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Welcome to Volume 2 issue 1 of the Centre's new online journal.

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This, the Spring issue, is the first of Volume 2 of our Journal which starts our third year of the Centre's work, and is available on the Centre's website for Members to read, download and/or print out from the online version. Volume 1 Issue 1 remains freely available but all issues from Volume 1 Issue 2 are now located into the protected area linked to the Centre's membership scheme which was launched at the 2010 Conference, 30 June to 2 July 2010. There is at present no separate subscription for the journal as it comes with membership which can be accessed through the website Membership pages and so far no hard copy version had been available since this enables the content to reach as wide a dissemination as possible at the lowest possible cost.

The Centre continues to be an exciting experience: we set out to bring together the perspectives of both academe and practice – that is practitioners in all sections of the profession, including the judiciary as well as the referral Bar and their instructing lawyers - and have been delighted at the continuing response from the specialist international experts, researchers and practitioners from around the world who attended our inaugural 2010 conference in the three linked Child Law topics of International Child Abduction, Forced Marriage and Relocation, and from the similar community of both the legal profession and interdisciplinary specialists who have attended our regular seminars in association with the specialist Family Law Chambers 7 Bedford Row and 4 Paper Buildings . We hope that our 2013 conference (postponed from 2012 owing to current economic constraints affecting academic and professional funding, particularly for long haul conference attendance) will generate as much interest. This conference will take our now established specialist approach to a mixture of Property, Finance and Relationships and Child Law within both national and international perspectives on Family Law. We are sure that, despite the constraints of the economic downturn, creating such opportunities to gather together the available corpus of international work on specialist topics in this way is still cost effective and highly beneficial as it promotes such a practical sharing of experiences and creative ideas as is difficult to achieve without a periodic focus on the issues which assail multiple jurisdictions, as Family Law continues to develop at a remarkable pace.

This issue of the journal focuses on Forced Marriage, and presents the opportunity to build on our association with the specialist Chambers with whom our London evening seminars are now regularly conducted by taking up a complementary link with another organisation close to the Centre both geographically and in terms of holistic Family Law and Practice approach: the Centre for Child and Family Law Reform at City University. This is a research committee which has, since its inception in the 1990s until very recently, been chaired by Professor Hugh Bevan of Wolfson College Cambridge. The CCFLR is focussed on law reform, for many years it met at Manches LLP, now meets at Charles Russell, another leading firm with a reputation in Family Law, and is currently chaired by HH Judge Donald Cryan of Clerkenwell County Court who also chairs the Advisory Board of City University Law School. Thus we are once again bringing together the academic, practitioner and judicial perspectives, but this time adding

the element of law reform, since the CCFLR's research and established relationships with the relevant government departments aims at the practical achievement of filling gaps in law by carrying through their deliberations into suggested drafts for effective legislative amendment.

Our next (Summer) issue, volume 2 issue 2, due in September, will carry articles on a mixture of topics, including some from our first Summer School, *Children and the Law*. Guidance on submission of articles for that or any future issue can be found within the pages of this issue. The Editorial Board welcomes the submission of articles which explore the connection between research and the development of Family Law and Practice, which bring research to the attention of practitioners and/or the role of practice to the attention of academics, and which analyse international comparative issues. Broadly the journal is designed to bring together the expertise of specialists from both academe and practice so as to explore contemporary issues from their distinct and complementary perspectives. We are also interested in exploring the impact of proactive personalities in the judiciary in the development of Family Law, and have been delighted to find the President of the Family Division of the High Court emphasising the importance of research for judicial decision making. All suggestions for the consideration of the Editorial board should be sent to me at frb@frburton.com. The Board, membership of which is set out below, meets 3-4 times a year for this purpose.

Frances Burton

Editor, Journal of the Centre for Family Law and Practice

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Benign accommodation? *Ukuthwala*, 'forced marriage' and the South African Children's Act

Lea Mwambene and Julia Sloth-Nielsen*

1. Introduction

The practice of *ukuthwala* in South Africa has recently received negative publicity, with numerous complaints being recorded. In the first and second quarter of 2009, the media reported that 'more than 20 Eastern Cape girls are forced to drop out of school every month to follow the traditional custom of *ukuthwala* (forced marriage)'.¹ Girls as young as 12 years are forced to marry older men, in some cases with the consent of their parents or guardians. Commenting on the matter, Congress of Traditional Leaders of South Africa (Contralesa) chairman, Chief Mwelo Nokonyana, said *ukuthwala* was 'an old custom that was now being wrongly practised in several parts of the eastern Transkei'.² Dr Nokuzola Mdende of the Camagwini Institute also stated 'that abducting a girl of 12 or 13 is not the cultural practice we know. This is not *ukuthwala*, this is child abuse. At 12, the child is not ready to be a wife'.³ At the SA Law Reform Commission 'Roundtable Discussion on the practice of *Ukuthwala*',⁴ which was held as part of its preliminary investigation to determine whether the proposal should be included in the Commission's law reform programme and in an effort to gather information on the subject, it was observed that *ukuthwala*, like many other customary institutions, has changed radically. The practice has now taken on other dimensions, including young girls forcibly being married to older men, relatives of the girl kidnapping and taking the girls themselves as wives, and abductions not being reported to the Traditional Authorities.⁵

These changed practices around *ukuthwala* potentially

increase the vulnerability of children's rights violations. The main aim of this article is to evaluate the implications of the Children's Act 38 of 2005 for *ukuthwala*. Insofar as the recent media comments are pertinent to some of the conclusions reached in this article, a preliminary discussion of *ukuthwala* in its differing dimensions is important. For that reason in the second part of this article we trace the history of *ukuthwala*, and the traditional reasons for, and the different forms of, *ukuthwala*. We further discuss the procedure of *ukuthwala* and the legal position of the practice under customary law. In the third part, we will contextualise the debate of *ukuthwala* within the constitutional and international rights to culture and equality paradigms. In the fourth part, we proceed by looking at the framework for the consideration of culture and custom in the Children's Act before discussing the implications of the Children's Act for *ukuthwala*. The last part contains some conclusions.

2. *Ukuthwala*

2.1 What is *ukuthwala*?

In South Africa, the custom originated from the Xhosas.⁶ However, although the custom is predominantly practiced among Xhosa-speaking tribes,⁷ the practice has expanded into different ethnic groups. For example, the Mpondo clan has adopted *ukuthwala* from Xhosa clans such as the Mfengus.⁸ Young Sotho men, through contact with other tribes, have also adopted the practice which was otherwise foreign amongst them.⁹ *Ukuthwala* in

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¹ *The Herald* 6 April 2009; *Sunday Times* 31 May 2009, 3.

² *The Herald* 6 April 2009.

³ *The Herald* 6 April 2009.

⁴ Convened on 30 November 2009. Dr Mwambene attended this forum and copies of the papers presented are on file.

⁵ Adv Ntsebeza 'Background to the investigation of *Ukuthwala*' presented at the SA Law Reform Commission (n 5 above).

⁶ M Ngcobo 'Presentation to the Portfolio Committee on the Role of the Department of Social Development on *Ukuthwala*', 15 September 2009.

⁷ JC Bekker, C Rautenbach and NMI Goolam *Introduction to Legal Pluralism in South Africa* (2006), 31.

⁸ Ngcobo (n 6 above).

⁹ JC Bekker *Customary Law in Southern Africa* (1989), 98.

South Africa enjoys popular support in the areas where it is still practiced.¹⁰ According to a newspaper report, one Chief (a woman) in the region where *ukuthwala* is practiced said that the young girls who escape from the houses where they are detained whilst awaiting marriage were 'embarrassing our village'.¹¹

The word *Ukuthwala* means 'to carry'.¹² It is a culturally legitimated abduction of a woman whereby, preliminary to a customary marriage,¹³ a young man will forcibly take a girl to his home.¹⁴ Some authors have described *ukuthwala* as the act of 'stealing the bride'.¹⁵ *Ukuthwala* has also been described as a mock abduction or irregular proposal¹⁶ aimed at achieving a customary marriage.¹⁷ From these definitions, we see that *ukuthwala* is in itself not a customary marriage or an engagement. The main aim of *ukuthwala* is to force the girl's family to **enter into negotiations** for the conclusion of a customary marriage.¹⁸ (Emphasis added).

The procedure for *ukuthwala* is as follows: The intending bridegroom, with the help of the one or two friends, will waylay the intended bride in the neighbourhood of her own home, quite often late in the day.¹⁹ They will then 'forcibly' take her to the young man's home. Sometimes the girl is caught unawares, but in many instances she is caught according to prior plan and agreement. In either case, the girl will put up a show of resistance to suggest to onlookers that it is against her will, when in fact, it is seldom so. As Bekker explains: 'The girl, to appear unwilling and to preserve her maidenly dignity, will usually put up strenuous but pretended resistance, for,

more often than not, she is a willing party'.²⁰ Once the girl has been taken to the man's village, her guardian or his messenger will then follow up on the same day or the next day and possibly take her back if one or more cattle are not handed to him as an earnest promise for a future marriage.²¹ Consequently, if the guardian does not follow her up to take her back, tacit consent to the marriage at customary law can be assumed.

After the girl has been carried to the man's family hearth, negotiations for *lobolo* between the families of the bride and the groom would then follow. If the families cannot reach an agreement, the girl will return to her parental home, while the man's family will be liable for damages.²²

As noted, the main aim of *ukuthwala* is to force the girl's family to enter into negotiations for the conclusion of a customary marriage. It follows, therefore, that if a man abducts a girl but fails to offer marriage, or if he does offer marriage but is deemed by the girl's guardian to be unacceptable as a suitor, a fine of one beast is payable to the girl's guardian,²³ who, with his daughter, is said to have been insulted by the *thwala* without a consequent offer of a marriage, or having been *thwala'd* by the undesirable suitor.²⁴

It is important to note that during the process of *ukuthwala*, it is contrary to custom to seduce a girl.²⁵ By custom, the suitor, after forcibly taking the girl to his home village, is required to report the *thwala* to his family head. The family head thereupon gives the girl into the care of the women of his family home, and sends a report to the

¹⁰ The prevalence of the custom nowadays can be depicted from what Koyana and Bekker (n 14 above) 139, note: 'from enquiries that we made and on the basis of our own observations we rest assured that the *thwala* custom is still widely practised in Nguni communities.'

¹¹ This was a response to a report in the *Sunday Times* 31 May, 2009, 3 that the current practice of *ukuthwala* also takes the form of detaining these girls against their will in guarded huts and forced to have sex with their 'husbands'. They allegedly get beaten and humiliated should they try to escape.

¹² DS Koyana *Customary law in a changing society* (1980), 1.

¹³ A customary marriage is a relationship which concerns not only the husband and wife, but also the family groups to which they belonged before the marriage.

¹⁴ Koyana (n 12 above)

¹⁵ E Curran and E Bonthuys 'Customary law and domestic violence in rural South African communities' (2005) *South African Journal on Human Rights*, 607, 615

¹⁶ It should be noted that 'irregular' did not mean 'unlawful'.

¹⁷ TW Bennett *Customary Law in South Africa* (2004), 212

¹⁸ JC Bekker, C Rautenbach and NMI Goolam *Introduction to Legal Pluralism in South Africa* (2006) 31. It should, however, be observed that *ukuthwala* can be distinguished from the common law abduction. At common law, the crime of abduction has been described as the unlawful removal of a minor from the control of his or guardian with the intention of violating the guardian's potestas and of enabling somebody to marry her or have sexual intercourse with her. On the other hand, *ukuthwala* is lawful in the society that designed it; there is no *ukuthwala* of males; and lastly, the purpose of *ukuthwala* is to negotiate a marriage, not conclude it, and sexual intercourse is customarily not the intention.

¹⁹ Bekker (note 9 above), 98; DS Koyana and JC Bekker 'The Indomitable Ukuthwala Custom' (2007) *De Jure* 139.

²⁰ Bekker (n 9 above) 98.

²¹ Bekker (n 9 above) 98.

²² E Curran and E Bonthuys, 'Customary Law and Domestic Violence in rural South African Communities' Research Report for the Centre for the Study of Violence and Reconciliation, (2004) 615.

²³ Mostly, among the *Pondo*, the *Fengu* and the *Bhaca*, and possibly other Cape tribes.

²⁴ Bekker (n 9 above) 98.

²⁵ Bekker (n 9 above) 98.

girl's guardian. A man who seduces a *thwala'd* girl is required to pay a seduction beast in addition to the number of *lobolo* cattle agreed upon and in addition to the *thwala* beast where no marriage has been proposed.²⁶ Other safeguards that were put in place for the protection of the *thwala* and the girl involved were that the parents of the girl were immediately notified after the *thwala* had occurred; if the *thwala* had not worked, a beast was supposed to be paid; and finally if a girl fell pregnant consequent upon her seduction, then further additional penalties were also supposed to be paid.²⁷

Numerous reasons exist for the practice of *ukuthwala*, some of which are arguably cogent and weighty. They include: to force the father of the girl to give his consent;²⁸ to avoid the expense of the wedding; to hasten matters if the woman is pregnant; to persuade the woman of the seriousness of the suitor's intent; and to avoid the need to pay an immediate *lobolo* where the suitor and his or her family were unable to afford the bridewealth. From these reasons, it is apparent that *ukuthwala* can serve important cultural purposes in those South African communities which live their lives accordingly to cultural norms. However, these reasons are also suggestive of the fact that the girl or the unmarried woman involved is, in some cases, *thwala'd* without her consent. This provides the link to forced marriage, which then calls into play constitutional and human rights standards. In addition, insofar as the girl who is *thwala'd* may be aged below 18, issues related to child marriage and early marriage arise which in turn calls for a consideration of some provisions of the Children's Act 38 of 2005.

2.2 Forms of *Ukuthwala*

It is generally accepted that the traditional custom of

ukuthwala is often carried out with the knowledge and consent of the girl or her guardian. This obviously suggests that *ukuthwala* is not necessarily effected against her will, or that of her guardian.²⁹ In the past, courts have held that *ukuthwala* should not be used as a cloak for forcing unwelcome attentions on a patently unwilling girl;³⁰ they have also held that abduction by way of *ukuthwala* is unlawful.³¹ On the other hand, courts have suggested that if there is a belief by the abductor that the custom is lawful and that the parents or guardians consented to the taking, it would not be abduction because abduction is a crime against parental authority.³²

We briefly look in this section at what we propose to be three forms of *ukuthwala*.³³ First, the practice that occurs where a girl is aware of the intended abduction and there is collusion between the parties,³⁴ i.e. where the girl or woman being abducted conspires with her suitor. The 'force' used in the act of abduction is therefore for the sake of performance only. For that reason, *ukuthwala* in this model could be suggested to be equivalent to elopement.³⁵ In this type of *ukuthwala*, the girl gives her consent.³⁶ The issue of consent is additionally important because, as observed earlier, *ukuthwala* is a preliminary procedure to a customary marriage and not a marriage in itself. The consent to *ukuthwala* presumably carries through the negotiations, to provide the basis for the validity of the (customary) marriage which is eventually concluded. If after the *ukuthwala* has taken place, the girl's parents refuse to give their consent, there cannot be a valid ensuing customary marriage.³⁷

Second, *ukuthwala* also takes the form of where families would agree on the union, but the girl is unaware of such an agreement.³⁸ It has been observed that this type of *ukuthwala* often happened in cases where the girl

²⁶ Koyana and Bekker (n 19 above) 141.

²⁷ F Mdumbe 'International and domestic legal frameworks impacting on *Ukuthwala*' presented at the SA Law Reform Commission Roundtable on the practice of *Ukuthwala*, 30 November 2009.

²⁸ It should be observed that before the Recognition of Customary Marriages Act, 1998, consent of the girl's father was essential to the validity of the customary marriage. It is, moreover, argued that this requirement may still be necessary because section 3 (b) of the Recognition of Customary Marriages Act provides that 'the marriage must be negotiated ... in accordance with customary law.' Unless the last phrase is read as referring only to ceremonial aspects of customary law, and the payment of *lobola*, the requirement of parental consent (as at customary law) is also requirement for a valid customary marriage under the Act. See further note 37 below.

²⁹ Curran and Bonthuys (n 22 above) 615.

³⁰ *Nkupeni v Numunguny* 1938 NAC (C & O) 77.

³¹ *R v Swartbooi* 1916 EDL 170; *R v Sita* 1954 4 SA 20 (E).

³² *R v Sita* (n31 above).

³³ Bekker, Rautenbach and Goolam (n 18 above), 31.

³⁴ *LAWSA Indigenous Law* Vol 32, 2009, para 89.

³⁵ *LAWSA* (n 32 above), para 89.

³⁶ M Herbst and W Du Plessis 'Customary law v Common law: A hybrid Approach in South Africa' (2008) 12 *Electronic Journal of Comparative Law* 6.

³⁷ The 1998 Recognition of Customary Marriages does not make provision for *ukuthwala*. It has, however, put beyond doubt the necessity for the consent of the bride to a customary marriage. In terms of section 3(1) of the Recognition of Customary Marriages Act, the consent of both spouses is necessary for the validity of a customary marriage. (The consent of the guardian is discussed in note 28 above).

³⁸ Bekker, Rautenbach and Goolam (n 18 above), 31.

might not otherwise agree to her parent's choice. It also happens in situations where a girl happens to be of high rank but, for various reasons, attracts no suitors.³⁹ After the girl has been *thwala'd* and both families' desire and consent to the union established, the girl is watched until she gets used to the idea of the marriage.⁴⁰ Consent, understood in western terms, might be more difficult to argue here.

