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Conceptualisation of Forced Marriage in the Criminal Law Context in Europe

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☞ Forced marriage; Human rights

Abstract

This article discusses the need for an understanding of the concept of forced marriage that is compatible with European human rights instruments. It does so in the context of the criminalisation of forced marriage as a tool to address the vulnerability of forced marriage victims. The article problematises the current conceptualisation of forced marriage and discusses the precarious situations of individuals forced into informal marriages, or forced to remain married, these being contexts easily overlooked in discussions of forced marriage. It also looks at whether conceiving forced marriage primarily as a form of modern slavery or trafficking in human beings is feasible. It argues that there is a pressing need for a more nuanced discussion of the concept of forced marriage in the criminal law context, one that is conscious of its different forms and its human rights implications.

Introduction

Criminal law is increasingly employed to enforce human rights for vulnerable individuals. The rationale of such criminalisation is often to protect vulnerable individuals by means of deterrence of crimes directed at them and/or to ensure the protection of societal values by punishing acts seen as serious violations of those values. This article argues that victims of forced marriage are placed in a situation of gendered vulnerability. The author is conscious of the fact that the vulnerabilities of persons in forced marriages will vary with the personal circumstances of the victims, the communities in which forced marriages are undertaken and the national context, but some common traits can be identified that will need to be addressed in all jurisdictions. Vulnerability affects the positive obligations of the state, including its obligation to ensure effective criminal legislation.¹ However, there is a lack of clarity regarding how criminal law should be designed to cover all aspects of acts of forced marriage. This is the perspective the author is interested in. The focus in this article is on the European human rights context.

Already the International Covenant on Civil and Political Rights, adopted in 1966, stipulated in art.23(3) that no marriage shall be entered into without the free and full consent of the intending spouses. The Convention on the Elimination of All Forms of Discrimination against Women adopted in 1979 contains a similar provision in art.16, while this is implicit in art.12 of the European Convention of Human Rights (ECHR), adopted in 1950, as discussed further in this article. While the understanding that marriages should not be forced is thus in no way novel, there is a lack of agreement how this should be achieved. Discussions on how to respond to the prohibition of forced marriage in terms of legislation are ongoing

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¹ See, e.g. the judgments of the European Court of Human Rights in the cases *G.M v the Republic of Moldova* (App. No.44394/15), judgment of 22 November 2022 at [128] and *AE v Bulgaria* (App. No.53891/20), judgment of 23 May 2023 at [100].

in some European countries. The matter has also been considered in international criminal law, with forced marriage being held to constitute a war crime and a crime against humanity in certain circumstances.²

This article employs the definition of marriage adopted by Haenen:

“any union between two or more people which, in a specific society, is legally, culturally and/or religiously sanctioned, which is binding, and which, within the particular context of that society, establishes certain rights and obligations between these people and is seen as marital or marital-like.”³

While taking note of the debate whether the term victim should be replaced by the more empowering term survivor, we find that most literature uses the former in the context of forced marriage and for this reason adhere to this usage.

The author recognises that forced marriage is a form of gender-based violence mostly, but not exclusively, directed against women. The article builds on the scholarship on forced marriage by authors such as Anitha, Gill, Haenen and Askola. In media and other public discussions, the issue of forced marriage is often framed as a cultural matter rather than as a form of the wider problem of violence against women, disregarding that women are pressured to marry by factors such as poverty and social norms underpinned by patriarchal structures in society.⁴ Also factors such as natural disasters and war may trigger an increase in the number of forced marriages. While it is essential to keep in mind that no community is entirely homogeneous on the issue of marriage, this does not mean one should ignore that the problem of forced marriage may affect some communities more than others due to “the coercive power of socio-cultural norms and expectations”.⁵ However, submitting that culture plays a part in the forces behind forced marriage does not imply that in some cultures every marriage is forced; while cultural expectations are relevant, they are not decisive for the occurrence of forced marriages.⁶

Forced marriage is an “unseen crime”, similarly to domestic violence, since it takes place in the privacy of the home, away from the eyes of others.⁷ It can constitute a form of honour-related violence in itself, as well as lead to honour-related violence in the union, although not all forced marriages are motivated solely or mainly by social norms on honour. Forced marriages take place also among persons who do not adhere to the social norms on sexual conduct generally portrayed as key features of honour cultures.⁸ It is incorrect to depict forced marriage purely as a migrant issue, as has been the case for example in Europe.⁹ The manner in which forced marriage is framed affects the strategies to fight it, with the choice in Europe generally being immigration measures and criminalisation.¹⁰

This article ponders how criminalisation of forced marriage in national law should be designed to be compliant with European human rights law. It first explores how forced marriage is conceived under the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), and then moves on to discuss how to assess whether a marriage is coerced or not, centring on the issue of consent. Thereafter, it looks at whether European human rights law regulates which acts should be included in the criminalisation of forced marriage. It discusses whether national lawmakers are

² This issue is further explored e.g. in K. M. Maloney, “Ending Impunity for Forced Marriage in Conflict Zones: The Need for Greater Judicial Emphasis on the Human Rights of Girls” (2021) 19(2) *Journal of International Criminal Justice* 327.

³ I. Haenen, *Force & Marriage: The Criminalisation of Forced Marriage in Dutch, English and International Criminal Law* (Cambridge: Intersentia, 2014), p.313.

⁴ S. Anitha and A. Gill, “Coercion, Consent and the Forced Marriage Debate in the UK” (2009) 17(2) *Feminist Legal Studies* 165, 166, 172.

⁵ Anitha and Gill, “Coercion, Consent and the Forced Marriage Debate in the UK” (2009) 17(2) *Feminist Legal Studies* 167, 176.

⁶ H. Askola, “Responding to Vulnerability? Forced Marriage and the Law” (2018) 41(3) *University of New South Wales Law Journal* 977, 996.

⁷ R. McQuigg, “Kurt v Austria: domestic violence before the Grand Chamber of the European Court of Human Rights” (2021) 5 *European Human Rights Law Review* 554.

⁸ J. Alanen, “Custom or Crime?: Part I of IV: Catalysts and Consequences of Forced Marriage” (2016) 29(4) *American Journal of Family Law* 3.

⁹ A. Sabbe, et al, “Forced Marriage: An Analysis of Legislation and Political Measures in Europe” (2014) 62(2) *Crime, Law and Social Change* 172.

¹⁰ I. A. Ebeturk and O. Cowart, “Criminalization of Forced Marriage in Europe: A Qualitative Comparative Analysis” (2017) 58(3) *International Journal of Comparative Sociology* 170.

obliged under the Istanbul Convention and possibly also the ECHR to criminalise only the act of forcing someone to enter into marriage or also forcing a person to remain in an unwanted marriage. A further question is whether only legally valid marriages, or also informal (such as traditional and religious) marriages should be included in light of these two conventions. In both the context of forcing someone into informal marriage and to remain in a marriage, the vulnerability of the victims is arguably relevant. Finally, it looks at different approaches to the criminalisation of forced marriage, in particular at whether it is to be understood as a form of slavery or human trafficking, or perhaps be made a stand-alone crime.

The article departs from the understanding that criminalisation of forced marriage is necessary due to the European human rights framework.¹¹ It touches upon the issue of whether criminal law is in principle the most suitable mechanism to deal with the phenomenon, but for more in-depth discussion of the matter defers, for example, to Haenen.¹² Child marriages are regarded as a form of forced marriage, but the particular legal aspects attaching to children will not be analysed separately.

Understanding forced marriage in a manner compliant with European human rights standards

Forced marriage under the ECHR and the Istanbul Convention

There is no common view in national criminal law in Europe regarding what precisely a forced marriage is, with national legislation varying regarding what acts are punishable. There are also widely differing interpretations of forced marriage in different countries outside the criminal law context. There are examples of strict interpretations of the concept of forced marriage for example in national asylum cases, which ignore the vulnerability of victims of forced informal marriages.¹³ Nor is there agreement in literature on how to conceptualise or address forced marriage. A partial reason for the divergent views about how to discuss and address forced marriage is the large variety in forced marriage contexts. By way of example, arguments applicable to girls and women forced into marriage in some areas of conflict or natural disaster for monetary reasons may not apply to peaceful contexts where families act under the premise that they are ultimately acting in the girl's or woman's best interest by securing a husband. As criminal policies in addition differ, there will by necessity exist variations between the conceptualisation of forced marriage in national criminal law.

