORCED MARRIAGE

It is impossible to give an accurate whole picture of the phenomenon of forced marriage. The problem is complex and multifaceted and may take various forms depending on the circumstances. Usually the form of this practice depends on several factors: such as the community in which the victim is living, culture within that community, family relationships or a notion of tradition within the family<sup>40</sup>. Structural factors, particularly poverty, migration, gender discrimination and asylum also play a crucial role in this worldwide affliction<sup>41</sup>. The most frequent of those factors is a strong tradition and culture within the communities where forced marriage occurs. To understand the core of the problem we must be aware that the context of marriage has a different dimension in ethnic communities and “Western” tradition<sup>42</sup>. In all religions marriage is considered as an important institution, which integrates two families. However particularly in Muslim communities this institution constitutes an important union, which brings the honour to the family, and is considered as a tool to uphold tradition and guard culture. Often this union is used to limit or prevent the exposure of young people to ‘western’ culture, “guaranteeing an honourable life for the child” and “preventing unsuitable relations” between young community members<sup>43</sup>. Marriage is seen as the easiest way to save a family’s honour when “misbehaviour” such as a relationship with somebody outside the community is noticed in the young offspring’s behaviour. Inter-religious and inter-ethnic marriages are often not tolerated or accepted in Muslim communities. The UN Special Reporter noticed the trend in communities of second-generation immigrants where young women and girls compose the group whose members are increasingly coerced into

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<sup>40</sup> Hester, Chantler, Gangoli, Devgon, Sharma & Singleton, 2008 p. 4. M. Hester, K. Chantler, G. Gangoli, J. Devgon, S. Sharma, & A. Singleton, *Forced marriage: the risk factors and the...op. cit.* p. 4.

<sup>41</sup> Ibidem.

<sup>42</sup> P. Gagoomal, *Margin of Appreciation for Marriages of Appreciation: Reconciling South Asian Adult Arranged Marriages with the Matrimonial Consent Requirement in International Human Rights Law*. “The Georgetown Law Journal”, Vol. 97, 2009, pp. 597- 598.

<sup>43</sup> G. Strassburgen, *Forced Marriage in Germany: An Outline of the Problem, Active Against Forced Marriage*: Documentation from Conference, Hamburg, 13 June 2007, p.14.

marrying against their will<sup>44</sup>. Also CoE observes that the phenomenon of forced marriage arises mainly in migrant communities and underlines the fact that “under the cloak of respect for culture and tradition of migrant communities, there are authorities which tolerate forced marriage and child marriage although they violate the fundamental rights of each and every victim”<sup>45</sup>. With regards this same recommendation, the Parliamentary Assembly refers to the UN General Assembly Resolution 843 declaring that certain customs, ancient laws and practices relating to marriage and family are inconsistent with the principle set forth in the Charter of the UN and UDHR which contain the fundamental human rights of the individual<sup>46</sup>. Therefore any of those practices, which under the cover of preservation of tradition constitute a brutal violation of individual’s rights, will not be tolerated and cannot be justified in accordance with international human rights standards.

Poverty and unemployment are another important aspect of forced marriage<sup>47</sup>. People from poor countries are sometimes willing to marry their children to somebody from a richer country. They believe that this union would give their children a chance for better life and also provide some financial backup and support for the remaining family. In certain communities where the marriages in question are taking place, women are regarded as financial and social benefits for the family. They may often feel obliged to support the needs of their family and even to sacrifice their life for the good of the family<sup>48</sup>. This factor is closely linked with economic migration, smuggling and the system of asylum, which can also cause forced marriages. In these specific circumstances marriage may be used to facilitate and conceal the crime of smuggling of illegal immigrants or help them to obtain a residence paper or visa of another country. Some women

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<sup>44</sup> See: UN, Economic and Social Council, *Ninth Report and Final Report on The Situation Regarding the Elimination of Traditional Practices Affecting the Health of Women and the Girl Child*, E/CN.4/Sub.2/2005/36, paras: 34, 82 and 85.

<sup>45</sup> CoE, *Forced Marriage and Child Marriage* Resolution 1468, October 2005, para 3.

<sup>46</sup> Ibidem, see also UN General Assembly Resolution 843 (IX), December 1954.

<sup>47</sup> S. Huda, *Report of the UN Special Rapporteur*, A/HRC/4/23/2007, para 18.