The third version is where the custom occurs against the will of the bride. Under this form, a girl is taken to the family home of the young man by force. Emissaries are then sent to her family to open marriage negotiations. The family of the girl may refuse negotiations in which case a beast is payable⁴¹ and the girl is taken back to her family. In this form of *ukuthwala*, there is no initial consent from either the girl or her parents or guardian. In addition, in its most abusive form, the forced abduction can expose the girl to rape by her 'husband' and to actual or threatened violence in order to keep her in the relationship.⁴² In this form of *ukuthwala*, we see that the bride is unwilling and therefore the intended marriage would, arguably, be a forced marriage. Other human rights violations are obvious, including the infringement of freedom and security of the person, violation of bodily integrity, dignity and various provisions which prohibit forms of slavery, to name a few.

As a general proposition, it can be concluded that some forms of *ukuthwala* do violate women and children's rights. At the same time, there are also some legitimate cultural goals which come with the practice and which arguably do not overstep the mark. How to address the objectionable forms of the practice of *ukuthwala*, therefore provides a suitable vehicle for pursuing the debate on whether criminalisation, or enacting an absolute prohibition of discriminatory customary laws, is the desirable path to follow. On the one hand, there is the abiding interest in improving the position of women and children affected by traditional customary practices which can be harmful or detrimental, by proscribing them altogether; however, on the other hand, for many supporters of *ukuthwala*, the practice serves to promote legitimate cultural goals, at least one of which is to force

the father of the girl to start marriage negotiations. For this group, criminalisation or prohibition would abrogate a cultural practice with considerable legitimacy, and impair the right to culture.

3. Contextualising *ukuthwala* within the constitutional and international human rights paradigms

From the above discussion, several conclusions with constitutional implications can be drawn from the practice of *ukuthwala*. First, it is clear that the practice of *ukuthwala* only subjects unmarried women and girls, and not unmarried men and boys, to it. As a customary practice applicable to only girls, gender equality is called into play. Second, the discussion has also shown that with some forms of *ukuthwala*, girls are *thwala'd* without their consent. This violates their bodily integrity and freedom and security of the person. Third, the reported incidents of the current practice of *ukuthwala* show that the practice has taken the form of a 'forced marriage' and is no longer merely a preliminary process undertaken in the lead up to a customary marriage. Fourth, we see that current trends related to *ukuthwala*, may lead to 'child marriages'. Fifth, reports show that *ukuthwala* is proving to be a serious contributing factor leading to violence against women and children.

3.1 *Ukuthwala* and the right to equality

Both the South African Constitution, in section 9, as well as international human rights standards prohibit discrimination based on sex and recognise equality of both sexes.⁴³ The significance of this principle where women's rights are concerned cannot be over-emphasised. Indeed, as Cook points out⁴⁴ in the international sphere at more or less the same time as the South African constitution was adopted:

The reasons for this general failure to enforce women's rights are complex and vary from country to country. They include lack of understanding of the systemic nature of the subordination of women, failure to recognise

³⁹ Bennett (n 17 above) 212.

⁴⁰ K Woods 'Contextualizing group rape in South Africa' (2005) 7 *Culture, Health and Sexuality* 303 at 313.

⁴¹ LAWSA (note 32 above) para 89; Bekker (n 9 above) 98.

⁴² Curran and Bonthuys (n 22 above) 616.

⁴³ Article 1 of the UN Charter; Article 2 of UDHR; Article 2 of CESC; Article 2 (1) of the CCPR; Article 2 of CEDAW and Article 2 and 3 of the ACHPR.

⁴⁴ RJ Cook 'Women's International Human Rights Law: The Way Forward' in RJ Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 3 at 3.

⁴⁵ Cook (n 44 as above). See, for example, Art.18 of the African Charter on Human and People's Rights; Art.1 of CEDAW; and Art.24 (3) of the Convention on the Rights of the Child.

the need to characterise the subordination as a human rights violation, and lack of state practice to condemn discrimination against women.

To this end, she observes that the legal obligation to eliminate all forms of discrimination against women is a fundamental tenet of international human rights law.⁴⁵

In South Africa, the Constitutional Court has consistently affirmed the fact that the principle of equality and non-discrimination is recognized, and its value conceded even in the contest of competing claims of the right to equality and the right to culture. In the *Bhe* case,⁴⁶ for example, Langa, DCJ noted that:

The rights to equality ... are of the most valuable of rights in an open and democratic state. They assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender.

At the point of entering into a marriage, several international human rights standards require that there should be equality of both spouses. For example, article 16 (1) of the Universal Declaration on Human Rights, 1948 (UDHR) provides that ... 'Men and women of full age ... have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.' In article 16 (2) UDHR, 'Marriage shall be entered into only with the free and full consent of the intending parties'. In addition to the UDHR, article 1 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1964 provides that 'No marriage shall be legally entered into without the full and free consent of both parties ...'

Furthermore, article 16 of CEDAW provides:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free

and full consent.

CEDAW is fully applicable to girls under 18 years of age. Article 16(2) of CEDAW provides that the betrothal and marriage of a child shall have no legal effect and that all necessary action, including legislative action, shall be taken by States to specify a minimum age of marriage, and to make registration of marriage in an official registry compulsory. In addition, in 1994, a General Recommendation on Equality and Family Relations, the Committee on CEDAW recommended that the minimum age for marriage for both boys and girls should be 18.

At the regional level, the African Charter on the Rights and Welfare of the Child (ACRWC)⁴⁷ sets the framework to eliminate gender discriminatory practices. The ACRWC prohibits discrimination of children in any form and guarantees all children to enjoy the rights and freedoms recognised in the ACRWC 'irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex ... birth or other status. Member states to the ACRWC have the obligation to adopt legislative or other measures as may be necessary to give effect to the provisions of the Charter.⁴⁸

Further, the ACRWC defines a child as 'every human being below the age of 18 years'.⁴⁹ This definition highlights the significance of addressing discrimination in African societies in a number of ways.⁵⁰ First, according to this definition, ACRWC applies to every child under the age of eighteen in ratifying countries, irrespective of sex. Secondly, the ACRWC unequivocally prohibits child marriages of both boys and girls under the age of 18. To that end, Mezmur has observed that the ACRWC provide greater protection than the Convention on the Rights of the Child, and avoids any discrepancy between the minimum age of marriage for both boys and girls, which is consistently lower for girls in many countries.⁵¹ Furthermore, the ACRWC is unequivocal with regard to the relationship between culture and children's rights. It explicitly asserts its supremacy over any custom, tradition, cultural or religious practice inconsistent with the rights and obligations guaranteed under it.⁵²

Further protection of women and children affected by

⁴⁶ *Bhe and others v Magistrate Khayelitsha* (Commissioner for Gender Equality as *Amicus Curiae*) 2005(1) BCLR 1 (CC); 2005 (1) SA 580 (CC)

⁴⁷ South Africa became a party to the ACRWC on 7 January 2000.

⁴⁸ Article 1 (1) of the Charter.

⁴⁹ Article 2 of the Charter.

⁵⁰ This significance is appreciated when the definition of a child under the Charter is contrasted with the definition of a child provided by the CRC. The CRC defines a child as 'every human being below the age of 18 years unless, under the laws applicable to the child, majority is attained earlier'. Marriage would typically result in majority status being attained.

⁵¹ B Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 SAPR/PL, 20.

⁵² Article 1(3) of the Charter.

discriminatory practices in Africa is provided under the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Protocol).⁵³ The Protocol provides that states parties shall enact appropriate national legislative measures to guarantee, inter alia, free and full consent of both parties to a marriage.⁵⁴ The Protocol has also set the minimum age for both girls and boys contemplating a marriage at 18.⁵⁵

From the above discussion, we see that the practice of *ukuthwala* has the strong potential to violate international human rights standards, especially where a forced marriage is the result of such practice. Equality norms make clear that men and women are to have equal rights at the point of entry into marriage. Some forms of *ukuthwala* are clearly in violation of this right. Moreover, the right to free and full consent to a marriage, as recognised in the international human rights standards, cannot be achieved when one of the parties involved is not sufficiently mature to make an informed decision. This position is applicable to cases of *ukuthwala* where, as reported, girls as young as 12 years are abducted. Furthermore, where consent is obtained through force, this is also a clear violation of the international standards that require that there should be free and full consent from both parties.

3.2 Right to culture

South Africa's constitution expressly recognizes the practice of one's culture, provided that persons exercising cultural rights may not do so in a manner that is inconsistent with any other provisions of the Bill of Rights.⁵⁶ Based on the constitutional recognition of the

right to culture, proponents of *ukuthwala* would argue that everyone, including, the state is prohibited from interfering with their right to practice *ukuthwala*. As argued by Bennett,⁵⁷ 'the recognition of culturally defined systems of law has become a constitutional right, vesting in groups and individuals, with the implication that the State has a duty to allow people to participate in the culture of their choice, including a duty to uphold the institutions on which that culture is based'. Devenish⁵⁸ has also argued that 'the right to practice one's culture allows members of communities to freely engage in the practice of their culture without intervention from the state or any other source'.

Sections 30 and 31 of the Constitution appear to be similar in wording to several international standards. An obvious example is article 27 of the UDHR.⁵⁹ Other examples of the recognition of the right to culture in international law are article 15 (1) (a) of the CESCR, 27 of the CCPR and article 29 of the CRC. On the regional level, the rights to culture were first declared in article 17 of the African Charter on Human and Peoples' Rights.⁶⁰

From the above discussion, we see that both international human rights law and the South African Constitution recognize the right to culture. This notwithstanding, cultural rights are not regarded as providing a basis on which other protections may be abridged.⁶¹ Rather than protecting culture at the expense of human rights, international documents reveal that culture necessarily must cede to universal standards.⁶² Indeed it is suggested that culture is protected so that it may enhance human rights development, and, in turn, not lead to the derogation or diminution of rights.⁶³

⁵³ The Protocol, which entered into force on 25 November 2005, is the first specialized gender neutral instrument for the protection of women's rights in Africa. It was adopted by the Assembly of the Heads of State and Governments of the African Union (AU) at its second ordinary session, on 11th July 2003 in Maputo, Mozambique. It was promulgated out of concern by the AU that women in Africa continue to be victims of discrimination and harmful practices (see Preamble to the Protocol).

⁵⁴ Article 6 (a) of the Protocol.

⁵⁵ Article 6 (b) of the Protocol.

⁵⁶ Ss 30 and 31 of the Constitution of the Republic of South Africa, 1996.

⁵⁷ TW Bennett 'Conflict of laws' in Bekker, Rautenbach and Goolam (n 18 above) 18.

⁵⁸ G Devenish *A Commentary on the South African Bill of Rights* (1999) 421.

⁵⁹ Article 27 of the UDHR states that: 'Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits; Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.' The right to culture is also an integral part of other fundamental rights enunciated in the UDHR such as freedom from conscience, expression and religion

⁶⁰ South Africa ratified this treaty in July 1996.

⁶¹ L Mwambene *The impact of the Bill of Rights on African customary family laws: A study of women's rights in Malawi with some reference to developments in South Africa* (2009) Unpublished LLD thesis, University of the Western Cape.

⁶² R Cook 'State Accountability under the Convention on the Elimination of all Forms of Discrimination Against Women' in R Cook (ed) *Human Rights of Women: National and International Perspectives* (1994) 228 at 234-235.

⁶³ J Sloth-Nielsen and B Mezmur 'Surveying the research landscape to promote children's legal rights in an African context' *2007 African Human Rights Law Journal*, 330, 335-336 observe that 'human rights documents continually recognise that culture is an area that must be protected. However, culture should be harnessed for the advancement of children's rights. But when it appears that children are disadvantaged or disproportionately burdened by cultural practice, the benefits of the cultural practice and the harm of the human rights violation must be weighed against each other. How to strike a necessary balance between culture and children's rights is an issue that should continue to engage the minds of scholars.'

International treaty law exemplifies the approach that places the preservation of human rights as the most fundamental universal principle, even when human rights protections challenge cultural practices. Article 5 of CEDAW requires States Parties to take all appropriate measures to:

modify the social and cultural patterns of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority of either of the sexes or on stereotyped roles for men and women.⁶⁴

The CRC also confronts the possibility of misuse of culture as a pretext to violate children's rights insofar as article 24 (3) provides that 'States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children'. Furthermore, the CRC clearly places a focus on the child's best interests,⁶⁵ the child's evolving capacities,⁶⁶ the principle of non-discrimination⁶⁷ and the respect for the child's evolving capacities⁶⁸ all of which recenter the focus of human rights on children and require placing children's interests before those of potentially abusive cultural practices.

The African Women's Protocol contains provisions relating to the elimination of harmful practices including the prohibition, through legislative measures backed by sanctions, of all forms of harmful cultural practices, including female genital mutilation.⁶⁹ Harmful practices have been regarded as receiving 'the most' attention in the Protocol.⁷⁰

On the other hand, some scholars' approach, largely influenced by cultural relativism theory, conceives another version of addressing the conflict between culture and human rights. They argue that instead of abolishing customary laws that appear to be inimical to human rights, we should closely look at local cultures and see which aspects we can best use to achieve the aspirations of human rights.⁷¹ This approach would militate against

the view that *ukuthwala* should be proscribed in its entirety.

Specifically addressing himself to this view, Ibhawoh states that:⁷¹

... it is not enough to identify the cultural barriers and limitations to modern domestic and international human rights standards. It is even more important to understand the social basis of these cultural traditions and how they may be adapted to or reintegrated with national legislation to promote human rights. Such adaptation and integration must be done in a way that does not compromise the cultural integrity of peoples. In this way, the legal and policy provisions of national human rights can derive their legitimacy not only from the state authority, but also from the force of cultural traditions.

These insights may be important to the analysis of the implications of the Children's Act for *ukuthwala* in South Africa. Thus, it may be necessary to distinguish between the practice of *ukuthwala* in forms which are inimical to human rights and may lead to human rights abuses, and those dimensions of the practice that advantage human rights, and promote the right to culture. In the light of the fact that the right to practice *ukuthwala* in South Africa continues to be asserted by people who are in opposition to change the custom, it may arguably be preferable to explore options which retain the positive features of the custom, rather than advocating an abolitionist/prohibitionist stance which denies any value in the customary version of *ukuthwala*.⁷³

However, the idea of developing customary laws so that they are consistent with human rights comes into direct confrontation with debates about the protection of women and children against discrimination and their protection against violence. Whilst the development or adaptation of customary law is considered to be a viable approach to achieving international human rights

⁶⁴ See too article 2 of CEDAW, which requires: 'State Parties ... by all appropriate means and without delay ... (to) undertake: (f) .. appropriate measures, including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.'

⁶⁵ Articles 3, 9, 20, 21, and 40 of the CRC

⁶⁶ Articles 5, 12, 14 and 40 of the CRC

⁶⁷ Article 2 and the Preamble of the CRC.

⁶⁸ Articles 21, 28, 39, 40, and Preamble of the CRC.

⁶⁹ Article 5 of the Protocol.

⁷⁰ F Banda 'Building on a global movement: Violence against women in the African context' 2008(1) *African Human Rights Law Journal* 1 at 16.

⁷¹ Nyamu-Musembi C 'Are local norms and practices fences or pathways? The example of women's property rights' 126 as cited by Banda (n) 256.

⁷² Ibhawoh B 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State' (2000) *Human Rights Quarterly* 838 at 839.

⁷³ At the discussion forum convened by the SA Law Reform Commission, most people were of the view that there was nothing wrong with *ukuthwala* as it was originally practiced and that, despite the recent distortions of the practice, the custom should not be outlawed.

aspirations because of the cultural legitimacy that achieves,⁷⁴ feminist scholars and children's rights advocates alike might question whether this can be done at all without sacrificing the protection of women and children on the altar of custom.⁷⁵ In the case of *Christian Education of South Africa v Minister of Education*,⁷⁶ the Constitutional Court affirmed that the rights of members of communities that associate on the basis of language, culture and religion cannot be used to shield practices which offend the Bill of Rights.⁷⁷ In this case, it was instructive to note that, for the discussion related to the practice of *ukuthwala*, children's rights to protection from violence trumped justificatory claims based on religion. By analogy, it could be predicted that courts may not uphold the practice of *ukuthwala* if it even has the mere potential for infringing other constitutional rights.

Fear of opening the door to trenchant violations of the physical security of South African women and children might blur and diminish arguments which advocate a more sensitive and nuanced treatment of the custom through which the positive aspects can be retained. We return to this in conclusion.

4. Exploring the impact of the Children's Act 38 of 2005 on *ukuthwala*?

4.1 Culture and religion in the Children's Act

The authors would assert that the Children's Act 38 of 2005 (hereafter the Act) is consciously sensitive to culture. Any number of provisions support this claim, including both direct and indirect references to the importance of culture in child rearing and legal approaches thereto. For instance, the 'best interest of the child' principle outlined in section 7 requires consideration to be had, where relevant, to the child's 'intellectual, emotional, social and **cultural** development' (section 7((1)(h)), and mentions the need for children to maintain a connection with (inter alia) 'the extended family, culture and tradition' (s 7(1)(f)(ii)) as a consideration conducing to the child's best interests (emphasis inserted).

As far as placement of the child in alternative care is concerned, there are various provisions emphasizing the importance of culture. Foster care, for example, requires placement of a child after consideration of a report of a designated social worker about 'the cultural, religious and linguistic background of the child' (section 186(1)(a)), and this cultural matching is reinforced further by the permissive provision to place a child from a different cultural, religious and linguistic background with foster parents whose characteristic are different to that of the child '*but only if...* there is an existing bond between that person and the child' (section 186(2)(a)) or if no suitable person can with a similar background can be found available to provide foster care to the child (section 186(2)(b)). The Norms and Standards for Foster Care (Part 11(6)(g) require foster care services, supervision and arrangements around such supervision to 'be sensitive to the religious, cultural and linguistic background of the child'.