The prevailing interpretation has been that international law does not oblige states to criminalise acts relating to forced marriage; they may choose other ways to fight the phenomenon.¹⁴ The Istanbul Convention introduces a change in this respect for ratifying states by explicitly requiring criminalisation of the intentional act of forcing someone to enter into marriage. Also the intentional conduct of luring someone abroad with the purpose of forcing the person to enter into marriage shall be criminalised. The Convention does not, however, require specific legislation on forced marriage; it is sufficient to apply general provisions in the criminal code,¹⁵ for example on coercion, human trafficking or assault, to the acts involved. Nonetheless, the Group of experts on action against violence against women (GREVIO) monitoring the implementation of the Istanbul Convention has recommended states to criminalise forced marriage in its

¹¹ In this context, it should be noted that also EU law requires criminalisation of forced marriage, a matter further discussed in this article.

¹² I. Haenen, "Down the Aisle of Criminalization: The Practice of Forced Marriage" (2015) 23(2) *European Journal of Crime, Criminal Law & Criminal Justice* 105.

¹³ N. Honkala, "'An Unhappy Interlude': Trivialisation and Privatisation of Forced Marriage in Asylum-Seeker Women's Cases in the UK" (2022) 41(3) *Refugee Survey Quarterly* 472.

¹⁴ K. Braun, "'I Don't Take This Man to Be My Lawfully Wedded Husband': Considering the Criminal Offense of 'Forced Marriage' and Its Potential Impact on the Lives of Girls and Young Women with Migrant Backgrounds in Germany" (2015) 16(4) *German Law Journal* 852.

¹⁵ Council of Europe, *Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* (Strasbourg: Council of Europe, 2011), para.155.

own right.¹⁶ There is no clarification of what is meant by the term marriage in the Istanbul Convention, its Explanatory Report or the reports issued so far by GREVIO.

In the case-law of the European Court of Human Rights (ECtHR), the issue of forced marriage has mainly arisen within the asylum and migration context, in cases where the Court has not addressed the matter of forced marriage as such. Nonetheless, forced marriage can be linked also to other human rights violations. There is a viable argument that also under the ECHR, states are under the obligation to ensure that their legislation and practice are effective in countering forced marriage, as such acts can violate the prohibition of torture or inhuman or degrading treatment in art.3 and/or the right to private and family life in art.8. Forced marriage might also fall within art.4 of the Convention, as will be discussed in this article. The ECtHR has made it clear that for some violations directed at vulnerable persons, civil remedies are not enough, and criminalisation is required.¹⁷ On the issue of forced marriage there is yet no such pronouncement by the Court. The ECtHR has held that criminalisation is needed for example for intentionally (or by gross negligence) taking a person's life, all practices contrary to art.3 (including rape and domestic violence), human trafficking and some infringements of physical integrity falling under art.8.¹⁸ Forced marriage entails a grave violation of the right to personal autonomy forming part of the right to private and family life. In addition, it is often associated with other forms of violence prior to or during the marriage. Coercion to marry can lead to numerous human rights violations during the marriage, such as physical and psychological violence (including rape), forced pregnancy and deprivation of liberty. Also refusal to submit to forced marriage entails a risk of violence. Furthermore, art.12 of the ECHR provides that men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of the right. Consent is a condition for marriage in all Council of Europe Member States, meaning that forcing someone to marry against their will would violate the right to marry of the coerced person.¹⁹

What makes a marriage forced?: The complex matter of consent

Mackenzie and others link the corporeal vulnerability of humans to the inherent sociality of human life, meaning that we are both vulnerable to the actions (including violence) of others and dependent on the support of others, to degrees that vary at different times in our lives.²⁰ This is clearly demonstrated for example in the case of forced marriage, which is an expression of dynamics within the family and the community that can give rise to severe pressure and expectations regarding marriage.²¹ The question of whether there is a legal obligation to build resilience to counter vulnerability, for example by strengthening the capacity of individuals to express their resistance to forced marriage, falls outside the scope of this article. However, State obligations to prevent human rights violations through attitude change are built into several conventions prohibiting forced marriage and thus entail a legal duty to build an understanding of the need for consent to marriage.

¹⁶ Group of Experts on Action against Violence against Women and Domestic Violence, *Baseline Evaluation Report Finland* (Strasbourg: Council of Europe, 2019), p.45.

¹⁷ The use of criminal legislation to address crimes against vulnerable persons is discussed for example in C. Heri, "Shaping Coercive Obligations through Vulnerability: The Example of the ECtHR" in L. Lavrysen and N. Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (London: Bloomsbury ebook, 2020), pp.93–116.

¹⁸ L. Lavrysen, "Positive Obligations and the Criminal Law: A Bird's-Eye View on the Case Law of the European Court of Human Rights" in L. Lavrysen and N. Mavronicola (eds), *Coercive human rights: positive duties to mobilise the criminal law under the ECHR*, pp.33–41, citing for example the cases of *Calvelli and Ciglio v Italy* (App. No.32967/96), judgment of 17 January 2002; *Öneryildiz v Turkey No.2* (App. No.48939/99), judgment of 30 November 2004; (2005) 41 E.H.R.R. 20; *Gäfgen v Germany* (App. No.22978/05), judgment of 1 June 2010; (2011) 52 E.H.R.R. 1; *Rantsev v Cyprus and Russia* (App. No.25965/04), judgment of 7 January 2010; (2010) 51 E.H.R.R. 1; and *Söderman v Sweden* (App. No.5786/08), judgment of 12 November 2013; (2014) 58 E.H.R.R. 36.

¹⁹ European Court of Human Rights, *Guide on Article 12 of the European Convention on Human Rights: Right to Marry*, (Strasbourg: Council of Europe, 2022), p.8.

²⁰ C. Mackenzie, W. Rogers, and S. Dodds, "Introduction: What Is Vulnerability, and Why Does It Matter for Moral Theory?" in C. Mackenzie, W. Rogers, and S. Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (New York: Oxford University Press, 2014), p.4.

²¹ Askola, "Responding to Vulnerability? Forced Marriage and the Law" (2018) 41(3) *University of New South Wales Law Journal* 985.

In theory, a distinction can readily be made between arranged marriages and forced marriages. Any marriage to which one party (or both) has not consented is a forced marriage, while an arranged marriage is a union to which both parties have given their consent. In practice, the forms of pressure used to make a person agree to marriage are complex, ranging from expression of cultural or parental expectations to physical and psychological violence and it may be difficult to distinguish which marriages are arranged and which are forced.²² Goror and Julios have provided examples of how coercion can be present also in the context of marriages regarded as arranged.²³ Anitha and Gill pointedly argue that the problem is that legal discourse is focused on “free will” and does not take into account that consent is constructed in the setting of power imbalances and gendered norms, often in the absence of explicit threats, meaning many coercive factors may remain concealed. Furthermore, they point out, the conceptualisation of the legal subject as an autonomous agent who is able to make free choices is not gender-less or race-less.²⁴ In other words, the issue of consent is regarded in isolation from all those contexts in which it operates, including any aspects of vulnerability.²⁵

It has been submitted that consent and coercion constitute two different ways of understanding and conceptualising a criminal act, with consent focusing on the will and behaviour of the victim, and coercion centring on the conduct of the perpetrator.²⁶ One should not presume that the attitudes of all persons subjected to patriarchal practices are similar, either rejecting or accepting the violence, but often quite complex.²⁷ This author agrees with the conclusion that consent and coercion in relation to marriage best can be understood as “two ends of a continuum, between which lie degrees of socio-cultural expectation, control, persuasion, pressure, threat and force”, an area women strategically navigate within existing constraints.²⁸ Arguably, then, the test to determine whether or not coercion has taken place should not focus only on the extent of physical or psychological pressure actively placed on the victim, but on “the total burden of coercion” that reflects the individual experiences of any pressure.²⁹ Here, the vulnerability of the person comes into play. In ECtHR case-law, vulnerability has the effect of stricter due diligence obligations for states, including a positive obligation to take vulnerability of crime victims into account in assessing criminal law measures in individual cases and in adopting legislation.³⁰