<sup>48</sup> E. Warner, *Behind the Wedding Well: Child Marriage as a Form of Trafficking in Girls*, “Journal of Gender, Social Policy & The Law”, Vol. 12, 2004, p. 241.

choose to marry in order to migrate and may use a brokering agent to find an overseas partner. In some cases this brokering system may leave some women vulnerable to abuse because of the high and repetitive brokerage fees and blackmail. However, as the UN Special Reporter noted, this system should not be confused with forced marriage and trafficking unless consent to the marriage is absent<sup>49</sup>.

#### DISTINCTION BETWEEN FORCED AND ARRANGED MARRIAGE

To understand the phenomenon of forced marriage first and foremost it is crucial to underline differences and similarities between arranged and forced marriage. In many cases the distinction between these two customs is tenuous<sup>50</sup>. Nevertheless, closer examination of individual cases can show the visible dichotomy between these two. The general meaning of forced marriage involves coercion, lack of free consent and indicates involuntary commitment for at least one of the spouses while arranged marriage may be more ambiguous and multifaceted. The second one has a long tradition and plays a crucial role in many communities in the preservation of tradition and culture<sup>51</sup>. The difference arises in the contrast between the definitions of consent and coercion<sup>52</sup>. While in cases of forced marriage consent is never present, the same is not true for an arranged marriage. On the contrary, in some cases the spouses are actually willing to marry the person chosen by the family. The absence of coercion and duress is necessary and required for a practice to constitute an arranged marriage<sup>53</sup>.

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<sup>49</sup> The Global Alliance Against Traffic in Women (GAATW), *UN General Assembly, Implementation of general Assembly Resolution 60/251, 15 March 2006, Human Rights Council Written statement submitted in special consultative status, A/HRC/5/NGO/36*, 7 June 2007, p. 3.

<sup>50</sup> S. Huda, *Report of the UN Special Rapporteur*, A/HRC/4/23/2007, para 26.

<sup>51</sup> British Home Office *A Choice by Right: Report of the Working Group on Forced Marriage*, London, June 2000 pp. 10-11.

<sup>52</sup> A. Abdullahi, „*Forced Marriage*”, 2000, p. 2.

<sup>53</sup> *Ibidem*.

The problem of legal clarification and legislative initiative concerning the issue of forced marriage comes from the delicate balance between respect for cultural diversity, heritage and human rights. As was shown above, in many communities forced marriages are often wrongly interpreted solely as a form of religious or cultural tradition, whereas this phenomenon has multiple dimensions. Therefore, an effective legal framework is needed to stop and prevent forced marriage from taking place. The UK was one of the first European countries that adopted a specific law concerning forced marriage.

In June 2006 the UK Government presented a civil legislation project to protect the victims of the offence. The UK Government introduced the Forced Marriage (Civil Protection) Act 2007, which clearly prohibits any practice of forced marriages. This Act provides a specific civil remedy to prevent forced marriage and to assist victims where a marriage has already taken place<sup>54</sup>. The regulation has sent a strong and important message to society that this practice is totally unacceptable and should not be tolerated under any conditions even based on cultural and traditional motives. The Forced Marriage Act focuses mostly on the prevention of potential victims becoming actual victims, and has widened the British courts' power to apply civil remedies to assure their protection without criminalising members of the family. The 2007 Act empowers courts to order those who are forcing another into marriage to stop this practice or impose requirements upon them. Breach of the order is punishable with a fine or a custodial sentence of up to two year's imprisonment<sup>55</sup>. The Civil Act targets not only direct offenders but also the individuals who aid and abet forced marriage or persuade others to carry out this practice. As was mentioned before, forced marriage often taken place within wider families and communities who may often be the instigators of this offence. Therefore this law also ensures that not only the direct perpetrators but also the group of individuals who are in some way involved in this offence will bear responsibility for

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<sup>54</sup> British Home Office, *Forced Marriage Consultation*, London, December 2011, pp. 6-7.

<sup>55</sup> *Ibidem*.

incitement<sup>56</sup>. This regulation gives Courts wide discretion to exercise their powers whenever there is a need to secure health, safety and well being of the victims.