In the assessment of the suitability of a prospective adoptive parent, the social workers effecting the assessment 'may take the cultural and community diversity of the adoptable child and the prospective adoptive parent into consideration' (section 231(3), and the Regulations to the Act affirm that in an inter-country adoption process, the report on the would-be adoptive parents must include information on the applicant's ethnic, religious and cultural background (regulation 111(e)).

Additionally, culturally appropriate values and principles surface periodically throughout the Children's Act: the legislative provision (in section 16) for the responsibilities of children, as provided for article 31 of the African Charter on the Rights and Welfare of the Child,⁷⁸ is a case in point.

In addition to the positive way in which culture emerges as a general consideration in the Children's Act, culture and social practice derived therefrom form the basis of a dedicated section of the Act, namely section 12

⁷⁴ AA An-Naim 'State Responsibility under the International Human Rights Law to change Religious and Customary Laws' in Cook RJ *Human rights of women: National and International Perspectives* (1994) 167 at 173-175 argues that unless international human rights have sufficient legitimacy within particular cultures and traditions, their implementation will be thwarted, particularly at the domestic level, but also at the regional and international levels. Without such legitimacy, it will be nearly impossible to improve the status of women through the law or other agents of social change.

⁷⁵ Grant E 'Human rights, cultural diversity and customary law in South Africa' (2006) *Journal of African Law* 2 reflects on the difficulties of legal pluralism in relation to the Bhe case: 'As the judgment shows, on one level, reconciling equality and culture is simply a matter of identifying those aspects of customary laws which offend the constitutional guarantee of equality, and striking them down. On the other level, it required the striking down of the male primogeniture rule in customary laws as incompatible with the right to gender equality. What to put in its place is far more complicated matter. It is complicated not merely because of practical problems which preoccupied the majority of the court in Bhe case, but because of potentially contradictory demands of equality and the maintenance of legal dualism'.

⁷⁶ *Christian Education of South Africa v Minister of Education* 2000 4 SA 757 (SCA) 711 para 26.

⁷⁷ See also T Maseko 'The Constitutionality of the State's intervention with the practice of male traditional circumcision in South Africa' (2008) *Obiter* 192.

⁷⁸ See J Sloth-Nielsen and B Mezmer, 'A Dutiful Child: The Implications of Article 31 of the African Children's Charter' 2008 (52) *Journal of African Law* 159.

(titled 'Social, cultural and religious practices'). The section regulates in detail two customary practices, namely male circumcision (section 12(8)-(10) and virginity testing (section 12(4)-(7)).⁷⁹ Female genital mutilation is also prohibited (section 12(3)).

Ukuthwala, it is worth noting at the outset, is not mentioned by name as a customary practice in this section, a fact which might become relevant were the effects of the Act upon the practice to be considered. It might, for instance, be inferred that the legislature knew about the social practice as evidenced by prior writing⁸⁰ and research on the practice, and, by choosing not to refer to *ukuthwala*, signaled that the custom did not require regulation. An *a priori* stance that the practice had no constitutional ramifications and did not necessitate legislative intervention could therefore be argued.

This does not mean that *ukuthwala* is in any way immune from future legal scrutiny. And, we suggest that should the constitutional or legislative validity of the practice be put in issue, it is possible that the impact of the remainder of section 12's provisions upon *ukuthwala* as a customary practice might be called into question, insofar as the practice has a bearing upon the girl child.

4.2 Section 12(1) and the overarching prohibition on detrimental cultural practices

Section 12(1) contains the overarching right of every child 'not to be subjected to social, cultural and religious practices which are detrimental to his or her wellbeing'. This section, cast as a right of the child, is not hit by the offences created by section 305 (the overarching penalties clause of the Act). Hence, were *ukuthwala* to be characterized as a social practice which either in general or in a specific situation violated section 12(1) as a practice 'detrimental to the child's wellbeing', the remedy would not lie automatically in the penal sphere (as far as contravening the Children's Act is concerned: there may well be criminal sanctions derived from other common law or statutory offences, however). The potential for delictual damages remains for any infringement of rights under this section, though, as do other potential remedies for infringements such as injunctions, declaratory orders and

interdicts, or preventive measures.

The debate about whether *ukuthwala* contravenes section 12(1) in any event (in the absence of any concrete sanction being attached) requires an assessment as to whether the practice is in fact a social and cultural practice which is detrimental to the child's wellbeing'. Our answer to this must be context dependent: the abduction and rape of a child without her consent falls undeniably to be outlawed as a harmful cultural practice, albeit that the sanctions of conventional criminal law might also be brought to bear. However, equally, we are convinced that not all forms of *ukuthwala* can be labeled as objectionable, harmful or detrimental, as outlined above in previous sections of this article. Any consideration of the implications of s 12 is speculative, as the determination as to whether the practice is detrimental will inevitably be related to the actual circumstances which are laid before the court for adjudication.

4.3 Section 12(2)(a) and early marriage

Section 12(2) (a) of the Children's Act is potentially of direct relevance to determining the legal status of *ukuthwala*. In fact, in ordinary parlance, this section would probably be described as the 'forced marriage' prohibition of the Act (as is required by the African Children's Charter, amongst other human rights documents).⁸¹

The first part, 12(2)(a), prohibits the 'giving out' in either marriage or engagement 'of a child below the minimum age set by law for a valid marriage'. Several comments may arise here: 'giving out' (seemingly an old fashioned terminological rendering of the marriage pact between families) limits the usefulness of this article in accommodating some versions of *ukuthwala* insofar as the child 'victim' is concerned: a child who is *thwala'd*, as described above, is definitely not in any conventional sense of the word 'given', let alone 'given out'. In fact, a more suitable English rendition would be achieved by the substitution of 'given' with 'taken'!

A tentative conclusion is that this prohibition was not drafted to target *ukuthwala* as conventionally understood. It seems primarily to target early marriage, and the family-to-family negotiations that may precede it.

⁷⁹ See section 12(4), (5), (6) and (7) in respect of virginity testing, and section 12(8),(9) and (10) in respect of male circumcision. Regulations 3-6 elaborate these provisions further. A detailed consideration is beyond the scope of this article. Suffice it to mention that the provisions on virginity testing were particularly contested during Parliamentary hearings, and led to a compromise provision which sees prohibition in place for the practice where the child to be subjected to the practice is below the age of 16 years, accompanied by the enactment of regulations prescribing how virginity testing is to be performed to comply with the Act where the child is over 16 years and furnishes her consent. One of the authors of this article was a member of the team which drafted the Regulations submitted to the Department of Social Development outlining the further requirements for the practice to be conducted in conformity with the Act.

⁸⁰ See, for instance, the prior work of Koyana and Bekker (note 19 above); Bennett (note 17 above).

⁸¹ Article 21(2) of the African Charter on the Rights and Welfare of the Child prohibiting both child marriage and betrothal.

Second, there are obvious and intractable difficulties occasioned by the phrase 'of a child below the minimum age set by law for a valid marriage' in section 12(2)(a). Not the least of these problems relates to the variety of minima set by law for valid marriages under different legal regimes in South Africa.⁸² Mention has been made of the minimum set for the recognition of a valid customary marriage – 18 years – in terms of the Recognition of Customary Marriages Act.⁸³ But is the minimum 'set by law' also a minimum under 'unwritten' customary law which has also been recognized as 'law' for the some purposes?⁸⁴ Assuming a much lower age as the minimum under most customary systems – eg around the age of puberty or shortly thereafter – this provision could potentially be of little practical effect in the protection of children against early marriage (an explicit requirement of the African Children's Charter as well as a number of other instruments relevant to South Africa).

However, such an interpretation would render the provision practically devoid of value, and would also raise questions about the value of the Recognition of Customary Marriages Act on setting a minimum age of 18 at all. Further, applying unwritten customary ages of marriage would run counter to the overall legislative intent that the Children's Act apply to all children below the age of 18 years (section 17). It is suggested, therefore, that the 'law' setting a minimum age of marriage referred to in section 12(1)(a) must refer to statutory law.

This does not assist in resolving the additional problem that the Marriage Act of 1961 nevertheless continues to contain a lower minimum age of marriage than 18 years, descending to 15 years or even lower with Ministerial consent,⁸⁵ and moreover is one that discriminates between boys and girls as regards the statutory minima set.⁸⁶

As 'pure' civil law, this Act might not, it is submitted, be of any relevance to explicating the legal status of *ukuthwala* as a customary practice. Nevertheless, in establishing the benchmark criterion of 15 years for girls as the minimum age for marriage, it would be difficult to argue that **in law**, any offensive practice regarding engagement, promise of marriage or marriage itself is restricted solely to persons above the age of 18 years, when the Marriage Act itself so plainly provides otherwise.

It follows, therefore, that *ukuthwala* (when it is deployed consensually as a prelude to marriage in the case of girls below the age of 18 years) can hardly be regarded as being *contra bonos mores* when the legal marriage of girls of that age is permissible under the law of the land.⁸⁷

4.4 Section 12(2)(b) and forced marriage

Section 12(2)(b) of the Act prohibits that a child 'above that minimum age be given out in marriage or in engagement without her consent.' It remains to discuss whether section 12(2)(b) is useful as a shield against other forms of *ukuthwala* (forced seduction, for want of a better description), and if so how? Section 12(2)(b) can be distinguished from section 12(2)(a) in that it refers, first, only to persons above the minimum age of marriage (as already discussed, i.e. 15 years of age for girls), and secondly, to their being given out in marriage or engagement *without their consent*. This accords more logically with the expectation of a prohibition on *forced marriage*, where the focus is also on absence of consent or upon duress.

Section 12(2)(b) apparently therefore includes *ukuthwala* within its ambit where the abduction is performed without consent; however, the caveat is whether *ukuthwala* can be brought within the legislative words 'marriage or engagement' – seduction is not mentioned, nor is it axiomatic that 'seduction with the view to an eventual marriage' bears an equivalent meaning – and, as important, whether the words 'given out' in section 12(2)(b) can be given a clear and precise meaning.

To be blunt, can the 'seducer', or abductor, in the way that *ukuthwala* has been described to take place, be subsumed under the prohibition on 'giving out' a child in marriage without her consent? This seems to strain the ordinary meaning of the words unduly, as the mischief targeted appears rather to be the act of *offering* the girl for marriage without her consent, and the wrongdoer likely to be a parent or family member, rather than the seducer or abductor. If this interpretation is correct, then *ukuthwala* does not fall foul of the section 12(2)(b) prohibition. It is simply inapplicable to the practice.

On the other hand, it is possible to conceive that the

⁸² Which in turn raises the potentially (indirectly) discriminatory application of this provision, since questions might arise as to which children are protected by which set of laws setting minima.

⁸³ Act 120 of 1998.

⁸⁴ See the discussion of South African 'law' as including customary law in LAWSA (n 34 above).

⁸⁵ As low as 12 years for girls and 14 years for boys, linked to the presumed age of puberty.

⁸⁶ P Mahery and P Proudlock 'Legal ages in South African Law 2010', Children's Institute, University of Cape Town.

⁸⁷ The argument that section 12(2)(a) refers to the minimum age for marriage set in the Marriage Act is reinforced if regard is had to the provisions of section 12(2)(b) which refers to protections for persons **above** the minimum age of marriage. Since the Act as a whole applies to persons below the age of 18 only, 'persons above the age of marriage' referred to in section 12(2)(b) must mean some other age, i.e. one below the age of 18 years.

acts of a girl's parents, were they to be complicit in making arrangements with the abductor, without the girl's consent, would render their participation in *ukuthwala* conduct which falls foul of section 12(2)(b). In this regard, it is worth pointing out that section 12(2) is explicitly subject to the penal sanctions of the Children's Act contained in section 305.

The question which then arises is whether section 305, read with section 12(2), renders *ukuthwala* subject to criminal sanction? The preliminary answer to this, based on the analysis above, is no (or not really?).

On the wording of both section 12(2)(a) and (b), the infringement of rights is committed by whomever 'give the child out' in marriage or engagement. That is the first hurdle. The abductor's conduct cannot be brought within the plain meaning of these words. Second, the difficulties with the internal conflict of laws relating to the minimum age of marriage, and the requirement of a guardian's consent to validate a customary marriage⁸⁸ might prove a fatal defence to any prosecution: which law, one might ask? And what of the *nulla poena sine lege* principle, which at minimum requires certainty as to the conduct to be deemed offensive?

Third, unless *ukuthwala* can be characterised as marriage – which it is not, it is a prelude to marriage negotiations – or engagement – which seems to be stretching a civil/canonical law concept way beyond the common meaning, it is not a practice which is covered by the prohibition at all. It is submitted that the entry into marriage negotiations expected in customary law, and embodied in the practice of *ukuthwala* is not the same as the concept of 'engagement' of civil law.⁸⁹

At first blush, section 12(2)(b) does seem to embody a forced marriage prohibition. But it is directed at only parents or guardians who furnish their consent in circumstances where that of the child is lacking, or where they apply duress. It may well be, therefore, that this conception of forced marriage is in need of better elaboration, and related more specifically to the South African cultural context, in the same way as has recently come to pass in the United Kingdom.⁹⁰

Two remaining points require consideration in the context of the Children's Act 38 of 2005, before the discussion concludes with the consideration of *ukuthwala*

as a customary practice with legal dimensions under current South African law.

The first question that may be posed is whether other provisions of the Children's Act may be adduced to condemn or to outlaw the practice. The answer to this is necessarily speculative, and rests largely on the approach to section 305(3) which criminalises parental child abuse, read with the various provisions which underscore the child protection system (including section 150 which defines a child in need of care and protection). Again, the abductor is potentially not liable under this approach, which focuses on the part played by parents and guardians.

Alternatively, recourse might be had to the offences contained in the Criminal Law (Sexual Offences) Amendment Act of 2007, or to common law renditions of kidnapping or abduction. When measured against the array of options for the assimilation, accommodation and development of customary law, these latter alternatives can only be considered as blunt swords indeed by which to address the nuances of custom and tradition under a constitutional dispensation.

Finally, some consideration must be given to the option of civil liability. Assuming that it is correct that *ukuthwala* does not fall neatly under the provisions of section 12(2), an infringement of the child's rights to wellbeing contained in section 12 (1) might conceivably lay the basis for such a claim against the abductor/seducer. This is reinforced by the conceptualization of custom of *ukuthwala* as a delictual claim **in customary law itself**.

This might seem like an alarming proposition – along the lines of sanctioning the payment of damages for rape. It might, too, be regarded as perpetuating extreme gender inequality and offensive stereotypes which achieve no good in modern day South Africa (characterised by one of the most violent societies in the world as far as gender based violence and rape is concerned).

However, it does present the possibility of a more benign accommodation of this particular customary practice, in line with the desired objectives of current constitutional jurisprudence. And, as demonstrated above, the Children's Act itself is far from a model of clear condemnation of *ukuthwala* as a form of forced marriage.

5. Conclusion

⁸⁸ Under customary law, the consent of the father was a *sine qua non*, regardless of the age of the girl. Tacit consent can be inferred from the circumstances. Should the father, for example, accept *lobolo* or allow the couple to live together as man and wife, consent can be inferred.

⁸⁹ Arranged marriages are not mentioned by name; there also the question of consent can be problematised when severe pressure is brought to bear on a would-be child bride, often over a period of time, and she ultimately does in fact furnish consent, but for fear of prejudicing family relationships (for instance).

⁹⁰ See the UK Forced Marriage (Civil Protection) Act 2007 and the Multi-Agency Practice Guidelines Handling Cases of Forced Marriage of June 2009 issued by the Forced Marriage Unit of the Ministry of Justice; see further H Patel and A Guha 'Forced Marriage' in *Journal of Family Law and Practice* vol 1.1 (May 2010).

Forced marriage fails the constitutional compatibility test on any number of grounds, including freedom and security of the person (s 12 of the constitution), dignity rights (s 9), and the best interests of the child (s 28(2)). Similarly, the précis of the practices of *ukuthwala* provided in section 2 of this article would in the minds of most at least prima facie contravene essential constitutional requirements. However, *ukuthwala* is not, in plain sense of the word, 'forced marriage', although it could lead to this if the negotiations are concluded without the consent of the girl.

Further, though, we have argued that *ukuthwala* cannot be treated as a unitary phenomenon; variants of the practice must be distinguished. In attempting to rescue or divide positive attributes of *ukuthwala* which do not prima facie offend human rights, we suggest that current legal terminology, such as that used in the Children's Act, is not sufficiently nuanced to describe and regulate it. An example relates to the inclusion of the words 'giving out' in sections 12(2)(a) and (b), which confine the application of this section unduly.

Sensitivity to various ways in which customary law can be accommodated would lead to a conclusion that South African law should recognise those forms of *ukuthwala*

where the requirement of consent of the 'bride' is met, and she colludes or is aware of the mock abduction. The legal relevance of her participation in these acceptable forms of *ukuthwala* should be acknowledged. Child participation, and recognition of the evolving capacities of the child are a basic tenet of the Children's Act, and recognising the role of the girl as an actor in her own interests via *ukuthwala* thus promotes a fundamental principle of the Act. The benign accommodation approach promotes the positive aspects of culture, and moreover emphasises children's agency. (It is conceded, however, that the 'straight 18' position of the African Children's Charter in relation to child marriage does pose a significant barrier to advocating this position).

It would further be required that the common law offence of abduction also be developed to permit forms of mock abduction which are legal in customary law and in which consent to being 'carried away' features. However, where consent is absent and the abduction becomes unlawful, we suggest that existing criminal offences are adequate to cover the practice. There is therefore no need for additional legislative intervention in the criminal law sphere.