In the UK, a test of “reasonable alternative” is used to determine whether a marriage has taken place under duress. In the absence of such an alternative it is accepted that duress, and not free will, is the basis of the marriage. However, it has been argued that courts implicitly base their assessment on this point on what would be reasonable for a white male, and therefore have been reluctant to accept the impact of factors that may be specific to some communities and particularly arduous for women, such as shame and fear of exclusion from the community, which can have a strong influence on the will of women.³¹

Pressure and coercion to marry or stay married can be indirect and subtle, which may be difficult for criminal law to grasp. Braun points out that while in the UK, the definition of “force” includes coercing someone into marriage by psychological means (such as referring to dishonouring the family), the building up of subtle psychological pressure does not amount to threat or force under German law. In some instances

²² K. Noack-Lundberg, A. K. Gill and S. Anitha, “Understanding Forced Marriage Protection Orders in the UK” (2021) 43(4) *Journal of Social Welfare and Family Law* 2.

²³ M. Goror, *Honour Based Crimes and the Law: Defining the Limits of Honour Based Violence and Abuse* (Milton, United Kingdom: Taylor & Francis, 2021), p.142; C. Julios, *Forced Marriage and ‘Honour’ Killings in Britain: Private Lives, Community Crimes and Public Policy Perspectives* (London: Routledge, 2016).

²⁴ Anitha and Gill, “Coercion, Consent and the Forced Marriage Debate in the UK” (2009) 17(2) *Feminist Legal Studies* 171.

²⁵ For a discussion of issues of vulnerability, dependence and consent from a moral philosophy perspective, see e.g. A. C. MacIntyre, *Dependent Rational Animals: Why Human Beings Need the Virtues* (Chicago: Open Courts, 1999).

²⁶ Haenen, *Force & Marriage: The Criminalisation of Forced Marriage in Dutch, English and International Criminal Law* (2014), p.30.

²⁷ U. Narayan, “Minds of their Own: Choices, Autonomy, Cultural Practices, and Other Women” in L. M. Antony and C. E. Witt (eds), *A Mind Of One’s Own: Feminist Essays on Reason and Objectivity* (Westview Press, Boulder, 2002), p.429.

²⁸ Anitha and Gill, “Coercion, Consent and the Forced Marriage Debate in the UK” (2009) 17(2) *Feminist Legal Studies* 165, 179.

²⁹ Anitha and Gill, “Coercion, Consent and the Forced Marriage Debate in the UK” (2009) 17(2) *Feminist Legal Studies* 172.

³⁰ E.g. *X v Netherlands* (A/91) (1986) 8 E.H.R.R. 235.

³¹ Anitha and Gill, “Coercion, Consent and the Forced Marriage Debate in the UK” (2009) 17(2) *Feminist Legal Studies* 173, 175, 179.

a father may demand that a marriage take place due to family honour without any accompanying threats, which for a girl raised in a patriarchal structure still rules out refusal.³² Interestingly, Austria has adopted a vulnerability-sensitive approach in making it punishable to coerce a person into marriage by threatening to break off or withdraw family contacts.³³ This is a common way to subtly force persons into marriage, which may be used on its own or in combination with other forms of pressure and coercion. It is submitted that in the forced marriage context, the concept of vulnerability is only of limited use to lawmakers if conceived of as originating from a single factor or independent of context. That context includes the various social norms playing into the upholding of the phenomenon of forced marriage.

Recognising the many faces of forced marriage

Vulnerabilities caused by forced marriage

This article argues that once completed, a forced marriage places the victim in a situation of vulnerability that is gendered. The individual will be particularly vulnerable to violence when social norms on honour entail that family members who have forced a person to marry do not intervene in violence nor permit leaving a violent spouse. Furthermore, victims who report forced marriages may face serious repercussions not only from their husbands but also from their family members. As Idriss points out, in honour contexts, prosecution of family members can also lead to the community ostracising the victim and further shame for the family,³⁴ outcomes that many victims will seek to avoid.

Forced marriage is gendered in the sense that women and girls experience forced marriage more often,³⁵ and its impact is more serious on women and girls than on men, as they are more likely to be subjected to domestic violence, sexual abuse and rape within the marriage.³⁶ Although men and boys can also be forced to marry, the consequences are not identical to those of women and girls. Divorced men do not face the same social stigma as divorced women, and men are more likely to be economically independent than women.³⁷ Furthermore, forced marriage often entails a wide range of gendered health consequences, such as gynaecological problems caused by rape and underage mothers having higher rates of maternal mortality.³⁸

It is to be kept in mind that criminalisation of the very act of forcing someone to enter into marriage does not address other human rights violations that can follow from a forced marriage, such as rape and other forms of torture or ill-treatment, forced pregnancy, deprivation of liberty and violations of the right to private life. Although victims of forced marriage are vulnerable to such crimes since they are generally unable to leave the marriage, they do not occur in all forced marriages. While these acts are covered in most criminal law systems, reporting and finding evidence for them can in forced marriage contexts be even harder than in other situations, as the victim might be isolated from anyone willing or able to help. We will now explore whether acts taking place after the entry into marriage and/or within informal unions are to be regarded as forming part of the concept of forced marriage and as acts to be criminalised in national law.

³² Braun, "I Don't Take This Man to Be My Lawfully Wedded Husband: Considering the Criminal Offense of 'Forced Marriage' and Its Potential Impact on the Lives of Girls and Young Women with Migrant Backgrounds in Germany" (2015) 16(4) *German Law Journal* 858.

³³ Austrian Criminal Code art.106(a).

³⁴ M. M. Idriss, "Forced Marriage—the Need for Criminalisation?" (2015) 9 *Criminal Law Review* 7.

³⁵ UNICEF, "Child Marriage", <https://data.unicef.org/topic/child-protection/child-marriage/> [Accessed 28 August 2024].

³⁶ Sabbe, et al, "Forced Marriage: An Analysis of Legislation and Political Measures in Europe" (2014) 62(2) *Crime, Law and Social Change* 174.

³⁷ Honkala, "An Unhappy Interlude": Trivialisation and Privatisation of Forced Marriage in Asylum-Seeker Women's Cases in the UK" (2022) 41(3) *Refugee Survey Quarterly* 475.

³⁸ E.g. Sabbe, et al, "Forced Marriage: An Analysis of Legislation and Political Measures in Europe" (2014) 62(2) *Crime, Law and Social Change* 175.

Forcing someone to remain in a marriage

Discussions on forced marriage at times overlook the fact that it affects not only the moment the victim is not able to say no to becoming married but sets the frame for the victim's entire life after that moment. From the moment of marriage, the spouse might be in a position to make any major decision for the victim of forced marriage and can use this position of power to control and abuse the victim. In this sense, forcing someone to marry can be described as a continuing human rights violation.

A key question is therefore whether the term forced marriage refers only to the acts leading to someone becoming married or has a wider meaning. A Council of Europe report has leaned towards the latter, having noted that the term marriage has the dual meaning of designating "both the immediate act that initiates the state of being married, and the state itself as a continuing condition".³⁹ The CEDAW Committee similarly seems to regard marriages to which a person has originally given some form of consent but later want to leave as a form of forced marriage.⁴⁰ However, under art.37 of the Istanbul Convention, states are under a duty to criminalise "the intentional conduct of forcing an adult or a child to enter into a marriage" as well as intentionally luring someone abroad with the purpose of forcing the person to enter into marriage. The Explanatory Report to the Convention clarifies that the term forcing refers to physical and psychological force where coercion or duress is employed. As regards luring someone abroad for forced marriage, the marriage need not be concluded for the act to be regarded as criminal. Attempts as well as aiding and abetting of forced marriage are also to be criminalised. This could be read as the Istanbul Convention only requiring that states criminalise the "entry" part of the use of force, not forcing someone to stay in the marriage.