The application may be handed over directly by the victims seeking the protection. However considering the fact that in majority of cases victims are isolated and imprisoned within the family home they may not have access to the court and may only have limited opportunity to communicate with people from outside the family. Therefore, the regulation allows submission of the application on behalf of the victim by people who are connected with her in a particular way e.g. close friend, boyfriend or a teacher. In addition, Article 63C 2(b) also allows a “*relevant third party*” to make the application. According to the Lord Chancellor this provision will let charitable and voluntary organisations help and associate with victims of forced marriage, as well as with the Governmental FMU or local authorities<sup>57</sup>. However in this case the victim must be served with a copy of the application and have a possibility of being incorporated as a party to the proceeding<sup>58</sup>. Moreover the Civil Act provides victims with a chance to obtain redress for the legal and financial consequences of forced marriage. The key remedy in the civil regulation is the injunction – an order made by the Court prohibiting certain acts that may lead to a forced marriage. Injunctive relief<sup>59</sup> should be seen as a one of the most important features of the Civil Act which will allow a victim to seek effective and rapid protection to prevent forced marriage practices and to stand for their rights. It may also help the reconciliation process with the family<sup>60</sup>. Additionally a victim may also issue civil proceedings to obtain

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<sup>56</sup> Liberty, *Liberty's Briefing Forced Marriage Civil Protection Bill*, January 2007, p. 7.

<sup>57</sup> Article 63C 79(c) of the Forced Marriage Act 2007 says: “relevant third party: means a person specified, or falling within a description of person specified, by order of the Lord Chancellor. See also: G. Vallance - Webb, 2008, *Forced Marriage: A Yielding of the Lips Not the Mind*, “Family Law”, Vol. 38, June 2008, p. 568.

<sup>58</sup> Ibidem.

<sup>59</sup> *Injunctive relief* is an order given by a court telling a party to refrain from doing something, or in the case of a mandatory injunction, to carry out a particular action. Usually injunctive relief is granted only after a hearing at which both sides have an opportunity to present testimony and legal arguments.

<sup>60</sup> Liberty, *Liberty's Briefing Forced Marriage...op.cit.*, January 2007, p. 8.

compensation in instances where an injunction cannot provide an effective remedy. Taking the above-mentioned into account we can conclude that this new civil regulation provides significant protection and remedies for the victims of forced marriage.

The Civil Act appears to be successful in providing protection and assistance for victims as well as preventing this practice. The British Ministry of Justice initially expected that there would be approximately 50 applications per year brought under this new regulation<sup>61</sup>. Statistics shown that between the November 2008 when the 2007 Act come into force and June 2011, 339 orders were recorded<sup>62</sup>.

However, it should be kept in mind that forced marriage and victim's protection cannot be successfully approached using only a civil policy. As was already stressed above, in certain circumstances this offence may be classified as criminal and prosecuted when elements of criminal offences apply<sup>63</sup>. This will occur particularly when forced marriage is used as a tool to facilitate or cover serious crimes such as trafficking in human beings. In those circumstances, it seems that forced marriage should be clearly classified also as a criminal offence, and should be examined and charged in accordance with criminal law provisions prohibiting trafficking in persons<sup>64</sup>. For that reason in 2005 the British Foreign Commonwealth Office and Home Office carried out a national consultation period concerning creation of special forced marriage criminal legislation<sup>65</sup>. This initiative caused heated discussion in the public arena and found both enthusiastic supporters and opponents<sup>66</sup>.

The substance of the problem is very delicate and is often confused with different matters such as arranged or fake marriages. Therefore, criminalisation of this issue would focus the public attention on the core of this

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<sup>61</sup> C. McCurley, *The Forced Marriage (Civil Protection) Act 2007 new hope for those forced into non-consensual partnership*, "Solicitors Journals", April 2009, p. 3.

<sup>62</sup> Ibidem, p. 6.

<sup>63</sup> We can enumerate here abduction, false imprisonment assault, rape or violence.

<sup>64</sup> UN, Economic and Social Council, *Forced Marriage of the Girl Child, Report of Secretary General*, E/CN.6/2008/4, December 2007 para. 30.

<sup>65</sup> See: Home Office, *Forced Marriage "A Wrong not Right"*, London, 2005.