Forced Marriage: The role of cultural and religious difference in understanding of marriage and sexuality as a factor in forced marriage

Catherine Shelley¹

From the first reported case of forced marriage, *Hirani v Hirani* in 1983, it took over 20 years to enact specific legislation dealing with Forced Marriage and develop child protection guidance. It remains a phenomenon for which it is difficult to assess the incidence and reporting. Comprehensive and identifiable statistics have only been collected since creation of the FCO Forced Marriage Unit in 2005. Since then the Forced Marriage Unit estimates that it has dealt with 250/300 cases of forced marriage per year and 100 of forced sponsorship of entry visa applications². However, as early as 2000 Abdul Abdullahi An Na'im cited a figure of 1,000 forced marriages per year from the UK³. It seems that greater recognition of the concern both within the communities affected and regulatory authorities has led to such reporting as there is.

Forced marriage is defined by the Forced Marriage (Civil Protection) Act 2007 as a situation in which 'a person ("A") is forced into a marriage if another person ("B") forces A to enter into a marriage (whether with B or another person) without A's free and full consent.' Independently of the forced marriage legislation the law requires that both parties' consent to a marriage for it to be valid. For the purposes of the forced marriage legislation "force" includes 'coerce by threats or other psychological means'. However, in considering the socio-religious and cultural context in which forced marriage occurs questions arise as to whether the test of duress and force adequately protects 'free and full consent' in all cases.

Introduction and what the article is not

saying...

In considering cultural and religious differences I am not identifying Forced Marriage as either a Muslim or South Asian problem. By way of illustration, the first reported UK case involved a young Hindu woman and last summer forced marriage was highlighted as an issue over several weeks of the South African soap opera *Generations*. All world religions condemn forced marriage and emphasise that, for validity, marriage must be consensual. Aware of the fact that forced marriage has been an issue in some Muslim communities the Muslim Council of Great Britain⁴ and the 'Contextualising Islam'⁵ report condemn forced marriage in strong terms.

However, some parents and elders from a variety of communities do still believe that certain marriages are required for their children and are in their children's best interests. This article therefore examines worldviews that lead parents to insist that their children enter marriages which overstep the boundary from being arranged to being coerced. The simple distinction drawn between arranged and forced marriage by Munby J (as he then was) at the 2009 London conference on forced marriage⁶ fails to recognise cultural differences, particularly in relation to heteronomous versus autonomous identity, which complicate the issue of consent.

In a similar vein the condemnation by Wall LJ in *Re BM*⁷ of 'honour'⁸ as being 'against human rights' fails to recognise the inter-relationship not only of 'honour' and forced marriage but also between 'honour' and arranged marriage. This characterisation also seems blind to the fact

¹ The Reverend Catherine Shelley, Diocese of Manchester

² Ministry of Justice Press Release – 'New law to prevent forced marriage' 31.01.09 www.justice.gov.uk/news/newsrelease260707

³ An Na'im, SOAS CITE Project www.soas.ac.uk/CIMEL

⁴ Dr G Siddiqui Uproot forced marriages or face the consequence www.muslimparliament.org.uk/forcedmarriage

⁵ Chaired by Professor Y Suleiman www.cis.cam.ac.uk/CIBPReportWebpdf p.45-50 October 2009

⁶ Munby J *London Forced Marriage Conference* Family Law (June 2009) p.533

⁷ *Re B-M (Care Orders: Risk)* [2009]EWCA Civ 205, *Fam Law* June 2009 p.475

⁸ The word 'honour' is used by way of shorthand. Wall LJ's argument that such codes have nothing to do with 'honour' is accepted but the fact that such codes do still hold in some communities needs to be acknowledged and engaged with.

that understanding and interpretation of human rights is not self-evident. Simply stating that something is not religious does not effectively address the worldview of those who do believe that practices related to 'honour' are religiously founded. Simply asserting that something is contrary to human rights is insufficient in a multicultural society. Interrogation of what is understood by consent in relation to marriage, of what founds and constitutes human rights and of worldviews at odds with these assumptions, is therefore needed.

In considering such issues it is also important to engage with the motivation and reasoning of those families and communities who do still believe that a particular marriage is in their child's interests and religiously required, even if that requires force. It is only by engagement with such understandings that changes can be made effectively. Such engagement needs to be in language that acknowledges those different worldviews, in the words of Abdul Abduallahi An Na'im *inculturating* rather than *imposing* human rights.

Different approaches to sex and marriage

Western, secular society views decisions about sex, relationships and marriage as autonomous by contrast with a more heteronomous construction of the human person and such decisions in traditional, religious cultures. In western culture the individual has a clear choice in both finding and then choosing to sleep with a sexual partner and in consenting not only to whom they marry but also as to whether they marry. Secular society no longer has any law or expectation that sex is reserved for marriage. Decisions to limit sexual expression to marriage remain in the personal and often religious sphere. English law now also seems to see a disjunction of consent to sex and consent to marriage since *Re SK, An LBC v KS v LU*.⁹ The case concerned a Muslim woman whose mental illness and learning disabilities compromised her capacity to consent. She was held not to have capacity to marry but her right to have sexual intercourse was upheld, confirming capacity to consent to sexual relationships as involving less responsibility than marriage. The disjunction of capacity to consent to sex and capacity for marriage sits ill with cultural understandings that sex and marriage

should be inseparable.

The reason for the distinction between marital commitment and non-marital sexual relationship is the fact that marriage signifies long-term legal and public commitment, even in the privatised understanding of relationships in western culture. In cultures with religious codes that do not separate sex from marriage, sexual relationships will always signify the public commitment of marriage. The fact that marriages in many such communities are also arranged, due to restrictions on mixed sex association, entails familial, even communal, involvement not only in supporting the marriage but in the choice of partner.¹⁰ The expectation of marriage as normative means that arranged marriage is the standard developmental path from childhood to adulthood.

The option not to marry and remain single, even if celibate, is far more limited than in western culture because, whilst sexuality is strictly regulated, most cultures see sex as a gift from God. Both Islam and Judaism not only see sex as a gift from God and therefore an essential feature of human life but also that the gift of sex carries with it a duty of procreation. Consequently it is strongly expected that all will marry and marry young, so that sexual relationships and procreativity are appropriately channelled. These expectations come not only from the family, which is likely to be extended, but also from the wider community. Case law shows that a variety of relatives may be involved not just parents.

Parents, guardians and marriage

Arranged marriage means that the role and scope for intervention by parents and guardians is far greater in traditional and religious communities than in western society. Whilst within liberal, secular culture parents of teenagers may have concerns about the age at which their offspring begin a sexual relationship, parental approval is not needed. The lack of pressure to marry to validate intimate relationships also means that sexual aspects of personal life remain less formal and less public and therefore less open to parental intervention than the act of marriage. Once over the age of sixteen non-marital relationships are protected by the right to private life.¹¹ Over the age of eighteen, whilst parental acceptance may

⁹ [2007] EWHC 636 & 3289, [2008] 2FLR 707 & 720; & *X v MM (by OS) v KM* [2007] EWHC 2003

¹⁰ See eg Alan Untermann *The Jews* Sussex University Press 1996/9 p.136 'An arranged marriage is not simply the coming together of two young individuals, it is the marriage of two families each of which will have some say in the suitability of the match'

¹¹ Article 8 European Convention on Human Rights

be sought, approval for marriage is not needed and the right to marry is protected by Article 12, ECHR. Parents may have concerns about their offspring getting emotionally hurt, having a premature or unplanned pregnancy and they might advise their child against a particular relationship – as illustrated by a recent story line in *The Archers*. However, there is no role for parents or community to prevent a relationship or arrange an alternative partner.

Yet arranged marriage, with the involvement of elders in the community, is clearly permitted within English law.¹² Its legal basis depends upon the construction that although arranged for them, with partners chosen by others, the marriage is not valid if the parties themselves do not consent both to the arrangement process and to marrying each other. The precise form and mechanism for arranging the marriage, the extent to which parties meet beforehand and the role of parents or other guardians, varies from tradition to tradition. However, the essence of the practice is that parents, guardians or marriage arrangers gather details about the (generally young) people in question and match-make, with their best interests and compatibility in mind.¹³ It is in this context that traditional, religious communities want to ensure that a good marriage is made.

In traditional families, because marriage is not simply an individual choice and intimate relationships are by definition marital, marriage is a public and community matter. Marriages are to a greater and more explicit degree about a joining of families within that community, not just the partners to the marriage.¹⁴ Marriage is constructed as something arranged by and accountable in some degree to those outside the marital couple. Accordingly parents have a more active role in finding the right person in using their experience of marriage and their child to find a suitable partner. This is also a longer-term role, lasting into children's adulthood, by contrast with the west where parental concern is generally limited to teenagers under the parental roof.

Much writing on forced marriage considers cases

involving women over 18, although it is estimated that up to 1/3 of UK cases involve minors.¹⁵ Regardless of age women caught up in situations of forced marriage are dependent due to the status of being unmarried. This arises from a construction as objects of care, protection, control and symbols of family and community honour.¹⁶ Dr Abbedin, the first woman to invoke the Forced Marriage (Civil Protection) Act 2007, was aged 33. Culturally marriage is expected; parents have a strong desire to ensure that their children are happily married. 'Honour' can be affected not only by relationships that are disapproved of but also by the status of remaining unmarried. It is in this context that marriage occurs and consent to marriage is exercised; therefore understandings of consent have to be interrogated more carefully and contextually.

Proponents of arranged marriages argue that it allows experienced heads to consider issues of social and other compatibility for the young people involved and that it provides significant support for the couple. Arranged marriage is not necessarily based on immediate, romantic love but aims at longer, more rooted and stable love. A range of protective factors and motivations for defining the right partner come into play, for example material security, compatibility of religion, class and background. The danger is that children's interests are overly identified with familial and communal expectations. Arguments for material security can become over-conflated with ulterior motives to secure unification of family property through marriage. Other ulterior motives include immigration clearance,¹⁷ finding a spouse for an adult child with disabilities¹⁸ and continuity of family line. The concern is whether young people genuinely have freedom to consent or withhold consent in the face of parental and community expectation.

In arranged marriages free choice and consent is already constrained – or more neutrally, regulated – to a degree by the inviting or trusting of others to arrange the initial choice and introduction of a partner. Consent is to the particular person that one is marrying¹⁹ but there may

¹² Munby J *London Forced Marriage Conference Family Law* (June 2009) p.533

¹³ A Untermann *The Jews* op cit; S Levine *Mystics, Mavericks and Merrymakers* NYU Press 2003

¹⁴ A Untermann *The Jews* 1996/1999 Sussex University Press p.136 op cit fn.9

¹⁵ Home Office figures indicate that 30% of these are children under 18, another 30% aged 18-21 – hence the increase of the age for a marriage visa to 21 from July 08

¹⁶ Ayalet Shachar *Multicultural Jurisdictions* 2001 CUP

¹⁷ *Re SA* [2005] EWHC 2942; *Re SK* [2004] EWHC 3202

¹⁸ *Re SA (Vulnerable Adult)* [2005] EWHC 2942; [2006] 1 FLR 867, *Re SK* fn 1 above; *City of Westminster v IC, KC v NNC* [2007] EWHC 3096

be limited scope to refuse a parent or guardian's choice of partner. When this regulation is considered in the context of wider regulation of relationships, whether sexual or simply friendship and of roles within community and family as regards work choice and parenting roles, the issue of constrained consent becomes still more complex. It reflects more dramatically the different context of consent between an individualistic society and a more traditional community.

In addition, because marriage is a more public affair the reputation of the young person and their marriage affects the whole family through the concept of 'honour'. Young people may feel compelled to continue with a marriage because failure to do so would bring dishonour on the family, with consequences not only for their own future marriage prospects but also for younger siblings and wider family. Pressure to continue with a marriage can occur if consent has been given to marriage on behalf of minor wards. Although in theory the ward can call off the marriage at puberty if they do not consent, the freedom to repudiate in situations with high familial expectations of marriage must be questionable.

The code of 'honour' and marital prospects are particularly associated with the reputation of young women as opposed to young men. If a potential partner does not meet familial expectations, for example because from a different religion or caste or biraderi, sexual codes underlying arranged marriage are breached.²⁰ However, 'honour' is breached even in cases of sexual involvement against the young woman's will. Pressure may be brought to continue with a marriage because of earlier abuse by the potential spouse; marriage essentially becomes sacrificial to save the honour of the family.²¹ Even where marriage does not follow abuse such as rape the 'victim's' marriage prospects are affected as illustrated by Attorney General's Reference (No. 51 2001)²² where the Court of Appeal increased a rape sentence, responding to the

community's argument that the Asian Muslim victim's reputation and marriage prospects were harmed. Thus in attempting to be culturally sensitive the Court upheld the 'honour' code, without recognising or challenging its damaging impact.

Many cases of forced marriage occur in response to perceived breaches of the 'honour' code to deter what are seen as inappropriate relationships. In such cases parents or elders may coerce marriage motivated by understandings that their role is not only to arrange marriage but to prevent bad marriages or extra-marital relationships. In such instances a parentally approved marriage 'saves' children from liaisons seen as inappropriate or harmful and is a lesser evil than punishment or loss of reputation for zina²³ and izzat²⁴. These cases are the consequence of the 'honour' code as much as is 'honour killing'. If the law condemns such codes in relation to forced marriage and killing, it also needs to tackle its influence in other circumstances.

It is the cases of forced marriage to 'prevent' a love marriage and cases of older unmarried women, such as Dr Abbedin, that have constructed marriage without consent as 'forced' and set the parameters for tackling it. To prove that a marriage lacks consent English law requires evidence of duress.²⁵ In the case of marriage duress encompasses emotional threats not just threats of physical force.²⁶ Where marriage is arranged to replace or divert from an existing relationship and the young person's behaviour clearly evidences lack of consent, the test of duress to nullify the marriage and ground injunctive protection is relatively straightforward. Since the development of guidelines on forced marriage agencies and courts have taken an increasingly proactive stance to protecting young people who have the autonomy to seek help. An example is the exercise of extra-territorial jurisdiction in *Re A*²⁷ to protect a 15-year-old British national raised in Pakistan, who sought help from the

¹⁹ *Hadiths 7/51, 9/80 Women in Islam* Ed Nicholas Awde, Bennet & Bloom 2005; Judaism also requires consent see *The Jews* p.139 A Unterman Sussex 1996 as does Christianity *Marriage service*

²⁰ Outside religious or class boundaries or same-sex relationship; Jaswinder Sanghera, Karma Nirvana and case studies at www.soas.ac.uk/cimel (accessed 20.12.09)

²¹ Examples are found in the Bible eg *Eg Dinah*, Genesis 34, the barrier to marriage was not that she had been raped but that the potential husband was not a Jew; Deut 22.v28 – 'if a man meets a virgin... and seizes her and lies with her [he] must give the girl's father 50 shekels; she shall be his wife since he has violated her'

²² *sub nom R v C* [2001] EWCA Crim 1635, (2002) 1 Cr App R 334 : (2002) 1 Cr App R 80

²³ Adultery

²⁴ Dishonour

²⁵ Such as to 'overbear the will' of the victim; *Hirani v Hirani* [1983] 4 FLR 232

²⁶ *Hirani v Hirani* [1983] 4 FLR 232

²⁷ [2008] EWHC 1436

British consulate to avoid a marriage to an older man, believed to be an alcoholic. The court made her a ward of court enabling the consulate and Forced Marriages Unit to assist her leaving Pakistan and join an older half-brother in Glasgow. In such circumstances the distinction between arranged and forced marriage and the lack of consent is clear.²⁸

However, the concept of 'forced' marriage or marriage under duress does not cover the whole picture of non-consensual marriage. Questions about the validity and freedom of consent in a context in which arranged marriage is the norm cover a wider range of situations than those in which physical force or threats are used, as Abdullahi An Na'im comments.²⁹ Courts injunct, nullify or refuse recognition to marriages in cases of incapacity to consent, for example where a party to a purported marriage lacks capacity due to learning disabilities³⁰ or mental illness.³¹ However, the courts do not always see being under the minimum age of consent to marriage as requiring nullification in cases involving those from non-European cultures, as seen in the 1969 case of *Mohammed Al Hajji v Knott*³² where the marriage of a Nigerian Hausa woman aged 13, was upheld. Surprisingly the case was cited more recently in *Re K sub nom LA v N& Others* despite the fact that it sits ill with the need to protect from forced marriage. Such cases illustrate a reluctance to nullify marriage or even question consent where there is no allegation of force even though there are questions about the validity of consent on other grounds.

In order to be valid consent requires not only a 'yes' or 'no' but also that it is given freely, without pressure or coercion of any sort and that it is appropriately informed, with knowledge of what is entailed and of acceptable and genuine alternatives. It is questionable whether consent given in the absence of any knowledge of the person to be married, in the absence of alternatives or in which alternatives will be censured by family and the community, is not an appropriately informed or freely given consent. In the absence of evidence of violence,

proving lack of consent given in such situations is much more difficult and therefore much more likely to go undetected.