The ECHR may arguably require a wider criminalisation. Due to the interplay between the Istanbul Convention and the ECHR,⁴¹ a joint reading of the two might assist in the interpretation of which acts constitute forced marriage. There is a viable argument that also under the ECHR, states are under the obligation to ensure that their legislation and practice are effective in preventing and punishing forced marriage. As noted above, forcing someone to marry violates art.12 of the ECHR. In addition, such acts can violate the right to private and family life in art.8 and/or the prohibition of torture or inhuman or degrading treatment in art.3. Forced marriage arguably entails a grave violation of the right to personal autonomy forming part of the right to private and family life, as victims are not only unable to marry someone else but are confined to living with a person they have not freely chosen. Moreover, art.3 might be implicated if it can be established that the fact of forcing someone to remain married violates human dignity. In addition, coercion to marry can lead to numerous rights violations during the marriage, such as physical and psychological violence (including rape), forced pregnancy and deprivation of liberty. Also refusal to submit to forced marriage entails a risk of violence. Read together, the ECHR and the Istanbul Convention may in other words require states to criminalise also forcing someone to remain married.

Admittedly, such an approach raises several questions that need to be addressed at the national level. These notably relate to which acts (if any) committed during the marriage, in addition to coercing the person to marry and remain married, are to be regarded as forming part of the crime. It also needs to be determined when the limitation period begins (when the crime is first committed, not until the forced marriage is over or at another point in time). If the criminal offences that may take place within a forced marriage after its conclusion are not considered part of the specific act of forced marriage, legislators need to ensure that these acts are also criminalised and, in states where the Istanbul Convention applies, make sure that the fact that they were committed against a former or current spouse and/or against a person

³⁹ E. Rude-Antoine, *Forced Marriages in Council of Europe Member States A Comparative Study of Legislation and Political Initiatives* (Strasbourg: Council of Europe, 2005), p.16.

⁴⁰ Joint general recommendation No.31 of the Committee on the Elimination of Discrimination against Women/general comment No.18 of the Committee on the Rights of the Child (14 November 2014, CEDAW/C/GC/31-CRC/C/GC/18), para.23.

⁴¹ The Istanbul Convention and GREVIO are guided by the case-law of the ECtHR, see Council of Europe, *Explanatory Report*, para.29. The ECtHR in turn refers to the Istanbul Convention and the standpoints of GREVIO in its case-law.

made vulnerable by particular circumstances can be taken into account as an aggravating circumstance as required by art.46 of the Istanbul Convention.

It is thus argued that criminal legislation should not be designed to solely prevent crime and punish the coercion and pressure put on the victim to agree to marriage, but also reflect what the forced marriage continuously does to the victim as the marriage continues (notably being unable to marry someone else and having to spend their life with a person chosen for them).⁴² The author therefore submits that it would be topical to discuss on the European level whether being forced to remain in a marriage to which one has originally given some form of consent could also be regarded as forced marriage. We do not primarily have in mind here situations where women in particular may be unable to leave a marriage due to social norms that do not condone leaving your spouse or immigration laws according to which immigration status is dependent on marriage to a person with a right to stay in the country, as such situations per se are not perceived as forced marriage from a criminal law point of view in the absence of a perpetrator.⁴³ However, in many cases there are one or several perpetrators forcing someone to remain married, often the spouse and/or the family of either spouse. The implications of including such acts in the criminal offence of forced marriage could potentially be wide, as the term forced marriage may then apply to the many instances in which a spouse hinders the other party from leaving or getting a divorce, for example by presenting threats related to the safety of their children. In this context, it is pertinent to note that while the ECHR does not guarantee a right to divorce,⁴⁴ in accordance with art.32 of the Istanbul Convention states are required to ensure that forced marriages can be voidable, annulled or dissolved.

Looking at national legislation, in for example Germany only the act of coercing another person to conclude a marriage is punishable.⁴⁵ Braun submits that the reporting rate for forced marriage remains low in Germany and extended criminalisation would not change this as social, cultural and economic issues hinder women from reporting such acts.⁴⁶ Also in English law, there appears to exist no criminal offence that covers forcing someone to remain married.⁴⁷ Meanwhile, in some other European countries, such acts are punishable. Denmark has expressly criminalised forcing someone to remain in a marriage or marriage-like relationship as a form of coercion (s.360 of the Criminal Code) and the Dutch Criminal Code (s.284 on coercion) is interpreted as applying to forcing someone to remain in a marriage.⁴⁸ In Finland, a draft Government Bill proposes to explicitly criminalise forced marriage, which is understood as including forcing someone to remain married, within the criminal law provision on trafficking in human beings.⁴⁹ There has not been much discussion in legislative initiatives of the fact that at times it is the context rather than specific persons that force a person to remain married, and that criminal law is of little avail in the former cases. However, in most countries explicitly criminalising forced marriage, awareness-raising efforts complement the legislation.

A related issue is whether prosecution for forcing someone to remain in (or enter into) a marriage should be subject to public prosecution. It can be argued that being able to leave a forced marriage without prosecution of family members might at least in some cases enable the victim to retain some degree of contact with the family and/or community. If the only way to get assistance from the authorities is to make

⁴² One might perhaps draw parallels to the some of the elements identified by the Committee on the Rights of Persons with Disabilities as essential for the development of a person's identity and personality, notably where one lives and with whom, in Committee on the Rights of Persons with Disabilities, General comment No.5 (27 October 2017, CRPD/C/GC/5), p.4.

⁴³ Note, however, the Istanbul Convention's requirements in terms of residence status for women victims of domestic violence (art.59). Inability to leave forced marriages due to social norms is arguably best addressed through awareness-raising.

⁴⁴ European Court of Human Rights, *Guide on Article 12* (31 December 2020), p.13.

⁴⁵ Braun, "I Don't Take This Man to Be My Lawfully Wedded Husband": Considering the Criminal Offense of 'Forced Marriage' and Its Potential Impact on the Lives of Girls and Young Women with Migrant Backgrounds in Germany" (2015) 16(4) *German Law Journal* 853.

⁴⁶ Braun, "I Don't Take This Man to Be My Lawfully Wedded Husband": Considering the Criminal Offense of 'Forced Marriage' and Its Potential Impact on the Lives of Girls and Young Women with Migrant Backgrounds in Germany" (2015) 16(4) *German Law Journal* 861.

⁴⁷ Haenen, "Down the Aisle of Criminalization: The Practice of Forced Marriage" (2015) 23(2) *European Journal of Crime, Criminal Law & Criminal Justice* 112.

⁴⁸ Haenen, *Force & Marriage: The Criminalisation of Forced Marriage in Dutch, English and International Criminal Law* (2014), p.325.

⁴⁹ Ministry of Justice, *Avioliittoon pakottamisen rangaistavuuden selkeyttäminen, Mietintöjä ja lausuntoja 2024:7* (2024).

a criminal complaint leading to ex officio prosecution, some victims may prefer to stay with an abusive spouse. A counterargument is that once a woman leaves a marriage which she has been forced into by her family, this in itself leads to cutting ties with the family. Therefore, criminalisation of forcing someone to remain married (and making this crime subject to public prosecution) will not affect the victim's chance of maintaining ties with the family. To pinpoint the effects of criminalising the act of forcing someone to remain married, it would be advisable to undertake a survey among stakeholders in the country concerned, as was done for example in England and Wales.⁵⁰

Informal marriages

The ECtHR does not adhere to a strict interpretation of marriage but regards it as a legally and socially recognised and formalised form of (long-lasting) cohabitation that is based on exclusivity with regard to sexuality and on the mutuality of material and moral support and affection, a view of marriage which might apply to most European countries, but not necessarily other societies.⁵¹ The Istanbul Convention for its part does not define marriage, nor does its Explanatory Report.