<sup>66</sup> A. Norfolk *Despair as forced marriages stay legal*, "The Times", 24 July 2006.

problem and help to show the linkage with the problem of a grave criminal offence like for example mentioned above trafficking in human beings<sup>67</sup>. Additionally, awareness of the existence of this criminal offence might also bring a deterrent effect on the potential perpetrators and show that the law is taking the intimidation of young people into forced marriage seriously<sup>68</sup>. This new legislation would give potential victims power and strength to oppose family orders and protect them from this kind of practice. However, on the other side, the opponents of this idea argue that criminalisation of forced marriage as a method of deterrence may have the opposite effect<sup>69</sup>. They declare that the effectiveness of this new law would be questionable. First and foremost, they underline the fact that the perpetrators are often closely related to the victim's family and close community. A victim may be afraid to prosecute their own family members and criminal prosecution might be seen as a "betrayal" of the community and family<sup>70</sup>. Due to the fear and trauma of repercussions and reprisals from the family, victims might be less willing to ask the state for help and assistance and less likely to testify in public against a family member. Young victims might feel under pressure to make difficult choices between their family and culture or their rights. As a result it may turn out that the state would actually have fewer opportunities to examine the offences of forced marriage and prosecute them. Instead of putting this offence into public light and protecting the victims, it might draw the offence deeper into the grey zone and at the same time indirectly minimise the ability of the state to provide practical human rights protection, with the illegal practices continuing to thrive in secret. For that reason the opponents of criminalisation argue that a non-punitive approach might be found to be the most effective measure to ensure recovery and release of the victims<sup>71</sup>. In addition, presenting Bangladesh as an

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<sup>67</sup> Ibidem.

<sup>68</sup> Liberty, *Liberty's response to the Joint Home Office and Foreign & Commonwealth Office Consultation on Forced Marriage*, December 2005, p. 5.

<sup>69</sup> Ibidem.

<sup>70</sup> G. Gangoli and M. McCarry, *Criminalising Forced Marriage: Debate in the UK*, Justice Matters, "Criminal Justice Matters" Issue 74, December 2008, p. 45.

<sup>71</sup> S. Hossain, S. Turner, *Abduction for Forced Marriage - Right and Remedies in Bangladesh and Pakistan*, "International Family Law", April 2001, p. 3.

example, where forced marriage is also criminalised, they underline that ironically, the effects created may be opposite to those planned, and could be used against the women forced into marriage. As some reported cases show, it may happen that women who successfully avoid a forced marriage planned by family and who marry a different person in defiance of their family's wishes may not be able to achieve legal assistance or help from the government. Paradoxically both spouses can be exposed to false charges by the victim's family, such as kidnapping, abduction or rape against the man whom the victim decided to marry against the family's will and bigamy against the woman herself<sup>72</sup>. In such cases the victims are often placed in so called 'safe' or protected custody and in the most extreme cases even held in jail due to the lack of access to available spaces in sheltered homes<sup>73</sup>. In these circumstances the only way that a woman can liberate herself is by use of the *habeas corpus* petition<sup>74</sup>, which is a well-established practice in Bangladeshi legislation<sup>75</sup>. The opponents also underline that the only way to make a deterrent effective is to ensure that potential perpetrators are aware that the particular law is applicable to him or her. However, as the research conducted by Liberty in the consultation papers for the UK Government have shown, many of the perpetrators involved in a forced marriage may not realise that they have committed an offence. On the contrary, the majority of them believe that the victim actually did consent to the marriage, even when ample evidence exists to suggest otherwise<sup>76</sup>. Although in many cases consent is attained by coercion and pressure they still see this practice as a part of their legitimate parental obligation and duty. They may not realise that force had been used at any stage<sup>77</sup>. Additionally to make this

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<sup>72</sup> Ibidem p. 4.

<sup>73</sup> See: Violence against Women and Children (Special Provisions) Act 2000 s. 31.

<sup>74</sup> *Habeas corpus petition* is a legal writ, through which a person can seek relief from the unlawful detention of him or herself, or of another person. In the cases concerning forced marriage habeas corpus is well established in Pakistan and Bangladesh and allows a victim to liberate herself.

<sup>75</sup> see: Abedin Hymaira's case.; R. Blakely, "Forced marriage" doctor, *Humayra Abedin, freed by Bangladesh court.*, "The Times", December 15 2008.

<sup>76</sup> Liberty, *Liberty's response to the Joint Home Office...*op.cit., pp.10-11.