There is a range of circumstances in which marriages may not be in a young person's best interests. These include marriages to consolidate property or obtain a carer or immigration clearance, all of which raise questions about exploitation which do not invalidate the marriage, even if consent to marriage is given in ignorance of the potentially exploitative features of the marriage. The dangers of limited knowledge inherent in arranged marriage are highlighted by contrasting the case of Miss K³³ with Miss A, both aged fifteen. Miss K,³⁴ an Afghani refugee was married, aged fifteen, to an older, abusive husband. Although the marriage was subsequently dissolved she was held to have consented to it. By contrast Miss A's³⁵ knowledge of her potential husband's alcoholism enabled her to seek help to avoid the marriage and find safety outside Pakistan. Lack of information inhibits capacity to give informed consent. In cases of medical consent decisions are overturned where consent is inadequately informed. In situations where lack of information arises because of religious upbringing, if not indoctrination, this is illustrated markedly by cases concerning adolescent Jehovah's Witnesses refusing blood transfusions.³⁶ However, lack of informed consent is not a test applied to marriage. Whilst one can never know everything about a potential spouse there must be a minimal level of knowledge and acquaintance in order to give valid consent. This is not necessarily inimical to arranged marriage but it might reduce the incidence of marriage arranged for ulterior motives unknown to the young people concerned.

In assessing consent high familial or community expectations, as opposed to threats, do not constitute duress. Thus less rebellious or resilient children who do not consent but cannot articulate refusal, or consent only because of parental or community expectation, remain vulnerable to exploitative or inappropriate marriages. In

²⁸ Wall LJ *Re B-M* op cit; Munby J *London Forced Marriage Conference* Family Law (June 2009) p.533

²⁹ *Forced Marriage* Professor of International Law Emory University (2000) CIMEL Project

³⁰ *NS v MI* [2006] EWHC 1646; *Re SK (Adult by her litigation friend Anne Marie Hutchinson)* [2004] EWHC 3202, [2005] 3 All ER 421, [2005] 2 FLR 230, [2006] 1 WLR 81; *P v R* [2003] 1 FLR 661; *City of Westminster v IC, KC v NNC* [2007] EWHC 3096

³¹ *Re SK (Adult by her litigation friend Anne Marie Hutchinson)* [2004] EWHC 3202, [2005] 3 All ER 421, [2005] 2 FLR 230, [2006] 1 WLR 81

³² *Re K sub nom LA v N& Others* [2005] EWHC 2956 citing *Mohammed Al Hajji v Knott* [1969] 1QB

³³ *Re K sub nom LA v N& Others* [2005] EWHC 2956

³⁴ *Re K sub nom LA v N& Others* [2005] EWHC 2956

³⁵ *Re A* [2008] EWHC 1436

³⁶ *Re E (Wardship: Consent to medical treatment)* [1993] 1 FLR 386; *Re S (A Minor: Consent to Medical Treatment)* [1994] 2 FLR 1065;

Re L (Medical Treatment: Gillick Competency) [1999] 2 FCR 524

some cultures a young woman's mere failure to object can be taken as consent, her lack of reply being construed as the shyness of modesty, as outlined by some Islamic scholars and hadith.³⁷ It can be difficult to articulate refusal against the pressure of family expectation and the position is compounded in situations where consent is not in fact given but is assumed. A lack of articulated objection means that consent is upheld, even though not given. As well as lack of information about the circumstances of a marriage there is also an argument that lack of knowledge about alternatives to marriage undermines consent. This was the situation in the case of Miss K, who seemed to have little awareness of alternative options and potentially remained vulnerable to a further abusive marriage as her capacity to exercise genuinely free and informed consent were constrained by lack of knowledge. Emphasising duress means that other factors that invalidate consent are not assessed and young people with capacity to consent, who submit to marriage through pressure of expectation though not threat, have no defence.

The decision in *Re K* followed that in *Mohammed Al Haji v Knott*³⁸ where the Nigerian marriage of a Muslim Hausa couple was recognised, although the wife was only thirteen. The court's rationale for non-interference, despite the wife's age, was that the couple were temporary UK residents whilst the husband completed his studies. Their marriage was upheld as in accordance with the couple's religious and national law. The wife's consent or capacity to consent was not addressed, even though, by statute, consent was not possible until sixteen and Gillick competence³⁹ was twenty years away. Although forty years on and in times more aware of forced marriage, *Re K*⁴⁰ did not consider how far marriage was genuinely the young woman's own choice, as opposed to compliance with her father's wishes and possible indoctrination.

The cases highlight different understandings of agency, autonomy, capacity and consent. It is the heteronomous construction of individuals within traditional and religious communities that leaves scope for arranged marriage to tip into forced or non-consensual marriage in cases that

are not so obviously forced or non-consensual. Loyalty and obedience to parents and elders, along with possible cultural isolation from dominant society, leaves children from such communities with limited autonomy. Thus questions remain about consent as approaches to minors with sufficient agency to react against their culture differ from those with limited capacity for independent agency. Limiting tests of consent in marriage to duress leaves the most vulnerable without protection. To address the full scope of marriage without consent requires the recognition of consent as a range of contextualised positions rather than a simple black and white act of agency.

In tackling the phenomenon of purported marriages without adequate consent it is also important to acknowledge that concepts of autonomy and rights may not be recognised by some of the communities concerned. To talk in terms of women's rights and equal opportunities risks alienating those who are influential in the community through use of ideas considered alien to their religious tradition. This in turn risks turning the community against young members who may be perceived as adopting western values and rebelling against their culture. Simply asserting that rights are breached⁴¹ is also ineffective unless there is some analysis of what the right is and what constitutes the breach. Understandings of rights that might be contravened, such as private life, association, the right freely to marry and found a family, may not be understood in the same way within a culture of arranged marriage as in western society.

The more effective approach, as recommended by Abdul Abdullahi An Na'im,⁴² is to frame the concerns and prohibitions in the language and concepts of the culture concerned. In the case of marriage therefore emphasising that no religion condones a lack of consent to marriage and that it is not in the interests of anyone for a young person to be in an unhappy marriage. Understandings of genuine consent may be developed from an approach based on theology of respect for the person, for their equal worth in God's eyes and their equal accountability before

³⁷ *Hadith* 7/51 N Awde op cit p.70

³⁸ [1969] 1 QB 1

³⁹ *Gillick v West Norfolk & Wisbech AHA* [1986] AC 112

⁴⁰ *Re K sub nom LA v N v Others* [2005] EWHC 2956

⁴¹ As in *Re B-M (Care Orders: Risk)* [2009] EWCA Civ 205, *Fam Law* June 2009 p.475

⁴² A A An Na'im "Cultural transformation and Normative consensus on the best interests of the child" *IJLF Vol 8* (1994) p.62-81 particularly p.69/70 & 79/82

God. Theological or religious language may carry more understanding in some religious communities than the language of rights. The issue is for all communities to respect young people's right to make their own decisions, within the context of the culture, values and norms they want to live by, there is likely to be a greater degree of happiness and possibly relationship success.

Conclusions

In tackling the phenomenon of purported marriages without consent it is important to recognise the full range and complexity of situations that may both invalidate consent and militate against tackling its incidence. In considering lack of consent duress is not the only litmus test that needs to be applied, wider questions also need to be considered to establish both free and informed consent. However care needs to be taken in framing such questions to avoid undermining young women and limit their risk of having to choose between freedom of consent to marriage and their community. Engaging with genuine parental concerns and beliefs about their children's future, both in terms of happy marriage and eternal salvation, is likely to be more constructive in changing practices than simply dismissing them as human rights offences. Similarly, recognising that the roots of some forced marriages lie in parental concern about children being at risk in inappropriate relationships,⁴³ may help bridge cultural gaps in how such concerns are tackled. This does not ignore the need to address communal codes that stigmatise young women's sexuality but allows for more productive discussion if parental concerns are acknowledged and understood rather than dismissed as 'backward'. Scope also needs to be provided for internal

dialogue within religious communities, enabling co-religionists to challenge coercive practices as incompatible with the religious grounding of marriage in consent.

If rights are to be used and their implications translated into appropriate religious and cultural terms, their content needs to be substantiated rather than asserted. An alternative way to frame marriages that do not constitute duress but are not in children's interests would be to consider rights to protection from exploitation.⁴⁴ Thus any marriage that has additional features, such as the joining of family property, must show that the parties are aware of the plans and can genuinely give free and informed consent. If this cannot be demonstrated questions might be asked about whether the marriage is genuinely about the couple or about family ambitions. This could protect youngsters whose consent is inadequate for lack of information or emotional resilience to community pressure, particularly in marriages motivated by property, immigration or procuring a spouse to care for someone with learning disabilities. Such protection may also simplify enforcement in evidential terms.

A further aspect of tackling non-consensual 'marriage' is to enhance the awareness of young people themselves so that they can protect themselves and know where to turn for support. This should not only be to agencies outside the community but also to trusted supporters in the community so that opposing a marriage that their parents have arranged for them does not enforce separation from family and community. The aim is not to undermine faith or tradition but to ensure that young people – and predominantly young women – can make own genuinely consensual decisions.

⁴³ See for example the recent story line in *The Archers* between Pip and Jude!

⁴⁴ Articles 34-36 United Nations Convention on the Rights of the Child

Consent to Marry Under English Law

David Hodson*

Marriage/Wedding law and practice

Each person marrying in England in an English civil law ceremony must give their consent.

English marriage law derives significantly from the dramatic changes made by Lord Hardwicke's Marriage Act 1754 which laid the foundation for much of English marriage (and wedding) law and practice. Previously there were clandestine marriages, fraudulent marriages, under-age marriages (12 and under), quite bizarre rural and pagan traditions instead of any formal vows, unqualified (unfrocked or even defrocked) officiating clergy and undoubtedly many forced marriages. The Act created and regularised the system of Banns which in part were to ensure an orderly minimum period before the marriage and the giving of public notice of the wedding in order to allow any objections. Consent was found in the period of notice and the public element of

notice and openness of the ceremony.

In 1763, the minimum age was raised to 16 where it has remained although if either party is 16 and under 18, certain consents e.g. from parents, are required, s3(1)(A) Marriage Act 1949. Marriage to a person under 16 is void, section 2 Marriage Act 1949.

Failure to give "valid consent" "whether in consequence of duress, mistake, unsoundness of mind or otherwise" will lead to grounds for nullity of the marriage. It is voidable: s12(c) Matrimonial Causes Act 1973.

England will recognise marriages entered into abroad provided first, that the form of the marriage was in accordance with local law and secondly, that each party had capacity to enter into the marriage according to the law of their ante-nuptial domicile: Dicey and Morris *Conflict of Laws*¹

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He is the author of "A Practical Guide to International Family Law", (Jordans July 2008), probably the leading textbook on international family law, of which part of this is an extract.

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The International Family Law Group is a specialist law firm providing services to the international community as well as for purely national clients. iFLG has a special contract with the Legal Services Commission for child abduction work and is regularly instructed by the UK Government (Central Authority). It acts for international families, ex pats and others in respect of financial implications of relationship breakdown including forum shopping and international enforcement of orders. It receives instructions from foreign lawyers and, as accredited specialists, acts for clients of other law firms seeking their specialist experience.

iFLG is situated in Covent Garden near the Law Courts. Its mobile telephone accessible website includes valuable information, podcasts, a government approved child abduction questionnaire and formulae as a starting point for calculating fair financial settlements. It has emergency 24-hour contact arrangements. Contact at www.iflg.uk.com. © June 2010 (Statutory material: (c) Crown Copyright)

¹ 14th Edition. 2007

- “capacity to marry is governed by the law of each party’s ante nuptial domicile”.
- Consent is a matter of capacity to marry, see p. 68 of Dicey and Morris:
- “no marriage is valid if, by the law of either party’s domicile, he or she does not consent to marry the other”.

The effect of this rule is that a marriage between two parties with different pre-marriage (ante nuptial) domiciles celebrated in a foreign country will be void (and not recognised) where the law of the ante nuptial domicile of one of them denies the individual the requisite capacity to marry: *Sottomayor (otherwise De Barros) v De Barros (No. 1)* [1877] LR 3 PD 1. A marriage is normally invalid when either of the parties lacks, according to the law of his or her pre marital domicile, the capacity to marry the other.

Case law decisions

In *Hussein* (1938) P 159, it was found that the free will of the woman had been undermined by the repeated threats to kill her by the husband if she did not agree to the marriage.

In *Buckland* (1967) 2 AER 300, it was found that the man had only agreed to marriage due to his reasonably held fear of imprisonment in Malta if he had not gone ahead with the marriage.

Justifiable reasons for non-consent had to be very serious and invariably some threat of violence. Emotional distress was not enough. In *Szechter* (1971) P 286 the court said that it was “insufficient to invalidate an otherwise good marriage that a party entered into it in order to escape from a disagreeable situation”. The only ground for nullity was when the will of one of the parties was “overborne by genuine and reasonably held fear caused by threat of imminent danger ... to life, limb or liberty”.

In *Singh* (1971) 2 AER 828 the court found that a 17-year-old girl who went through a arranged marriage out of respect for her parents and religion would have been willing to continue with the marriage had the man in question been, as promised, handsome and educated. Instead when she saw him for the first time “she did not

like what she saw” and therefore changed her mind. It was accepted as a marriage based on free consent.

The major change occurred in *Hirani* (1983) 4 FLR 232, where a 19-year-old Hindu girl entered into a marriage with a man previously unknown to her and she left him and the marriage unconsummated after six weeks. The appeal court held that the restrictive definition of duress no longer revolved around threats of physical violence. Her age and financial dependence on parents were relevant factors. The test was not only fear of life and liberty but “whether the mind of the applicant victim has in fact been overborne, howsoever that was caused”.

Other cases followed in England and Scotland such as *Mahmood* (1993) SLT 599 and *Mahmud* (1994) SLT 599, the latter being a 30-year-old man living apart from his family and not financially dependent upon them could still have his consent vitiated by pressure amounting to force, in this case that his persistent refusal to marry had brought about his father’s death and was bringing shame and degradation on his family.

Forced marriage legislation

S63A of the Family Law Act 1996, containing the forced marriage legislation introduced in 2007, provides as follows:

‘(4) For the purposes of this Part a person (“A”) is forced into a marriage if another person (“B”) forces A to enter into a marriage (whether with B or another person) without A’s free and full consent’.

This expression “free and full consent” derives from the Universal Declaration of Human Rights: “Marriage shall be entered into only with the free and full consent of the intending spouses”.

S63A(6) of the 1996 Act provides:

‘ In this Part—

- “force” includes coerce by threats or other psychological means (and related expressions are to be read accordingly)’.

The legislation applies to marriages in England or abroad.

Capacity

Consent is also an issue in the context of capacity to enter into a marriage. In *KC v City of Westminster Social and Community Services Department* (2008) EWCA 198, it was held that a 26-year-old man with the mental capacity of a 3-year-old was incapable of entering into a marriage conducted over a speaker telephone by him in England with the other party in Bangladesh at the time. The court said it had a duty to protect the man. This was despite the "marriage" having already taken place and it being valid under both Sharia law and Bangladeshi law. The marriage would have enabled the new wife to obtain a UK visa.

Arranged marriages

The courts have been quick to demonstrate an awareness of the difference between forced marriage without consent and arranged marriage with consent, even though at times the distinction may be a fine one. In *Re SK (Proposed Plaintiff) (An Adult by way of her litigation friend)* (2005) 2 FLR 230, Singer J said

" there is a spectrum of forced marriage, from physical force or fear of injury or death in the most literal form, through to the undue imposition of emotional pressure which is at the other end of the forced marriage range, and that a grey area than separates unacceptable forced marriage from marriages arranged traditionally which are in no way to be condemned but rather supported as a conventional concept in many societies. Social expectations can of themselves impose emotional pressure and the grey area to which I had been referred is one way where one may slip into the other: arranged may become forced but forced is always different from arranged".

In *NS v MI* (2007) 1 FLR 444, Munby J described arranged marriages as "perfectly lawful ... not merely to be supported but respected" and "a conventional concept in many societies".

In contrast in respect of forced marriages where at least one does not consent to the marriage, he stated that such practice is

"intolerable ... an abomination ... the court must not hesitate to use every weapon in its protective arsenal if faced with what is or appears to be a case of forced marriage"

Recent case law

In *B v I* (2009)² the High Court held there was no consent when a young intelligent English girl of 16 was taken to Bangladesh and in effect kept prisoner in a bedroom by her family, dressed in formal clothing and made to go through a ceremony she thought was a betrothal. In fact under local law, it was a wedding. The court held that nullity was not available due to lapse of time. However on the evidence it was clear the bride did not consent so it was not capable of recognition.

In this case three years had elapsed before the application was brought before the court and therefore the opportunity for a petition of nullity had elapsed. Nevertheless the High Court granted a declaration under its inherent jurisdiction that the ceremony had not given rise to a marriage capable of recognition in the jurisdiction of England and Wales. It was said that the court had a duty to act fairly and to make declarations when they were fit to be made.

The authorities establish that inherent jurisdiction was a flexible tool enabling the court to assist parties where statute law failed. The declaration in this form did not violate section 58 of the Family Law Act 1986 which prohibited a declaration under that Act or otherwise that a marriage was at its inception void.

In *SH v NB* (2009) EWHC 3274 a man born in Pakistan and a woman born in England of Pakistani origins went through a ceremony of marriage in Pakistan in 2001 when the man was 27 and the woman just 16. She returned to England a month later. The circumstances concerning the marriage were heavily disputed. She said she had been forced into the marriage against her will and without consent. She alleged physical violence by the father, emotional blackmail, pressure and death threats. A DVD of the ceremony showed her weeping copiously. The man however asserted that she had willingly and freely consented to the marriage and that they had lived as a happily married couple afterwards. Extensive evidence was given by the parties and other

² published under ref FD09F05012.

witnesses. The jointly instructed expert gave evidence that under Hanafi Islamic law, as well as under the applicable family law in Pakistan, a lawful marriage could only take place with the complete and absolute consent of both parties, free from any form of coercion or pressure whether physical, emotional or psychological.