As Honkala notes, many marriages entered into by use of force are not formally registered, either because the element of force used makes it impossible to obtain a registration or because the families or communities in question do not regard registration as essential. Nonetheless, these marriages are seen as equally binding by the communities in question.⁵² Exiting such an informal marriage (that is, an unregistered, traditional or religious marriage) may be difficult or impossible in accordance with the social norms upholding the marriage. Moreover, being in an informal marriage can entail additional difficulties for victims of forced marriage since they may not benefit from the same protection as other forced marriage victims. By way of example, in asylum claims made by women in informal marriages, these marriages may be regarded by receiving states as less binding than formal marriages, thereby affecting the possibility to obtain asylum.⁵³

A narrow reading of the Istanbul Convention would not require the criminalisation of other than formal, legally valid marriages, meaning that forcing someone into an unregistered marriage would not be punishable as such. This would result in different treatment for victims depending on the formal status of their marriage, which is problematic, since victims of forced informal marriages face the same human rights violations as victims of legally valid marriages. It could also lead to the risk that instead of formally registering the marriages, those forcing someone into marriage choose informal marriages. Already from the perspective of the principle of due diligence, it would be problematic to leave informal marriages outside the acts punishable by domestic law. The GREVIO Committee has indeed noted that this would leave part of the victims of forced marriage without legal protection.⁵⁴

A study undertaken for the EU includes both formal and informal marriages in the definition of forced marriage.⁵⁵ Moreover, several countries in Europe regard informal marriages and marriage-like relationships as comprised in the concept of forced marriage. These countries include Denmark,⁵⁶ Norway, Sweden,⁵⁷

⁵⁰ Home Office, *Forced marriage—A consultation: Summary of responses* (2012). We will return to these and other issues raised in the discussion of the pros and cons of criminalising forced marriage in the UK as analysed by A. Gill, "Exploring the Viability of Creating a Specific Offence for Forced Marriage in England and Wales" (University of Roehampton, 2011), https://www.endthefear.co.uk/wp-content/uploads/2010/06/Forced-Marriage-Legislation_Report-of-Findings.pdf [Accessed 28 August 2024].

⁵¹ Haenen, *Force & Marriage: The Criminalisation of Forced Marriage in Dutch, English and International Criminal Law* (2014), p.18, referring to D. van Grunderbeeck, *Beginnselen van personen—en familierecht. Een mensenrechtelijke benadering* (Antwerp: Intersentia, 2003), p.238.

⁵² Honkala, "An Unhappy Interlude": Trivialisation and Privatisation of Forced Marriage in Asylum-Seeker Women's Cases in the UK" (2022) 41(3) *Refugee Survey Quarterly* 477.

⁵³ Honkala, "An Unhappy Interlude": Trivialisation and Privatisation of Forced Marriage in Asylum-Seeker Women's Cases in the UK" (2022) 41(3) *Refugee Survey Quarterly* 477.

⁵⁴ Group of Experts on Action against Violence against Women and Domestic Violence, *Baseline Evaluation Report Turkey* (Strasbourg: Council of Europe, 2018), para.241.

⁵⁵ E. Psaila, et al, *Forced Marriage from a Gender Perspective* (Publications Office of the European Union, 2016), p.15.

⁵⁶ Danish Criminal Code art.260(2).

⁵⁷ Swedish Criminal Code Ch.4 ss.4(c) and 4(d).

England and Wales,⁵⁸ Scotland,⁵⁹ and Northern Ireland.⁶⁰ The Danish Criminal Code was amended in 2021, following criticism that the explicit criminalisation of forced marriage in Danish law was mainly symbolic, upheld different treatment of different forms of marriages and did not cover all aspects of forced marriage.⁶¹ It now includes not only formal marriages, religious marriages and registered partnerships but also “other marriage-like relationships” entered into without the presence of a religious authority, for example by drawing up a written or oral marriage contract, as well as being forced to remain in a marriage or marriage-like relationship.⁶² The Norwegian Criminal Code similarly encompasses also “extrajudicial” marriages, a move which has been welcomed by GREVIO.⁶³ Finland likewise plans to include informal marriages when explicitly criminalising forced marriage, with the aim of protecting the rights to personal freedom, integrity and private life in an equal manner, regardless of the legal status of the marriage.⁶⁴

Different approaches to the criminalisation of forced marriage

Making forced marriage a stand-alone crime

Addressing forced marriage by legislative means has been a highly contested topic due to its linkages to immigration, cultural rights and women’s rights.⁶⁵ The purpose of legislation on forced marriage varies between different countries, with some focusing on the protection of societal interests (generally through criminalisation) and others on aiding victims (in which case civil legislation is used on its own or in addition to criminalisation). Framing forced marriage as a human rights violation has acted as a catalyst for taking action, but simultaneously strengthened the preference for criminalisation, and at times led to the possible misuse of human rights arguments for anti-immigration purposes.⁶⁶ The political forces advocating for criminalisation have in several European countries been right-wing, at times in coalition with liberal parties with quite different motivations for criminalisation.⁶⁷

While many countries in different parts of the world punish acts associated with forced marriage (rape, kidnapping etc), there are indications that forced marriage is made a specific crime mainly in Europe, with the entry into force of the Istanbul Convention in 2014 accelerating the pace of criminalisation.⁶⁸ This is so, even though the convention does not require separate criminalisation of forced marriage. In this region, there has been a strong tendency to respond to the phenomenon of forced marriage through criminal law with the dual aim of ensuring punishment in individual cases and achieving deterrence on a societal level.

Countries that have adopted specific legislation criminalising forced marriage include Austria, Belgium, Denmark, Germany, Norway, Spain, Sweden, Scotland, and England and Wales. Finland is presently debating whether to do so. An argument for explicit criminalisation is that this legislation might allow the

⁵⁸ England and Wales Anti-social Behaviour, Crime and Policing Act 2014 s.121.

⁵⁹ Scotland Anti-social Behaviour, Crime and Policing Act 2014 s.122.

⁶⁰ Northern Ireland Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act 2015 s.16.

⁶¹ K. S. Mirza, *Æresrelaterede Forbrydelser: Strafferetlige Perspektiver* (Copenhagen: Jurist- og Økonomforbundets Forlag, 2018), pp.194, 210, 233.

⁶² Council of Europe, *Reporting Form on the Implementation of the Recommendations Addressed to State Parties*, (Committee of the Parties, Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Council of Europe, 20 January 2021), 3, rm.coe.int/denmark-reporting-form-on-the-implementation-of-recommendations-address/1680a30d80.

⁶³ Group of Experts on Action against Violence against Women and Domestic Violence, *Baseline Evaluation Report Norway* (Strasbourg: Council of Europe, 2022), p.54.

⁶⁴ Ministry of Justice, *Avioliitton pakottamisen rangaistavuuden selkeyttäminen, Mietintöjä ja lausuntoja 2024:7* (2024), p.52.

⁶⁵ Ebeturk and Cowart, “Criminalization of Forced Marriage in Europe: A Qualitative Comparative Analysis” (2017) 58(3) *International Journal of Comparative Sociology* 169.

⁶⁶ Askola, “Responding to Vulnerability? Forced Marriage and the Law” (2018) 41(3) *University of New South Wales Law Journal* 983; Sabbe, et al., “Forced Marriage: An Analysis of Legislation and Political Measures in Europe” (2014) 62(2) *Crime, Law and Social Change* 177.

⁶⁷ T. Akkerman and A. Hagelund, “‘Women and Children First!’ Anti-Immigration Parties and Gender in Norway and the Netherlands: Patterns of Prejudice” (2007) 41(2) *Patterns of Prejudice* 197; A. Bredal, “Tackling Forced Marriages in the Nordic Countries: Between Women’s Rights and Immigration Control” in S. Hossain and L. Welchman (eds), *Honour: Crimes, Paradigms, and Violence against Women* (London and New York: Zed Books, 2005), pp.332–354.