<sup>77</sup> N. Khanum, *Forced marriage, family cohesion and community engagement: national learning through a case study of Luton*, Equality and Diversity, 2008, p. 14.



law successful the threat and awareness of prosecution must be perceived as realistic. However, in practice, the probability of prosecution of this offence may be minimal<sup>78</sup>. As was mentioned above, victims may not be willing to involve the state in their private sphere of life or to accuse their relatives of committing this crime. Additionally, one of the strongest arguments presented against the creation of this criminal offence is the possibility of removal of a child- victim from the European Country to the country of his or her origin at an early age. In order to “bypass” the new criminal legislation and avoid the possibility of being prosecuted, parents might send children to their country of origin and keep them there until they obtain the minimum statutory age allowed for marriage. In addition, it would also obstruct the possibility of reconciliation, which is desired in the majority of forced marriage cases<sup>79</sup>. Opponents of criminalisation also argue that, since forced marriage is an extremely delicate subject, non-legislative measures would be preferable and at the same time would also be less costly<sup>80</sup>. It was argued that the new law would increase racial segregation, victim isolation and Islamophobia, which is caused by confusion of the varying forms of forced marriage<sup>81</sup>. Therefore, using the above-mentioned arguments, they argue that proposed criminal laws might not work effectively as a deterrent and may not bring about the intended effects. Additionally, they underline that forced marriage may be defined through a combination of the few elements which constitute criminal offences independently. In such situations, forced marriage may be subsumed under other criminal offences. Therefore this argument is often raised against criminalisation, underlining that sufficient and applicable penal legislation which regards such acts as unlawful already exists and provides an adequate basis for prosecution and victim protection<sup>82</sup>.

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<sup>78</sup> Ibidem.

<sup>79</sup> AHRC Research Centre for Law, Gender and Sexuality, *Response to the home office consultation document-“Forced Marriage: a Wrong not Right”* “Kent Law School” 2005, p.12.

<sup>80</sup> Ibidem, p. 5.

<sup>81</sup> G. Gangoli and M. McCarry, *Criminalising Forced Marriage...op.cit.*, p. 44.

<sup>82</sup> UN, Economic and Social Council, *Forced Marriage of the Girl Child*, Report of Secretary General, E/CN.6/2008/4, December 2007, para 30.

Out of 157 responses to the government's consultation document considering criminalisation of forced marriage, the majority stand against a new criminal offence<sup>83</sup>. Only 34 per cent of respondents, mainly from children's organisations, supported criminalisation as a way to deal with this phenomenon<sup>84</sup>. Due to the absence of clear support for criminalisation, The British government has chosen civil legislation as a way to deal with forced marriage practices.

## CONCLUSION

The purpose of this paper was to make an examination of the phenomenon of forced marriage. This study has demonstrated different policy options concerning the problem of forced marriage. The analysis was focused mainly on UK regulations and action plans concerning this problem in that particular country. Careful and detailed examination showed that, considering the gravity of the issue of forced marriage civil law should be seen as the most useful tool. However, criminal law may also be indispensable in the battle against forced marriage when the problem involves serious criminal offenses such as for example trafficking of human beings.

In compliance with international human rights instruments, states should ensure that marriage will be entered into only with free and full consent of both intending spouses. However despite this opposition, only a few countries have specifically criminalized the practice. And regardless of the existing opposition and laws, the practices of forced and early marriage continue. Therefore it is important to bring awareness of this hidden problem and assure society that the voices of many victims trapped behind closed doors and under the "veil" of marriage will be heard. States must provide and ensure that marriage will remain the central institution based

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<sup>83</sup> See: G. Gangoli and M. McCarry, *Criminalising Forced Marriage...op.cit.*, p 45. The responses came from a range of different organisations including NGOs dealing with domestic violence and working with women, children, Black and Ethnic groups and organisations working in the criminal justice sectors.

<sup>84</sup> *Ibidem*.

on love and trust and will not be used as a tool to violate fundamental human rights and cause harm and suffering to the victims.

#### SUMMARY

Forced marriage is an extremely controversial topic deeply rooted in human rights. It goes to the heart of debates on cultural relevancy acting as a visible fracture line in multicultural societies. This paper explores how forced marriage should no longer be considered merely as a harmful tradition violating fundamental human rights, but increasingly as a disguise for human profiteering and exploitation, in particular in the sex industry.

It examines the current legal framework and theory on forced marriage and considers alterations which should be made to address this problem. The analysis has a legal base and is focused on both national and international legal frameworks, particularly British legislation. The study has a qualitative approach. Literature on this topic is very limited; therefore research is framed mainly as an analysis of different national and international documents relevant to the area of investigation. The materials come largely from legislation, international conferences, interviews, and the Internet. The study proposes solutions to focus attention on the problem and comprehensively address it.