The High Court decided that the question was whether the consent was real or was the result of threats, pressure or other means by which the will of the individual is overborne. It decided the woman was a more credible witness than the man on central issues and considerable weight to be given to her evidence. The independent evidence was strongly corroborative of her case. The woman had satisfied the court on the civil standard of proof that she had not validly consented to the marriage in that her free will had been overborne as a result of the pressure exerted on her.

Again there was no opportunity for a decree of nullity as more than three years had elapsed. It was said that section 58 of the Family Law Act 1986 prohibited the court from making a declaration that the marriage was void at its inception. It did not prohibit the court from making a declaration under section 55 of the Act that there was no marriage between the parties which was entitled to recognition as a valid marriage in England and

Wales.

The case law on consent to marry will continue to develop, perhaps increasingly so with the context of forced marriages. There is a wide spectrum between free, volunteered consent and violent force. Towards its extremes, lack of consent is easy to identify. However beyond the extreme cases, identifying lack of consent can be an issue and especially where it is strongly affected by family and community pressure.

Whether consent has been overridden may depend on specific facts, although may have to be seen in the context of upbringing and family relationships. Alleging lack of consent several years after the marriage may not be fatal to a claim, especially if the person was young and unable to have their voice heard initially. Nevertheless outside the protective provisions of the forced marriage legislation and the more extreme cases, the courts will continue to be wary in finding a person did not really consent to their actions. More important is public education and awareness of marriage being a relationship freely and voluntarily entered into, within the context of community and the wider family.

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Forced Marriage: A Paper prepared for the Centre for Child and Family Law Reform¹

District Judge Carlos Dabezies*

- 1 In December 2001 the Centre for Child and Family Law Reform prepared a paper making various proposals for legislation in relation to the problem of forced marriage. Not long before the government's Working Group on Forced Marriage had published its report *A Choice by Right*, and over the next few years a consensus developed that legislation was required. In this paper we summarize developments since 2001 and make suggestions for amendment of both law and practice.
- 2 Our starting point is the recognition that forced marriage is a serious interference with the human rights of those forced into marriages "without their free and full consent". (Universal Declaration of Human Rights, Article 16(2)). We recognise the important distinction between forced marriages and arranged marriages, which are, by their nature, consensual. There are a myriad of circumstances in which a marriage can be forced, ranging from emotional, financial and intellectual pressure to kidnapping and threatening to kill.
- 3 In 2005 the Forced Marriage Unit (FMU) was created as a joint Home Office and Foreign & Commonwealth Office initiative. Later that year it issued a consultation *Forced Marriage – A Wrong Not a Right*. The paper sought views on whether a specific criminal offence would help combat forced marriage. In June 2006 the Government decided against introducing legislation to this end.
- 4 In November 2006 Lord Lester introduced the Forced Marriages (Civil Protection) Bill to provide for remedy by way of an injunction to prevent a person from forcing another into marriage and to protect a person after a forced marriage. The Government took up the Bill at Grand Committee stage in April 2007, and the Forced Marriage (Civil Protection) Act 2007 ("the Act") came into on 25 November 2008. It operates by inserting additional sections into to the Family Law Act 1996.
- 5 Inevitably it has taken time for knowledge of the powers available under it and the associated procedures to be disseminated among stakeholders, principally the courts, police forces, local authorities, and voluntary organisations. Fifteen county courts have been designated to deal with applications for forced marriage protection orders (FMPOs). The courts chosen to handle these cases were selected as being, on the demographic characteristics of their catchment areas, most likely to receive applications for a FMPO, based on information from the FMU.
- 6 In November 2008 statutory guidance entitled *The Right to Choose* was issued pursuant to section 63Q of the Family Law Act. This guidance states that it is targeted at directors and senior managers of agencies involved in dealing with forced marriage cases, and covers matters such as training, inter-agency working, and outreach work. It is not intended to be consulted by front-line practitioners. The chapter in relation to services for vulnerable adults is quite limited in relation both to procedure and legal remedies.
- 7 In June 2009 the Ministry of Justice produced *Multi-Agency Practice Guidelines* directed at professionals working within health, education, police, children's social care, adult social care and local housing

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¹ The Centre for Child and Family Law Reform is a research committee sponsored by City University and until recently chaired since its inception by Professor Hugh Bevan, Wolfson College, Cambridge, and currently chaired by HH Judge Donald Cryan, Clerkenwell County Court.

authorities to encourage multi-agency partnership working. This guidance, intended to supplement the statutory guidance, is comprehensive and sensible. In particular, it counsels caution in organizing family group conferences and is disclosing information to family members or other third parties. Authorities are urged to liaise with the FMU in any case with a foreign dimension, and to refer to a family panel solicitor if "specific legal advice" is required.

- 8 Section 63A of the Act provides that proceedings may be commenced by a "relevant third party" ("RTP") without leave of the court. In November 2008, a public consultation asked what need existed for relevant third parties, what type of people or organisations should act and what safeguards were required. Generally respondents supporting conferring RTP status on local authorities in order to enhance existing work to protect adults and children. The Government's response published on 13 November 2008 set out its plans to designate local authorities as an RTP once safeguards were in place, and this provision was implemented on 1 November 2009.
- 9 November 2009 also saw publication of *One Year On*, an assessment of the first year since implementation of the Act. In 2008 the FMU received some 1600 reports of forced marriages, of which 420 became cases. In 2009 the FMU gave advice or support to 1682 cases, of which 86 percent of these cases involved females.
- 10 To the end of October 2009, 83 applications had been made under the Act. Although the report acknowledges some difficulties with recording, 18 are recorded as "adult victims", 39 as "child victims", 15 as third party applications, and 11 as "other applicants". Of the total 13 are recorded as being made while the person to be protected was outside of the United Kingdom. The majority of applications were dealt with ex-parte; orders were made in a substantial majority of cases, and a power of arrest was attached to most of these. In only 4 cases were

applications recorded as having been withdrawn, suggesting that the greatest difficulty is encountered prior to the making of the application.

- 11 Among its conclusions, the report recommended that further consideration should be given to increasing the number of courts with forced marriage jurisdiction. Given the small number of applications made, we agree, and consider that this should take place as soon as practicable. However, it must be recognized that at this stage even those courts currently able to exercise the jurisdiction have not had significant experience of hearing applications under the Act. While applications can be relatively simple, they often involve layers of complexity and a need for understanding of matters infrequently encountered within domestic disputes. Beyond that, the technicalities of dealing with undisclosed evidence (currently, pursuant to guidance, the province of High Court Judges) or alternatively victims or family members abroad (to which the same could be said to apply) are matters of great sensitivity. It must be remembered that a case which seems simple at first instance can become complicated, and dangerous to the victim, very quickly. Accordingly, we propose that specialist training be provided to judiciary by practitioners experienced in the field and honour based violence experts, whether or not the number of forced marriage courts is to be increased
- 12 One of the positive developments since implementation has been the Forced Marriage Independent Domestic Violence Adviser (FM-IDVA) Pilot. IDVA projects run through voluntary agencies have existed since at least 2005. The Pilot involved making grants available to eleven voluntary support projects operating in 11 of the 15 areas covered by designated forced marriage county courts in order to enable them to dedicate a worker to forced marriage cases. The evaluation of the Pilot published in June 2010 was positive, although it concluded that it was not appropriate to confer RPT status on voluntary organisations.

Local Authorities

13 The role of local authorities is particularly important because they are the only bodies with RPT status. It is the experience of some practitioners that social workers and local authority legal departments may look at complaints of forced marriage in the context of care proceedings, and as such seek to surmount what is an imagined evidential threshold prior to issuing proceedings. There is some anecdotal suggestion by practitioners that more applications under the Act are made by police authorities, notwithstanding that they must apply for leave to make the application.

14 Further, the evaluation of the FM-IDVA Pilot noted some uncertainty as to the respective role of the IDVA and the local authority:

'While the majority of [domestic violence] services were aware of the status of IDVAs in terms of making a third party application, it is evident that further clarification is required in that currently, only the local authority is the designated RTP and this means children's services and adult services and that the council/authority legal team could reasonably be expected to take the case to court, even if there was an IDVA service involved. This did not seem to be an issue where the IDVA service was employed by the authority. The council's legal team would issue the application with an affidavit from the IDVA in support.'

15 If a local authority applies directly for an FMPO, then the difficulty and delay in locating a suitable solicitor and applying for legal aid can be avoided. This may be particularly important given the very uncertain status of family legal aid, and the likely diminution in the number of providers.

16 We propose that guidance should require that any local authority whose boundaries overlap those of a designated county court should employ at least one social worker to function as an FM-IDVA. The concept

of a statutory advocate is already familiar under the Children Act. The presence of a local authority IDVA would provide a focal point for referrals by colleagues in the authority. It might also serve as a catalyst to stimulate awareness of the issue within the authority, helping to overcome what can sometimes be a division between children's services and adult services.

17 Finally in relation to children, in our view the government's Working Group concluded correctly that education and support for those involved, especially children, is essential. Local authorities have a crucial educational role to play in publicizing the problem of forced marriage and the steps which can be taken by or on behalf of persons to be protected. In our initial paper we identified the possibility of legislative amendment as a means of encouraging social services departments in discharge of their obligations under Section 17 of the Children Act ("the CA") in relation to children threatened with forced marriage. We proposed that the Secretary of State should be invited to use the powers given to him by Section 17(4) of the CA to amend Part 1 of Schedule 2 and that he should lay before Parliament an order amending Schedule 2 Part 1 of the CA by adding a new paragraph 1 (3) to the following effect:

'Every local authority in discharge of its duty in relation to paragraphs 1(1) and 1(2) shall have regard to the services provided by them to the victims and potential victims of forced marriages.'

In our view this amendment would still be helpful, and would complement the suggestion made above in relation to FM-IDVAs.

18 In relation to young people over 18, the matter is more complicated. The power given a local authority by the Act to apply for an order on behalf of a person to be protected is not subject to any upper or lower age limit. However, the Act confers no other power on the local authority, and imposes no duty to make an application, or even to investigate. Nor do the various community care and health statutes appear to permit services to be provided to a person to be protected who is not otherwise eligible to receive them.

19 There is government guidance regarding the protection of vulnerable adults, but this term lacks statutory definition. The definition employed in the 2000 guidance *No Secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse* appears to be widely adopted. This refers to a person "who is or may be in need of community care services by reason of mental or other disability, age or illness; and who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation". Again, this does not appear directly relevant to forced marriage.

In January 2010 the government announced following a consultation review of *No Secrets* that an Inter-Departmental Ministerial Group on Safeguarding Vulnerable Adults would be set up. It appears, however, that this has not happened.

20 On 24 February 2010 the Law Commission published its consultation paper *Adult Social Care*. The Commission considered (at paragraph 12.20) that ". . . in certain circumstances local authorities are already under a duty to investigate an adult at risk and consider whether services are necessary and what, if any, further action should be taken." However, the duty would arise under the community care legislation, and the Commission went on to note (at paragraph 12.21) that, "The community care assessment duty was not framed primarily with adult protection cases in mind, and it is often an unsatisfactory mechanism for dealing with them."

21 In this light the Law Commission concluded that the position should be clarified by statute. It proposed provisionally that "our future adult social care statute should place a duty on local authorities to make, or cause to be made, such enquiries as it considers necessary where it has reasonable cause to suspect that a person appears to be an adult at risk and consider whether there is a need to provide services or take any other action within its powers in order to safeguard that person from harm." It then went on (at paragraph 12.41) to suggest a definition of "adult at risk" consisting of two limbs:

(1) a person aged 18 or over and who:

- (a) is eligible for or receives any adult social care service (including carers' services) provided or arranged by a local authority; or
 - (b) receives direct payments in lieu of adult social care services; or
 - (c) funds their own care and has social care needs; or
 - (d) otherwise has social care needs that are low, moderate, substantial or critical; or
 - (e) falls within any other categories prescribed by the Secretary of State or Welsh Ministers; and
- (2) is at risk of significant harm, where harm is defined as ill-treatment or the impairment of health or development or unlawful conduct which appropriates or adversely affects property, rights or interests (for example, theft, fraud, embezzlement or extortion).

To avert any possible uncertainty concerning whether assistance in relation to forced marriage constitutes an adult social care service, we consider that definition should be extended to include "(f) is or may be a person to be protected within the meaning of the Forced Marriage Act". If the legislation sets out a comprehensive list of local authority powers in relation to adults, then assistance to persons to be protected should be included.

22 On 12 July 2010 the Department of Health published the White Paper, *Equity and Excellence: Liberating the NHS*. In that paper, the Government declared that it would publish in 2011 a further White Paper taking account of both the Law Commission proposals and the conclusions of the Commission on the Funding of Care and Support, due to report in the summer of this year. In November 2010 the Government published *A Vision for Adult Social Care*. It is envisaged that a Care and Support White Paper will be published toward the end of 2011, and a Social Care Reform Bill introduced in 2012. In order to put assistance to persons to be protected on a clear statutory footing, we consider that this Bill should give effect to the Law Commission proposals set out above including the amendment we have suggested to the definition of "adult at risk".

Legal Aid

23 Legal aid can pose problems in cases of forced marriage. Speed is often essential, and it may be difficult for a young person or a sympathetic adult to find a solicitor, let alone to collate evidence of means. To some extent this problem will be overcome if local authorities themselves commence proceedings as relevant third parties, although it would still be appropriate for the person to be protected to be represented.

24 In March 2009 the Legal Services Commission issued guidance in relation to forced marriage applications. Applications may be made only by providers holding family contracts. The Funding Code Criteria are the same as those in domestic violence cases. That is, "Legal Representation will be refused unless the likely costs are proportionate to the likely benefits of the proceedings, having regard to the prospects of obtaining the order sought and all other circumstances." Practitioners report some refusals in forced marriage cases. Eligibility is also governed by the domestic violence rules. That is, there are no income or capitals limits above which legal aid will not be available, although the applicant may be required to pay a contribution.

25 We consider that the person to be protected should be represented in all cases, akin to children in care proceedings. We suggest that legal aid should be made available without means or merits testing for the purpose of making applications under the Act. There is precedent for this approach in public law children proceedings and abduction proceedings. Given the limited number of applications made, and the likelihood that most applicants would be eligible under the means test, and it appears to us unlikely that this proposal would result in significant additional expenditure. In terms of forthcoming changes to the selection of legal aid providers, we consider that any firm which is able to make abduction applications should also be permitted to make forced marriage applications, as the expertise required is similar.

The disclosure of evidence

26 Practitioners have reported that difficulty may arise in relation to disclosure when an offence goes to trial. The person seeking protection by way of orders may also seek to remain in the bosom of his or her family, and would accordingly not wish the fact of the complaint to be revealed to the family members. Where such disclosure would give rise to a risk that the Article 2, 3 and 8 rights of the alleged victim would be infringed it has been deemed appropriate not to disclose the said evidence. This has been held to be an integral part of the protective function of the Act (*A Chief Constable and AA v YK & others* [2010] EWCA Fam 2438), and it is stressed in guidance.

27 In a straightforward case where material is disclosed to all parties of course no problem arises. However, where there are issues of disclosure (again, for example, *A Chief Constable and AA v YK & others*) this can then follow into the criminal proceedings, in which case it is entirely plausible that police officers involved in the proceedings under the Act might also play a part in the investigation and in subsequently giving evidence. In such a case it is possible that the officer giving evidence may, by virtue of his duty, be compelled to reveal evidence previously undisclosed in the Forced Marriage Act proceedings, to the detriment of the person to be protected. We understand that practitioners routinely advise a separation of investigative duties between those dealing with civil proceedings and any concurrent criminal investigation for the protection of the alleged victim. The conflict of the respective duties of an officer in such a situation may, however, be difficult to reconcile.

The Criminal Law

28 In our initial paper we noted that the Working Group did not support the creation of a new, freestanding offence of forcing a person to marry. This view is still widely shared by practitioners. First, individual criminal acts committed in the course of forcing someone to marry can often be the subject of

criminal proceedings. Second, it is argued that possibility of criminal proceedings will deter persons to be protected from commencing forced marriage proceedings. We accept that these are persuasive arguments.

29 Mindful of those objections, the Working Group considered it preferable to support the legislative method adopted to deal with racial aggravated offences in the Crime and Disorder Act 1998, ("the CDA 1998"). The CDA 1998 did not seek directly to criminalise racism, but rather to adopt a two-pronged attack against crimes motivated by racism. The first was to identify a number of specific offences were identified which are commonly used to further racist ends, offences with low or relatively low maximum sentences. To those offences were attached satellite offences, for example racially aggravated common assaults, that is, a common assault committed with a racist intent. The second prong was a general provision, in Section 82 of the CDA, which requires the court in any criminal matter which is racially aggravated to treat that motivation as a factor making the offence more serious. We consider as well that it should be provided that the court should state that it has treated the offence as so aggravated.

30 We remain of the view that the criminal law has a potentially important role to play. In part this is because concerns have been expressed about the effectiveness of the Act. It was reported recently² that in only five of the 254 cases in which orders have been made have steps been taken against those who have breached an order, and that in none of these has a conviction been obtained. We consider that, as happened in relation to domestic violence, society must make it clear that forced marriage is unacceptable. Accordingly, we continue to support the approach suggested by the Working Group. Effect might best be given to this by incorporating the relevant provisions in a criminal justice statute.

31 However, pending the introduction of primary legislation, we consider that the issue of forced

marriage should be considered further by the Sentencing Council. The guidelines produced by the Council specify aggravating factors in relation to various offences. In February 2008 the Sentencing Guidelines Council published its "definitive guideline" in relation to assault, including at paragraph 16 the comment that

'Where an offence was committed in the context of an attempted honour killing or in an effort to force a victim into an arranged marriage, the general aggravating factors 'abuse of trust' and/or 'abuse of power' will invariably be present and will be taken into account when assessing the seriousness of an individual offence'.