⁶⁸ Ebeturk and Cowart, “Criminalization of Forced Marriage in Europe: A Qualitative Comparative Analysis” (2017) 58(3) *International Journal of Comparative Sociology* 175, 179.

gender dimensions of forced marriage to be taken into account by addressing the particular vulnerability faced by many women subjected to forced marriage. Gender-neutral criminal law “disregards the fact that men and women experience different forms of duress as victims of forced marriages, and the fact that they attempt to escape such oppressive situations in different ways”.⁶⁹ The authors agree with Gill and Anitha that one should not understand forced marriage as a gender-neutral phenomenon but as originating from unequal power relations between women and men.⁷⁰

Among other possible positive effects of such criminalisation, proponents have listed not only its potential deterrent effect but that a specific criminal offence could empower young people to challenge their families, thereby bringing about attitude change.⁷¹ A wide-ranging survey was undertaken in the UK by Gill prior to criminalisation, but when the UK already had civil legislation on forced marriage protection orders in place. A minority (38%) of the survey respondents held that criminalising forced marriage would enable victims to negotiate with their parents. 57% felt that victims would be less likely to seek help if forced marriage was made a criminal offence, but 43% disagreed. All in all, over half the respondents were against specific criminalisation of forced marriage.⁷² Those opposing criminalisation strongly believed that criminalisation could potentially disempower victims, as they might want a non-criminal resolution of their case and reconciliation with their family. Meanwhile, the respondents who supported criminalisation pointed to the possibility for victims to choose between civil and criminal remedies.⁷³ Among both groups, victims retaining the power to oppose criminal measures was thus central. Gill’s study concluded that there are both significant pros and cons to introducing specific legislation and that only further research could illuminate which of these have a stronger effect in the majority of cases. It found that the significant division among stakeholders as to what measures are likely to prove effective was mainly due to different stakeholders having different concerns. While for example NGOs were focused on how to cause victims the least amount of lasting damage, police officers were often more concerned with preventing future cases. NGOs therefore often valued reconciliation between victims and their families more than the deterrent effects of harsher punishment.⁷⁴

Also in the EU countries, there has been a tendency to separately criminalise forced marriage, rather than apply existing criminal offences.⁷⁵ However, the legislation has been of limited application in practice, with few prosecutions and even fewer convictions.⁷⁶ The criminal law measures have been complemented with civil law measures such as introducing a higher-than-normal minimum age for marriage, invalidating forced marriages and enabling divorce in forced marriage cases. Some countries have chosen not to adopt specific criminal legislation on forced marriage but have instead amended existing legislation on marriage and consent to more readily apply to forced marriage, or have complemented criminalisation with such measures.⁷⁷ The Netherlands chose against separate criminal legislation, finding that such legislation would be largely symbolic, potentially discriminating and stigmatising for communities with an immigrant background, and not able to effectively address what is essentially a social problem.⁷⁸ In France, it is an

⁶⁹ A. Gill and S. Anitha, “The Illusion of Protection? An Analysis of Forced Marriage Legislation and Policy in the UK” (2009) 31(3) *Journal of Social Welfare and Family Law* 263.

⁷⁰ Gill and Anitha, “The Illusion of Protection? An Analysis of Forced Marriage Legislation and Policy in the UK” (2009) 31(3) *Journal of Social Welfare and Family Law* 265.

⁷¹ Sabbe, et al, “Forced Marriage: An Analysis of Legislation and Political Measures in Europe” (2014) 62(2) *Crime, Law and Social Change* 177.

⁷² Gill, “Exploring the Viability of Creating a Specific Offence for Forced Marriage in England and Wales” (2011), https://www.endthefear.co.uk/wp-content/uploads/2010/06/Forced-Marriage-Legislation_Report-of-Findings.pdf.

⁷³ Home Office, United Kingdom, *Forced Marriage—a Consultation*, p.10.

⁷⁴ Gill, “Exploring the Viability of Creating a Specific Offence for Forced Marriage in England and Wales” (2011), https://www.endthefear.co.uk/wp-content/uploads/2010/06/Forced-Marriage-Legislation_Report-of-Findings.pdf, pp.27, 28.

⁷⁵ European Union Agency for Fundamental Rights, *Addressing Forced Marriage in the EU: Legal Provisions and Promising Practices* (European Union Agency for Fundamental Rights, 2014), p.7.

⁷⁶ Directorate-General for Internal Policies of the Union, *Forced Marriage from a Gender Perspective* (Publications Office of the European Union, 2016).

⁷⁷ Ebeturk and Cowart, “Criminalization of Forced Marriage in Europe: A Qualitative Comparative Analysis” (2017) 58(3) *International Journal of Comparative Sociology* 176.

⁷⁸ Sabbe, et al, “Forced Marriage: An Analysis of Legislation and Political Measures in Europe” (2014) 62(2) *Crime, Law and Social Change* 178.

offence only to lure someone abroad in order to force them into marriage. Allwood and Wadia note that when criminalisation of forcing someone to marry within France was contemplated, civil society argued that existing law covered the acts involved in forced marriage (violence, sexual assault, threats, kidnapping, deprivation of liberty and rape) and criminalisation would be contrary to the interests of victims, who did not want punishment of their family members. The French forced marriage policy is thus primarily concerned with protecting individual female victims of forced marriage rather than changing structures and attitudes that uphold violence against women.⁷⁹

Haenen's analysis of the criminal law provisions in the Netherlands and England demonstrates that explicit criminalisation (as in England) does not necessarily better address the harm caused by forced marriage.⁸⁰ The explicit criminalisation in England and Wales encompasses any marriage recognised by the customs of the parties to it, whether or not the marriage is valid according to English law. However, also in the Netherlands, where forced marriage is construed as coercion or influencing someone's statement, the punishable acts encompass forcing someone into informal marriage, and in addition, forcing someone to remain in a marriage.⁸¹ From the perspective of ensuring that forced informal marriages and the act of forcing someone to remain married are made punishable acts, explicit criminalisation is thus not necessarily the only solution.

Doubts have been expressed regarding the deterrent effect of criminalisation in general, with for example the specific criminalisation of female genital mutilation in the UK not leading to an increased number of convictions and indeed few cases referred to prosecutors.⁸² It has been pointed out that while the possibility that there are few prosecutions should not necessarily hinder criminalisation, several failed prosecutions which are made public can have a negative effect.⁸³ Researchers have stressed that criminalisation can be ineffective as it might deter victims from seeking help due to fear that family members would be prosecuted in ex officio proceedings over which victims lack control. They have argued that most victims do not want their family to be punished, but rather seek to make sure that they are not forced into an unwanted marriage.⁸⁴ Some authors therefore hold that forced marriages should only be prosecuted with the victim's consent.⁸⁵ However, leaving the victims of forced marriage the choice of whether to pursue civil or criminal remedies is similarly problematic, as also in this case authorities need to ensure that victims are able to make a free and informed choice.⁸⁶

In several European countries contemplating explicit criminalisation of forced marriage, such as the UK, questions have been raised whether such criminalisation will lead to stigmatisation. Criticism has been raised that the Danish process of criminalising forced marriage has been stigmatising.⁸⁷ Some experts on the subject of forced marriage indeed argue that separately criminalising practices associated with minority communities is not only ineffective but counter-productive.⁸⁸ Those opposing introducing forced marriage as a distinct crime notably point to the potential for discriminatory impact against persons with an immigrant background, and submit that criminalisation may leave women forced into marriage even worse off as their communities may insist more on traditional beliefs due to feeling threatened and

⁷⁹ G. Allwood and K. Wadia, "Forced Marriage and Gender Transformation: Feminist State and Civil Society Networks at the Local Level" (2020) 18 *French Politics* 132, 138.

⁸⁰ Haenen, *Force & Marriage: The Criminalisation of Forced Marriage in Dutch*, English and International Criminal Law (2014).

⁸¹ Haenen, *Force & Marriage: The Criminalisation of Forced Marriage in Dutch*, English and International Criminal Law (2014), p.325.

⁸² R. Gaffney-Rhys, "The Development of the Law Relating to Forced Marriage: Does the Law Reflect the Interests of the Victim?" (2014) 16(4) *Crime Prevention and Community Safety* 285.

⁸³ Gill, "Exploring the Viability of Creating a Specific Offence for Forced Marriage in England and Wales" (2011), https://www.endthefear.co.uk/wp-content/uploads/2010/06/Forced-Marriage-Legislation_Report-of-Findings.pdf, p.27.