32 This guideline remained in place following the replacement in April 2010 of the Sentencing Guidelines Council by the Sentencing Council, but will be replaced with effect from 13 June 2011 by a fresh definitive guideline. This new guideline considers particular offences in greater detail, but does not comment at equal length on general principles. Perhaps for this reason it appears to omit any specific reference to forced marriage. In our view this is unfortunate, and should be reconsidered by the Council at the earliest opportunity. Particularly in light of this, we consider further that the Council should ensure that the issue of forced marriage is considered whenever a guideline is developed or amended. We recognize, as Lord Ackner pointed out in the debate on the CDA 1998³ that, in the absence of providing for aggravated offences, there is a possibility that the issue might arise only following conviction, requiring the judge to deal with it by himself. Nonetheless, in our view the importance of deterring forced marriage outweighs any additional burden on the judge.

33 The Centre for Child and Family Law Reform would be grateful for any comments on this paper. These should be directed to Lucy Cheetham, Chambers of Jonathan Cohen QC, 4 Paper Buildings, London EC4Y 7EX (020 7427 5243 , lc@4pb.com).

² The Times, 2 February 2011, p 3.

³ *Hansard*, 12 February 1999, Vol 585:1294-1295.

New research into long-term effects of child abduction

A research project to consider the long-term effects of child abduction is being undertaken at the Centre for Family Law and Practice (CFLP) at London Metropolitan University by Professor Marilyn Freeman, who has conducted extensive research in the area of child abduction over many years. The project will analyse data from research samples of adults based mainly in the United Kingdom and the United States who were abducted as children.

The CFLP wishes to hear from any adults who were abducted as children and who may wish to participate in this research.

We are also interested in hearing from those who have represented people involved in child abduction cases which may fall within the remit of our research, and who still have contact with those people. We understand completely any reservations practitioners may have regarding confidentiality, so we assure them that we do not seek names or contact details of any of the parties involved in any of the cases they have dealt with. We will send to any such practitioners wishing to participate an information pack containing a consent form, a stamped addressed envelope, and a letter providing further information about the research, which may then be passed on to the parties involved.

Any practitioners wishing to take part in this project, or who are willing to provide any information which may assist with the research, should please e-mail James Heath (j.heath@londonmet.ac.uk) or call the Centre for Family Law and Practice on 020 7320 1197.

Restorative Justice: A new judicial tool in Family Law?

Frances Burton*

A little known species of ADR

Since the Jackson Report¹ and the Legal Aid Bill² mediation and "other forms of ADR" have been familiar phrases whenever the subject of the presently extensive menu of government cuts in the costs of litigation has been mentioned, but little has been said about restorative justice, although this settlement tool has been discussed by the Judges' Forum of the International Bar Association, the largest lawyers' group in the world, at the last 3 IBA conferences³ : that is in Singapore, Buenos Aires and Madrid, and the debate was thought of sufficient interest to continue at Vancouver in 2010.

In the circumstances it should not be necessary to explain the concept of restorative justice, but in fact it still seems to be so little understood, even where the term is recognised, that it may be advisable to look at some practical ways in which restorative justice might work in the UK legal system, where reformers are constantly looking for ways of caging the ever threatening monster of costs in litigation: the Legal Aid Bill indicates how much this otherwise worthwhile aim has now begun to impact significantly on access to justice, particularly in Family Law. Since any such restriction on access to justice is unacceptable in both theoretical and practical terms, as every civilised jurisdiction needs an effective judicial system, it may be worthwhile to include the relatively innovative technique of restorative justice in the profession's consideration of how more cases might settle both justly and effectively and also expeditiously, even in Family Law.

Two cases suggest themselves as likely to benefit from restorative justice: the current context of apparently intractable contact disputes in relation to children of separating parents, and some types of

domestic violence, including the forced marriage syndrome which has grown out of what were once traditional arranged marriages, a cultural practice which has not always survived westernisation of the younger members of minority ethnic families. In both these cases where an ongoing relationship is desirable before matters have gone too far - severing the family relationships indefinitely and sometimes leading to the homicides - the theory and practice of restorative justice could be particularly significant. This is particularly so in view of the numerous parenting disputes which reach the courts, the impact of which on children has been deplored by the President of the Family Division, and because some of the more minor cases of domestic violence arise from impact on contact disputes and those cases associated with forced marriage where the problem is the collision between traditional cultural views held by older members of minority ethnic families and their younger (often British born and significantly westernised) members. The forced marriage syndrome in particular impacts adversely on teenage children who resist traditional arranged marriages but whose resistance is rejected, leading to the forced unions in which English law now protects the victims, not always to the benefit of those victims who then become isolated from their families and culture. This forced marriage context in particular could benefit from restorative justice principles, as the Parliamentary groups which periodically consider Family Law appear currently to favour criminalisation of forced marriage (previously resisted by the Ministry of Justice, as a step too far precisely because it might not have entirely beneficial results) but which is not likely to be compatible with preserving family relationships, any more than the

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¹ 2010. Available at www.judiciary.gov.uk/media/mediareleases/2010.

² Legal Aid, Sentencing and Punishment of Offenders Bill. Currently before Parliament and previously the subject of extensive consultation.

³ Singapore (2007), Buenos Aires (2008) and Madrid (2009).

conduct which would lead to such a sanction.

While some judges might not accept the relevance of restorative justice – just as some still do not accept that mediation has a place in the judicial toolkit, because its techniques are directly opposite to judges' expertise in, and experience of, determination which they see as the judicial function - judges might not feel they relate to the restorative justice philosophy which is outside the field of judicial determination: and this might result in their feeling that, while they could order a recourse to a restorative justice process as an appropriate disposal, getting involved in restorative justice practices themselves might be a step too far. It is possible that in time some judges might become acclimatised, depending on past professional experiences before going on to the Bench, as there has been a successful transition of many judges to mediation, contrary to such expectations – even judicial mediation within the European GEMME system – which is a process completely different from judicial determination. However the English legal system is conservative and it must be accepted that a wide acceptance of restorative justice in England and Wales may be for the future when the processes are more widely known and accepted.

Similarly, where the judiciary does not lead, the practitioner does not follow. Restorative justice appears therefore to be low on everyone's horizon of consciousness and restorative justice is therefore at the present time virtually non-existent in the UK outside youth justice, where it was incorporated into the Crime and Disorder Act 1999.

Canada's lead and other initiatives in Commonwealth and civil law systems

However, if there is anywhere in the world which is well known to have advanced the use of this particular variant of ADR it is Canada: indeed it is a matter of legal and judicial general knowledge that restorative justice was significantly successful in settling the major Saskatchewan farmers' dispute in the late 1970s, and in Canada and elsewhere to be particularly suited to, and useful in, community dispute contexts and particularly in addressing youth justice issues. This early initiative has continued in Canada and similar practices have developed in Australia and, in Europe, in Denmark. These

practices were the subject of a session at the IBA's annual conference in Vancouver in 2010: Judge Marion Buller-Bennett described the use of restorative justice in the general jurisdiction of the Provincial Court of British Columbia, Judge Brendan Butler its use in the Magistrates Court of Brisbane, Queensland, and Justice Henrik Rothe the Danish equivalent in the Maritime and Commercial Court in Copenhagen. In all these cases the practice has abandoned the traditional common law practice of observing the judge's hierarchical position, by developing the alternative methodology of judicial involvement in the resolution of the case through encouragement of the participation of respected local citizenry in the determination of the appropriate disposal. This practice clearly has its origins in the "talking circles" developed by the indigenous peoples in both Canada and Australia and the equivalent members of specific communities in other contexts, such as the maritime community in Denmark. Despite its success in youth justice in English law and practice, and in community disputes elsewhere, there are obvious queries surrounding the issue of whether such a practice could work in English Family Law, but the idea should not necessarily be dismissed.

Early ADR in the UK

The Saskatchewan farmers dispute was the main example of this form of ADR when alternative dispute resolution theory first began to develop in England in the 1990s, attracting some commentary in the London University Institute of Advanced Legal Studies' *Journal of ADR and Negotiation*⁴ as this was also around the time that the majority of the English legal profession first discovered the impact of practical ADR: larger numbers then began to be trained as mediators, not necessarily by one of the UK's 3 main providers, ADR Group, Academy of Experts or CEDR⁵, but by ADR Chambers Inc of Toronto. This was when, also in 1999, ADR Chambers brought its Harvard mediation training methods to London as part of a project to set up a satellite version of the Toronto panel's highly successful Canadian operation, in which recently retired judges (of the Ontario courts and elsewhere in the various provinces of Canada) were having great success in the 1990s in settling disputes of all kinds, principally by mediation or arbitration, but also by other methods.

Mediation, Early Neutral Evaluation and

⁴ Vol 1, issue 2, p 33, F Burton, "Dispute Resolution – An Integral Not Alternative Process: the English and Canadian Experiences".

⁵ Which all trace their earliest origins in the provision of mediation services to the late 1980s.

Restorative Justice

The variants of mediation to which the profession was then introduced on that first Harvard method course included early neutral evaluation, which some did think at the time might have a practical future in the UK, as a means of obtaining a better flavour of the likely chances of success in litigation than by the then received method of one or both parties simply taking counsel's opinion, and basing their opportunities for negotiated settlement, or lack of it, on the possibly one sided view of their own advocate or even that of the other side's – not always a successful indicator, since it is well known that where 2 or 3 advocates are gathered together it is likely that about a dozen opinions will emerge, which is quite confusing for the untrained litigant client.

However restorative justice caught the minority imagination even at this early stage, as it seemed a logical extension of the theory that was learned on that first local Harvard course in England, namely that there is more that can be done with any creative ADR tool than through prescriptive court rules and judicial determinations. Moreover, restorative justice's first obviously unique selling point is that it can, if successful, resolve the entire dispute in such a way as actually to mend broken relationships rather than just to preserve them: and that therefore, in certain types of dispute, the parties' active participation in restorative justice was likely to be more successful than a bare judicial determination, which was unlikely to be entirely satisfactory to either side. It was also noted that restorative justice practices were just as likely to be successful than classic non-evaluative mediation.

It is thus quite surprising that in the general discovery of ADR in the UK, which can be dated from around the end of the 1990s, and coincided with the Woolf reforms of civil litigation and a radical new set of procedural rules⁶, nothing seemed to come of this idea in contexts in which it seems that the restorative justice methodology could work. A classic example at first were boundary disputes in the County Court, which often started from a land grab which may or may not have had a sound foundation and which usually generated ridiculous costs bills and entrenched positions, regularly adversely commented on by the superior courts. Another was workplace disputes which similarly generated injured feelings as much as actual financial or

career damage, and which have in recent years been the subject of a major overhaul of the tribunal processes which formerly decided them in an adversarial manner. Also landlord and tenant relationships and certain family disputes were considered as potentially suitable, in both of which, if let run unchecked, the bitterness that could ensue would be likely to destroy relationships in contexts where the law required that they should continue eg particularly in ongoing parenting of children of separated parents, a context in which the UK Ministry of Justice and others have spent an inordinate amount of resources on parenting programmes, without, it seems, significant success.

There has also in recent years been fairly widespread use of the psychologist's tool of cognitive behavioural therapy (CBT) for treating personal and family relationship breakdowns, which often originate in a variety of grudges, so in theory restorative justice, which some claim is not an ADR tool at all but a distinct process based in the school of psychology, should be useful in these contexts. This is particularly the case as in the UK much of the work of the lower courts is taken up with small scale disputes of this sort, many of which are currently resolved through mediation by District Judges in the Small Claims list of really busy Civil Trial Centres and by court based mediators in those courts' own linked mediation services, a programme which the Ministry of Justice has much expanded in recent years.

It should not, therefore, in theory be too difficult to expand the provision to include alternatives to the mediation programmes which have been relatively successful. Indeed one County Court - Cardiff in South Wales – started just such a pilot scheme in early 2011, where the Association of District Judges had been planning such a scheme for the previous two years in which they had ultimately persuaded the Civil Justice Council⁷ to give restorative justice a try, initially, it seems, including in some Family cases.

Is restorative justice likely to work in Family Law bearing in mind that its main use has so far been in youth justice?

The answer to this question is that we do not know, and as in so many areas of fast developing Family Law and Practice, outcome research is required, particularly if the theory behind restorative justice is considered, as it

⁶ The Civil Procedure Rules or "CPR".

⁷ This committee, chaired by the Head of Civil Justice in the Royal Courts of Justice in London, routinely oversees such developments.

has been felt by experienced practitioners that while restorative justice might be suitable for some community and other relatively simple civil cases, it would never work in Family disputes. There is also a respectable view that restorative justice is not a form of ADR at all and is distinct from that portfolio of settlement tools, although it is difficult to see where this view comes from since, in the alternative perspective, any methodology which resolves a dispute and prevents the parties from entering into litigation, or stops them as soon as possible after they have taken that initial step, is literally worthy of the name of Alternative Dispute Resolution: nowhere is a court dispute more destructive than in Family cases and it does not usually do any good in many other small civil disputes involving individuals. Generally speaking litigation is best left to corporate entities who need the heavy artillery of sophisticated legal systems.

Restorative Justice is not new

One point in favour of restorative justice is that it is one of the oldest ADR methodologies and is found in the earliest legal codes, the Laws of Hammurabi in Babylon, the Sumerian Code, the Pentateuch, and in ancient cultural systems in the Southern Hemisphere such as those of the Maoris. It is also found in African cultures. However, of course it does have subtle differences from other forms of ADR, just as ADR differs from a judicial determination, because in essence it focuses on the needs of both the victim and the offender in a relationship in which reparation and repair needs to be effected, and accountability and satisfaction achieved for something that has gone wrong rather than on abstract ideas of justice. What is clear from the experience of youth justice, and in particular in the context of vandalism, is that it has the capacity to reduce recidivism, and that it is therapeutic and cathartic as well as retributive.

A broader example of this type of experience suggested by this essential description might be South Africa's Truth and Reconciliation Commission and the similar approach in Spain to acknowledge the roles of the opposing sides in the Spanish Civil War of the 1930s which has in the last few years sought to heal the differences between the Fascist followers of Franco (who "won" and stayed in power till Franco's death in 1975) and the (democratically elected) Communist National government which his rising displaced, with significant bloodshed on both sides. The sociological background to this development in Spain is interesting, since until

relatively recently Spain had a politically influential religious infrastructure with which in history we are particularly familiar in England, since of course it was Spain which sent an Armada against England in 1588 for religious as well as political reasons (and indeed Spanish culture still refers to the English seafaring hero Sir Francis Drake as "El Draque", the Pirate). While it might be expecting too much of Spain to extend the restorative justice approach that has been grounded in reconciliation after the Civil War to the iconic figure of El Draque (the "evil freebooter, sea robber and mocker of Spain" - as played by Errol Flynn in countless classic films but also a sort of national bogeyman like Guy Fawkes) they are certainly achieving a very commendable result in reconciling the blood stained history of the Civil War of only 80 years ago, which is sufficiently recent to impact on the memories and family traditions of living Spaniards. Accordingly if this can be managed in such a sensitive national context the methodology seems worthy of examination for wider use.

Worldwide interest in restorative justice

Indeed it seems that the deployment of this innovative restorative approach is slowly building success internationally. It is backed by the UN and the EU. It is used in schools and workplaces, where it is particularly useful in bullying contexts, and there was in 2010 an innovative conference in the Midlands in England on peer mediation in schools and colleges which has highlighted the need for resolution of disputes in these institutions. In New South Wales the Young Offenders Act 1997 has incorporated the technique more broadly than into youth justice and the success of this has been evaluated producing compelling statistics which are interesting in the light of the lack of similar outcomes research in the UK. In New Zealand the similar statute is the Children, Young Persons and Family Act 1989, in Brazil there has been an adoption of youth justice "restorative circles" and a similar system in Hawaii. "Circles of support" in Hamilton, Ontario in Canada aim at the safe integration of high risk offenders which has had a high success rate since 1994, and in a handful of states of the USA (including Iowa, California, Minnesota, Oregon, Ohio and Vermont) volunteer restorative justice circles have reduced reoffending by 80%. The US Department of Justice produces a helpful and supportive fact sheet which can be found on the internet. In view of the relatively widespread ignorance of restorative justice in the UK, it is surprising that there are restorative justice groups in English counties such as

Somerset, Dorset and elsewhere, both in the South West and South East of England, and in various locations all over England and Wales, although legal practitioners in these areas often say that they have never come across any of them. According to a UK organisation, the Restorative Justice Consortium, it is said that restorative justice can, in spending each £1 sterling, save £9 in litigation costs, and that £185m could be saved over 2 years simply by reducing crime and anti social behaviour. It would be valuable to have some research to underpin such bold statements, which are, however, certainly believable because of the grossly disproportionate costs which are regularly accumulated in litigation, and which in theory could thus be saved.

Why No Restorative Justice in Family Cases?

So why do some experienced English judges consider that it will not work in Family cases? The theory behind this view seems to be that it is accepted that restorative justice may be effective in cases where the parties do not know each other well – eg in the classic youth justice cases where the offender is expected to acknowledge his or her wrong doing and to make reparation, the parties having created a relationship in which they have each now understand the other party's point of view – but that this is completely inappropriate in family situations because in that context there will usually be so much history and "baggage" that there will little chance of bringing about any kind of working relationship, particularly where there has been violence. This concern is of course the basis of why parties seeking public funding in a divorce context are exempted from the otherwise pre-requisite of assessment of suitability for mediation required by the Family Procedure Rules 2010 if there has been pre-existing domestic violence – although in these straitened times the UK Legal Services Commission is apparently looking at this, along with every other possible means of saving money, and it seems that in future not all cases where there has been some domestic violence will qualify for the exemption indefinitely.