⁸⁴ E.g. A. K. Gill and A. van Engeland, "Criminalization or 'Multiculturalism without Culture'? Comparing British and French Approaches to Tackling Forced Marriage" (2014) 36(3) *Journal of Social Welfare and Family Law* 245.

⁸⁵ Idriss, "Forced Marriage—the Need for Criminalisation?" (2015) 9 *Criminal Law Review* 7.

⁸⁶ Gill and Engeland, "Criminalization or 'Multiculturalism without Culture'? Comparing British and French Approaches to Tackling Forced Marriage" (2014) 36(3) *Journal of Social Welfare and Family Law* 245.

⁸⁷ Sabbe, et al, "Forced Marriage: An Analysis of Legislation and Political Measures in Europe" (2014) 62(2) *Crime, Law and Social Change* 178.

⁸⁸ Gill and Engeland, "Criminalization or 'Multiculturalism without Culture'? Comparing British and French Approaches to Tackling Forced Marriage" (2014) 36(3) *Journal of Social Welfare and Family Law* 241.

discriminated.⁸⁹ Some researchers have argued that separate criminalisation makes it more difficult for victims to come forward, while offering little protection in return. They point towards a need to work more closely with those at risk, instead of a top-down approach leaving minority communities feeling targeted and stigmatised.⁹⁰ Others note the need to assess the possible drawbacks of criminalisation.⁹¹

One might argue that the framing of forced marriage in national policymaking as a problem that can be legislated away lags behind the approach in expert organisations' feminist advocacy against forced marriage, which identifies patriarchy and gender inequality as the root causes and stresses the need for broader social transformation to eradicate the practice.⁹² Such a transformation would include empowerment of vulnerable women. Anitha and Gill in 2011 argued that the response to forced marriage in the UK was premised on the conception that black and minority women were unable to change patriarchal practices in their communities from within, leading to the conclusion that a response imposed from outside was required.⁹³ They find that the balance between individual autonomy and state is racialised in the sense that "British" women are provided with autonomy, while migrant or minority women are offered protection.⁹⁴ While legislators are required by international human rights law to take into account the possible vulnerability of victims, this does not exclude the need to respect the agency of victims. The task of legislators is thus complex, as they need to not only balance the general interest in preventing crime with the interest of the individual, but also balance the different interests of individual victims (agency versus protection against factors making an individual vulnerable, such as outside pressure not to contribute to criminal action against family members).

Conceptualising forced marriage as slavery or human trafficking

The crimes under which European countries address forced marriage, when not treating it as a stand-alone crime, range from coercion to sexual violence. It has also been proposed that forced marriage would constitute a form of slavery or human trafficking. This section explores whether the way that these latter terms are defined in international law is compatible with the acts involved in forced marriage.

An international study estimates that out of a total of some 50 million people living in conditions of modern slavery globally, 22 million live in a forced marriage. Two thirds of those victims are women and girls, and the majority were forced into marriage by family members.⁹⁵ Modern slavery is defined in the study as "situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, deception, and/or abuse of power".⁹⁶ However, it is arguably questionable if all forced marriages can be classified as a form of modern slavery, as this study seems to imply. This is a considerably wider definition than the one adopted by the ECtHR in the *Siliadin v France* case, where the Court held that art.4 of the ECHR requires states to criminalise any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour. It linked slavery to "a genuine right of legal ownership" and "reduction of the status of the individual concerned to an "object"" in a rather restrictive (and

⁸⁹ Ebeturk and Cowart, "Criminalization of Forced Marriage in Europe: A Qualitative Comparative Analysis" (2017) 58(3) *International Journal of Comparative Sociology* 170.

⁹⁰ Sabbe, et al, "Forced Marriage: An Analysis of Legislation and Political Measures in Europe" (2014) 62(2) *Crime, Law and Social Change* 185.

⁹¹ Braun, "I Don't Take This Man to Be My Lawfully Wedded Husband': Considering the Criminal Offense of 'Forced Marriage' and Its Potential Impact on the Lives of Girls and Young Women with Migrant Backgrounds in Germany" (2015) 16(4) *German Law Journal* 864.

⁹² M. Barney, et al, "From Age to Agency: Frame Adoption and Diffusion Concerning the International Human Rights Norm Against Child, Early, and Forced Marriage" (2022) 23(4) *Human Rights Review* 525.

⁹³ S. Anitha and A. K. Gill, "Reconceptualising Consent and Coercion within an Intersectional Understanding of Forced Marriage" in A. Gill and S. Anitha (eds), *Forced Marriage: Introducing a Social Justice and Human Rights Perspective* (London: Bloomsbury ebook, 2011), p.49.

⁹⁴ Gill and Anitha, "The Illusion of Protection? An Analysis of Forced Marriage Legislation and Policy in the UK" (2009) 31(3) *Journal of Social Welfare and Family Law* 263.

⁹⁵ ILO, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (ILO, 2022), pp.2, 5.

⁹⁶ ILO, *Global Estimates of Modern Slavery*, (2022), p.13.

criticized)⁹⁷ interpretation of art.4 of the ECHR, which states that no one shall be held in slavery or servitude and that no one shall be required to perform forced or compulsory labour.⁹⁸ In *Siliadin*, the ECtHR found that the applicant was held in servitude within the meaning of art.4 of the ECHR due to being obliged to perform labour without remuneration. It understands servitude to entail an obligation, under coercion, to provide one's services.⁹⁹ While there was no forced marriage in this case, it is conceivable that the conditions in some forced marriages would fall within art.4. In *M v Italy and Bulgaria*, the ECtHR indicated as much. In the case in question, it considered that the circumstances of a marriage of a minor did not amount to a violation of art.4, as there was no evidence of forced marriage or trafficking (even if money might have been handed over in the context of the marriage in accordance with Roma tradition) nor of servitude or forced labour.¹⁰⁰

McCabe and Eglén similarly argue that there is a complex relationship between forced marriage and other forms of exploitation, including forms of modern slavery, and note that being forced into marriage can in itself constitute modern slavery (treatment like property) or an institution or practice similar to slavery as defined in the Supplementary Slavery Convention.¹⁰¹ They find that while forced marriage may also constitute human trafficking, and entail or open the person up to exploitation, not every forced marriage leads to exploitation amounting to modern slavery,¹⁰² a conclusion this author subscribes to.

Other authors rather regard forced marriage as a form of human trafficking.¹⁰³ While this certainly is the case in some contexts of forced marriage, such as those researched by Kakar and Yousaf, it may not apply to all instances. The 2005 Council of Europe Convention on Trafficking in Human Beings defines trafficking as

“the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”.

It notes that exploitation shall include, “... the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.” All forced marriages do not have the intentional purpose of exploitation. It is indeed conceptually difficult to treat forced marriage primarily as a form of human trafficking. Firstly, the crime of human trafficking tends to be construed to apply to acts that deliberately place a person in circumstances contrary to human dignity. This applies only to some forced marriages. In some instances, the persons forcing someone into marriage might act under the belief that the marriage is in the best interests of the person forced into it. Secondly, forced marriage takes place for other reasons than human trafficking, and therefore other legal criteria apply. For example, in terms of forced marriage, the issue of consent is central, while for human trafficking consent is irrelevant, as one cannot give valid consent to being trafficked. Thirdly, also the legal effects of forced marriage and human trafficking differ, since formally concluded forced marriages can have legal consequences such as rights and obligations of the parties to the marriage, which does not apply to human trafficking. Fourthly, a defining characteristic of forced marriages is an

⁹⁷ J. Allain, “The Definition of ‘Slavery’ in General International Law and the Crime of Enslavement within the Rome Statute, Guest Lecture Series of the Office of the Prosecutor, International Criminal Court” (The Hague, 2007), p.18, http://www.icc-cpi.int/sites/default/files/NR/rdonhyres/069658BB-FDBD-4EDD-8414-543ECB1FA9DC/0/ICCTP20070426Allain_en.pdf [Accessed 20 September 2024].

⁹⁸ *Siliadin v France* (App. No.73316/01), judgment of 26 July 2005; (2006) 43 E.H.R.R. 16 at [122].

⁹⁹ *Siliadin* (App. No.73316/01), judgment of 26 July 2005 at [124].

¹⁰⁰ *M v Italy* (App. No.40020/03), judgment of 31 July 2012; (2013) 57 E.H.R.R. 29 at [160]–[166].

¹⁰¹ H. McCabe and L. Eglén, “‘I Bought You. You Are My Wife’: ‘Modern Slavery’ and Forced Marriage” (2022) *Journal of Human Trafficking* 1, referring to the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery. Entry into force: 30 April 1957. UNTS Vol.266, p.3.

¹⁰² McCabe and Eglén, “‘I Bought You. You Are My Wife’: ‘Modern Slavery’ and Forced Marriage” (2022) *Journal of Human Trafficking* 2.

¹⁰³ E.g. M. M. Kakar and F. N. Yousaf, “Gender, Political and Economic Instability, and Trafficking into Forced Marriage” (2022) 31(3) *Women & Criminal Justice* 278.

at times extreme pressure from the victim's family and community. This distinguishes it from trafficking, although also trafficking victims may sometimes be pressured by their family into their circumstances.

The EU has taken the approach of regarding forced marriage as falling within the concept of human trafficking in the amended to the Anti-trafficking Directive.¹⁰⁴ This directive, which provides common rules on criminalisation, investigation and prosecution of trafficking in human beings, does presently not mention forced marriage as one of the types of exploitation foreseen.¹⁰⁵ The forms of exploitation mentioned in the non-exhaustive list of forms of exploitation in art.2(3) of the Directive are the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, and the removal of organs. Even if Recital 11 clarifies that the definition covers trafficking in human beings for other purposes such as illegal adoption or forced marriage, Member States have tended to restrict the transposition of this provision by only mentioning the forms of exploitation explicitly included in art.2(3).¹⁰⁶ An EU report dated December 2022 found that during the period 2019–2020, 11% of all trafficking cases related to forms of trafficking in human beings other than sexual and labour exploitation, such as forced marriage and illegal adoption.¹⁰⁷ Since these constitute a substantial amount of all cases, the European Commission has proposed to add forced marriage and illegal adoption to the forms of exploitation that Member States should criminalise.¹⁰⁸ The report notes that the explicit mention is intended to “tackle the steady increase of the number and relevance of offences concerning trafficking in human beings committed for purposes other than sexual or labour exploitation”, insofar as these acts fulfil the constitutive elements of trafficking in human beings. This is perhaps the core of the issue. Not all forced marriages fulfil the criteria for trafficking, meaning that if states resort to simply criminalising forced marriage as a form of trafficking in line with the amendments to the EU Directive, some of these marriages will fall outside the scope of the criminalisation. A broader understanding of the concept of forced marriage is therefore arguably needed, one that encompasses acts committed against persons made vulnerable by being forced into marriages not fitting into the definition of human trafficking.

By way of comparison, in Australia, the response to force marriage centres on criminal law, and is linked to human trafficking, slavery and slavery-like practices. Askola finds that in the trafficking framework, vulnerability is largely conceptualised as vulnerability to criminal exploitation by relative strangers, such as employers, not family members, with the presumption being that it is simple to turn to the authorities for help.¹⁰⁹ This does not sit well with the characteristics of forced marriages. She criticises that little consideration has been given to what outcomes victims seek and how their vulnerabilities could be mitigated.¹¹⁰ EU countries considering the manner of addressing forced marriage might do well to take these experiences into consideration, to the extent they are applicable to their national contexts.

Conclusions

There is no common understanding of the term forced marriage in Europe, and no uniform approach towards which acts related to forced marriage are punishable. Since European human rights standards require criminalisation of forced marriage, it needs to be clarified which acts should be understood as

¹⁰⁴ Directive 2024/1712 amending Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims. Meanwhile, the European Commission's Proposal for a directive on combating violence against women and domestic violence COM(2022) 105 final does not require criminalisation of forced marriage, only of certain other forms of violence, such as female genital mutilation.

¹⁰⁵ Directive 2024/1712 amending Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims.

¹⁰⁶ European Commission, Proposal for a Directive of the European Parliament and the Council Amending Directive 2011/36 on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims (European Commission, 2022), p.12.

¹⁰⁷ European Commission, Report on the Progress Made in the Fight against Trafficking in Human Beings (Fourth Report) (19 December 2022).

¹⁰⁸ European Commission, Proposal for a Directive of the European Parliament and the Council Amending Directive 2011/36 on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims, pp.12–13.

¹⁰⁹ Askola, “Responding to Vulnerability? Forced Marriage and the Law” (2018) 41(3) *University of New South Wales Law Journal* 993.

¹¹⁰ Askola, “Responding to Vulnerability? Forced Marriage and the Law” (2018) 41(3) *University of New South Wales Law Journal* 993.

included in the concept of forced marriage and how the issue should be approached in national criminal law (as a separate offence or as part of another offence, such as trafficking in human beings). This article submits that it is conceptually difficult to treat forced marriage primarily as a form of human trafficking.

The fact that perpetrators in forced marriage cases generally are family members has several consequences for the vulnerability of victims. It makes opposing the forced marriage a complex decision, since it can entail cutting off all family ties. Furthermore, it may leave victims of forced marriage without support to leave the forced marriage and there will likely be active pressure to remain married. Forced marriage thus confines victims to circumstances where they are exposed to an increased risk of domestic violence and other human rights violations. Nonetheless, many victims do not wish to have their family members prosecuted for forced marriage. Understanding this is crucial when designing the approach to forced marriage, as the desire to protect the family may lead victims to prefer resorting to authorities other than the police and judicial system, rendering criminalisation ineffective if combined with *ex officio* prosecution for the crime. The approach of providing forced marriage victims with the option of choosing between criminal and civil law measures is not unproblematic either.

Forced marriage entails serious human rights violations of a character generally seen by the ECtHR as requiring a criminal law response. The author argues that when the opportunity arises, the ECtHR is likely to take note of the criminalisation requirement in the Istanbul Convention and find that forced marriage should be criminalised in national law. In ECtHR case-law, vulnerability has the effect of stricter due diligence obligations for states, including a positive obligation to take vulnerability of crime victims into account not only in assessing criminal law measures in individual cases but also in designing effective criminal legislation. Doing so would entail ensuring that all victims fall within the scope of the legislation. Clearly, victims should not be treated differently depending on whether the persons who have forced them into marriage and/or the spouse forced upon them have seen fit to have the marriage formally registered or not. The ECHR is interpreted as also requiring states to try to prevent human rights violations. The article argues that even if there is no explicit demand in the Istanbul Convention or the ECHR to criminalise forcing someone to remain in a marriage, the ECHR may demand such criminalisation. While it is possible to criminalise only forcing someone to enter into marriage and apply general criminal law provisions on coercion, rape, ill-treatment etc. to abuse within the marriage, this approach arguably fails to reflect the on-going violation aspect of the crime of forced marriage. It disregards that the victims are unable to marry someone else and confined to living with a person they have not freely chosen, as well as the effects this has on their everyday life. These issues arguably fall squarely within the right to private life as guaranteed by art.8 (in addition to art.12) of the ECHR, and possibly also within art.3 if it can be established that they violate human dignity.

Some European countries have adopted a wide understanding of forced marriage, encompassing informal marriages and/or forcing someone to remain in a marriage. There are also examples of national legislation attempting to cater to the vulnerability of victims in other ways, particularly by taking due note of perpetrators being family members. For example, Austria has made it punishable to coerce a person into marriage by threatening to break off or withdraw family contacts, which is a common subtle manner of forcing persons into marriage.

Criminalisation may make it difficult for victims to retain contact with their family after bringing the crime to the attention of the authorities. National legislators are indeed in for a difficult balancing act between different interests and would need to be clear about the primary goal; the safety and well-being of the victims, general prevention or punishing perpetrators. Whatever approach to criminalisation a state chooses, it is clear that criminalisation alone is not sufficient. It will need to be accompanied by strong support measures and preventive measures aimed at attitude change.