But is even domestic violence necessarily a bar to the use of restorative justice methodology, which will entail meeting, mutual understanding and reparation for fault? And if the group approach is examined, in which several jurisdictions are already deploying circles of family,

friends, victims and offenders in a kind of group conferencing to bring the parties together - to support the one who has offended and to see that he or she does not do so again - it does not appear that this necessarily precludes the use of these methods in a family context even where there has been domestic violence, unless perhaps the violence has been very extreme when of course safeguards would have to be put in place: this is surely because the impact of domestic violence must be a question of fact and degree, and Practice Directions, including provision for risk assessment⁸, have very clearly set out how this should be handled. However where violence has been low level, verbal violence only or merely other disagreeable behaviour (which has usually occurred at some stage in most relationship breakdown that reaches the courts) it is easy to see how the use of the supportive circle methodology could be cathartic for the parties, particularly since the Children and Adoption Act 2006 has much strengthened the pressures on parents to deliver cooperative parenting including effective and appropriate contact for the non-resident parent. It is obviously not practical to deliver a multiplicity of leaflets, charts and other aids to shared parenting after relationship breakdown, whether on divorce or simple separation, if no practical steps are taken to support the new relationship which appears to be taken for granted.

Relevance of Domestic Violence

Much more is now understood about domestic violence than even 10 years ago, when prior to the well known conjoined watershed cases of *Re L, V, M, H*⁹ in 2000 in the English Court of Appeal and the Report to the Lord Chancellor "The Question of Parental Contact in Cases Where There Is Domestic Violence" (2002), the principle that there should be contact was regarded as trumping any alleged anxiety or even terror on the part of the carer parent, ordered to provide the allegedly violent non-resident parent with contact with the child or children, even when the child or children were themselves said to be terrified. Since then the 2002 report, and subsequent steps taken to assess risk more accurately, and to define the harm perpetrated by domestic violence, has shone a closer light on domestic violence. As a result the appropriateness of contact, and in what form, has been able to be much more carefully considered in each case. It may be that it is now time to

⁸ 1989, 2008.

⁹ [2000] 2 FLR.

move on from this stage and to consider the relevance of past conduct of this sort to the future relationships within the family which are demanded by the concept of shared parental responsibility under the Children Act 1989: and also to consider how this ideal can in fact best be facilitated, which may not be by simply sweeping past violence under the carpet but by facing up to it, acknowledging that it was wrong and moving on constructively. These are criteria which judges considering applications for contact in such circumstances routinely have to address. Restorative justice could surely help here.

Experience in other contexts

There are, in fact, potentially more bitter relationships than those of former spouses or partners, such as disputes between Landlord and Tenant which are not only rife but can be much more acrimonious than any family dispute: yet it is still suggested that restorative justice is suitable for such disputes as the parties do have to tolerate each another unless one of them disposes of that party's interest: not unlike a family situation with a demand for ongoing relationships.

In these circumstances restorative justice clearly has more of a future than has been so far exploited as such Landlord and Tenant wrangles continue to be reported, and to attract adverse judicial comment on the costs "wasted": not unlike what the President of the Family Division says about bitter contact disputes between parents. Very soon after the CPR were brought in force, it should be noted that on 5 December 2003 a judge of the Chancery Division of the High Court in effect did actually order a mediation to take place in such a Landlord and Tenant case, relying in that instance on the then new CPR r 1.4 (which requires the court "actively to manage cases"). Case management in such cases followed Lord Woolf's inquiry into Access to Justice, and was appropriate in this instance because the dispute concerned the terms of the Lease between the parties, and the judge considered that they ought to be sufficiently adult in such an ongoing relationship to be able to work through the issues. Not long afterwards a recently passed statute¹⁰ came into force which appeared to enable the then Residential Property Tribunal Service¹¹, to institute a Mediation Panel to resolve certain property disputes instead of making a determination, whereupon

the President, having noticed the growth of in court mediation, found 15 members who were qualified mediators willing to set up a parallel service within the Tribunal's framework, whereby with the parties' consent RPTS could resolve disputes by mediation instead of adhering to the former statutory duty to make a determination that probably pleased no one. Some years later this is still running very successfully and has in effect metamorphosed into a species of restorative justice in which it is quite likely that the aggressive Landlord will eventually offer to put right the Tenant's complaints and the irritating Tenant sees that s/he is much more likely to get a better delivery of the Landlord's obligations under the Lease with some cooperation on the Tenant's side than by persistent applications to the Leasehold Valuation Tribunal for statutory relief. If these two traditional opponents can resolve their differences and build a working relationship it is difficult to see how this could not also be achieved in a Family Law context, although there will, of course, always be hard cases in every area of law and practice which will not be amenable to resolution, and these not be classified by area of law but by aptitude of the parties for each recognising the other's point of view.

Might the cautious introduction of restorative justice techniques be fruitful?

The answer to this question, in the absence of outcomes research, is why not? At the time 10 years ago when mediation really began to emerge in the public and professional consciousness in the UK no one, practitioner or client, had heard much about it, or indeed about any other forms of ADR, except for arbitration which had always thrived in certain contexts, particularly shipping and commercial cases. Thus restorative justice was certainly in no one's consciousness outside youth justice, which meant, of course, not on the civil law radar at all. The courts had also just missed an opportunity to do something about promoting ADR methodologies in case management when Lord Woolf's project on the modernisation of civil litigation was at the stage of drafting the new Civil Procedure Rules¹². This was a pity as these rules, although making many useful changes which have proved over the succeeding decade to be very much a step in the right direction, ignored the

¹⁰ The Commonhold and Leasehold Reform Act 2002.

¹¹ Now to be part of HM Courts and Tribunals Service.

¹² Concurrent with Lord Woolf's final report and the replacement of the former Rules of the Supreme Court with the CPR.

opportunity to make ADR an integral part of the process of litigation, and barely gave it a role as a “bolt on”. A further pity, as (contrary to all contemporary fears) those then new and innovative rules, requiring much more hands on judicial management than had ever been contemplated before, have undoubtedly speeded up the pace of English litigation, done something to save costs and delay and generally pushed civil litigation along, if not at a breakneck pace, at least more proactively than before.

Sadly, as far as mediation goes, ten years later the basic argument is still going on: mediation is still not widely accepted, including by judges, and it may be that restorative justice would follow a similar lengthy path towards acceptance. In relation to mediation the profession is still experiencing the same questions that have been debated for the past 10 years - can mediation or any form of ADR be made compulsory? And is it a contradiction in terms? Case law¹³ has now firmly established some costs sanctions for the parties’ stubbornly refusing to consider mediation at all, just as the CPR penalises in costs those parties who ignore its pre action protocols, but the administration of justice has never yet really come to grips in England and Wales with the concept of exploring the “Alternative” word in ADR, neither by formally treating ADR as a serious alternative to litigation nor by considering the varieties of “Alternative” methodologies.

This is strange since in the same year as the CPR 1999 were completed in the UK¹⁴ the concept of restorative justice was adopted in relation to the discrete area of youth justice. This was formally introduced in statutory form¹⁵ to create youth offending teams of specialist social workers, a methodology designed to prevent re-offending by the young by inculcating a recognition of the wrongdoing involved in the offence which had engaged the youth justice sentence which had brought them to the team, and by generating a spirit of recompense to the injured party. Roughly this is where formal restorative justice has stayed in the UK ever since,

although apart from youth justice there are pockets of its useful practice in civil cases, particularly in neighbourhood disputes, voluntary organisations, and even ecclesiastical matters. This failure to grow may be directly linked to the failure to grow the use of mediation itself, and to grow mediation awareness sufficiently. Had there been growth in this other ADR area it would probably have impacted also on other forms of dispute resolution, and the impact been positive. If the best known variety of ADR – mediation – is still not being sufficiently taken up by either the legal profession or the public, it is not a particularly encouraging sign for lesser known ADR species.

Another reason for lack of adoption of restorative justice might be the adverse impact of a failed presumption of generalised mediation in family cases in the Family Law Act 1996, which appears to have discouraged the public from absorbing any generalised mediation culture. This was unfortunately because that statutory innovation was not very well presented, and also because it fell victim to a destructive campaign conducted by an ill informed tabloid newspaper. That is therefore no reason for suggesting that restorative justice might not succeed where mediation has failed to win hearts and minds.

Are there any indications of escalating potential for the use of restorative justice?

Thus restorative justice still appears to be the cadet member in the Alternative Dispute Resolution portfolio in the UK although it seems to thrive better in other common law jurisdictions. At least, this seems to be the position in modern times since its inception in North America the 1970s, despite its ancestry going back a very long way indeed. However, note might be taken not only of the fact that several jurisdictions have adopted this version of alternative dispute resolution for various purposes but the growing academic interest, mostly manifested in solid but second rank North American

¹³ Eg *Cowl v Plymouth CC* [2001] EWCA Civ 1935 where Lord Woolf said it was indefensible to fail to adopt ADR where public money was involved”; *Lilian Halsey v Milton Keynes NHS Trust*, Court of Appeal, where criteria were laid down for acceptable and non-acceptable grounds for refusing to engage with litigation. Generally, it is accepted that while mediation is best utilised when the parties both consent to it, CPR r1.4 does permit it to be ordered and costs sanctions are likely to be exercised if the resistance of one party can be said to be “unacceptable” conduct falling within r 44(5)(3).

¹⁴ Although they effected such fundamental changes that they did not come into force until later.

¹⁵ In the Crime and Disorder Act 1999.

universities, indicates that its full potential is far from realised. A real indication that there may be escalating interest however is that in 2007 Professor Lawrence Sherman, Wolfson Professor of Criminology at the University of Cambridge in England and a Professor at the J Lee Centre of Criminology at the University of Pennsylvania, and Heather Strang, reviewed the academic research from 1986 to 2005, and in 2002 Oxford University Press published the leading text on Restorative Justice by J Braithwaite and an international conference was held in 2003. This seems to bring the concept of restorative justice into the academy and once that has happened it may be that research projects are likely to carry such a concept further. This itself could be important at a time when the costs of litigation are escalating and the provision of public funding for parties who do not have the means to pay high legal fees has been squeezed at a time of generally straitened economic circumstances.

The Jackson Report in England and Wales

In England and Wales the 2010 Report on Costs in Civil Litigation by Lord Justice Jackson has turned a new spotlight onto ADR in which the use of mediation appears to have grown by nearly a third over the past 3 years: at the same time, this less well known ADR tool of restorative justice, has reduced the crime rate and the incidence of anti-social behaviour in England, while public funding for Family Law litigation has suffered a round of severe cuts which are causing concern. Coincidentally, restorative justice may have begun to have a place in Family Law, where there has been an outcry at the most recent public funding cuts in Family Law litigation by the still relatively new Conservative-Liberal Democrat coalition government at Westminster. It must therefore at least be asked: is restorative justice, which has been a success in other contexts, about to come to the rescue in reducing litigation costs generally and in particular saving Family Law from meltdown?

It is fair to say that the collective heart of the legal profession tends to heart sink whenever it is presented with yet another investigation into its field of work and yet another report, especially when any such is advertised as revolving around the subject of costs which has become such a regular and depressing topic that it is

a major discouragement to read further. The Jackson Report, by the distinguished Court of Appeal judge Sir Rupert Jackson, was even less a source of enthusiasm as it also contained recommendations about more new rules on conditional fees, to which it is not necessary to return here because it is not relevant to restorative justice, but was nevertheless an added factor in the less than welcoming reception by the profession. So what does Lord Justice Jackson bring to the debate in respect of restorative justice?

The first point is that he does not even mention it. However the second is that although the rest of the report identifies important weaknesses in existing structures and areas for improvement, and majors on more discretion for the court, tighter controls for expert witness statement length and keener case management on the part of judges (which is really a development of the Woolf reforms over a decade ago) there is a new emphasis on Alternative Dispute Resolution, which - if not new thinking (as this has been current since at least the Woolf report, though with varying emphasis) - is at least a tool the growth of which has remained surprisingly stunted despite increasing awareness of its benefits, but which could be capable of sparking a fundamental new approach if it generated lateral thought on the wider picture. The third point is that there is a whole chapter in the Jackson Report on ADR which is said to be the result of lobbying by Sir Henry Brooke, Chairman of the Civil Mediation Council, who when in the Court of Appeal was the Judge in charge of Modernisation. Here Lord Justice Jackson finds that mediation should be "at the heart of every litigator's toolkit", although it should not be compulsory, and believes that it should be more widely used pre-litigation. Once again, as others have, he encourages greater education of the public, court users, businesses and lawyers including Judges, in all the benefits of ADR, recommending a neutrally published handbook - which is actually being prepared by the CMC and will be updated annually - so that information on reputable providers, processes and procedures should be known by all. He heartily recommends Early Neutral Evaluation, which is under used in this country although more widely popular in the USA and other common law jurisdictions. The ADR Chapter, chapter 36, can be read in full on the internet at the link

http://www.judiciary.gov.uk/about_judiciary/cost-review/reports.htm .

In summary it proposes a serious campaign should be embarked upon to ensure that judges, as well as the public and particularly small businesses, are aware of the benefits that ADR, particularly mediation, can bring about. He thinks that joint settlement meetings, as in the pilot at the Manchester courts, are very helpful. HH Judge Holman, the Designated Civil Judge at that centre, has concluded that these are well suited to larger sized multi-track claims from £500,000 upwards: not usually helpful to Family cases then, with the possible exception of ancillary relief in divorce. His next preferred form of ADR is early neutral evaluation (ENE) which, like restorative justice is also the subject of a pilot which, if it is successful, will be more widely used. However while it is a positive factor that ENE is at last to achieve some attention, some 10 years after the Woolf reforms first took note of ADR generally, it seems a pity that Sir Rupert Jackson did not notice the proposed pilot in the same court in Cardiff of restorative justice. However he does project that the use of the two methods of joint settlement meetings and ENE could bring significant costs reduction, as they are not being nearly widely enough used prior to litigation at present, probably because not enough is known about them: so it may be that this is a start for restorative justice to begin to achieve some notice, support and more widespread use. This might be an important catalyst since CEDR's annual figures show that of the average 4,000 existing classic mediations per year too few cases settled in the pre-action period which means, surely, that mediation techniques are not going far enough in sufficiently resolving disputes by giving the parties an insight into the potential for rescue of their relationship.

While Sir Rupert therefore concludes that procedural judges need to be more pro-active in asking probing questions about the extent to which mediation has been tried pre action, and where not satisfied to impose sanctions on both parties, it may be that restorative justice needs also to be included in the case management options, CEDR considers that procedural judges will have to be strongly encouraged to do any of this, because some of them are not in favour even of mediation, adding that mediation at least should be built into the case management timetable: moreover that since some such judges are pro mediation and some not, more judicial training will be required till they are all singing from the same hymn sheet.

Conclusion.

It does not seem that anything particularly special has emerged from the Jackson report, although some of its recommendations appear in the Legal Aid Bill currently before Parliament, but it does raise thoughts as to what could be achieved through another ADR awareness project, and in particular through looking again at restorative justice, which is certainly a currently under used form of Alternative Dispute Resolution. It remains to be seen in Family Law whether the firmer insistence in the FPR 2010 on assessment for suitability for mediation before proceedings are started (whether those proceedings are to be publically or privately funded) and on attempting any sort of ADR before opting for litigation will impact sufficiently on the parties for them voluntarily to seek alternative means of resolving their disputes: and if so whether this might mean that restorative justice now obtains sufficient profile to secure a place in the ongoing search for new miracles.

Forced marriages and the spouse visa age: Part I

Colin Yeo*

Having been the preserve of a relatively few lawyers, campaign and community groups for years, the issue of forced marriages has been given considerable prominence by the previous and current Governments. Any additional resources for preventing forced marriages and helping victims are to be welcomed, but some suspect that this is not the motivation behind the sudden interest politicians have shown in this scourge.

In his recent keynote speech on immigration, David Cameron himself explicitly coupled abuse of the immigration system with forced marriages:

'Every year tens of thousands of people marry into Britain or join their families here. Now many of these are genuine, loving relationships. But we also know there are abuses of the system.

For a start there are forced marriages taking place in our country, and overseas as a means of gaining entry to the UK. This is the practice where some young British girls are bullied and threatened into marrying someone they don't want to. I've got no time for those who say this is a culturally relative issue – it is wrong, full stop, and we've got to stamp it out.'¹

Many other more widespread immigration abuses might have been mentioned: illegal working, overstaying

of visas, bogus students and others. Why start with forced marriages? Why set up the straw man who says that the abhorrent practice is a matter of cultural relativity?

The principal or perhaps only measure taken so far to tackle the problem of forced marriages was the blanket increase by the last Government of the spouse visa age from 18 to 21 for both the UK-based sponsoring spouse and also the foreign spouse seeking entry. The age of consent remains 16, but a spouse must be 21 to sponsor their husband or wife to come to the UK and that husband or wife must also themselves be at least 21 years of age.

The change also applies to civil partners and unmarried partners and it applies whether the marriage takes place in the UK or abroad and whether the couple have met previously or not.

This article examines the effect and history of the age change, the evolving reasons that have been given at different times for it and the course of the legal challenge to the change. The article ends by questioning the motivation for making the change.

The effect of the age change

There are almost no exceptions to the new spouse visa age rule. Any young person marrying a foreign national, whether in a love match or an arranged marriage, therefore finds that they cannot live with their spouse in the UK. Some chose to live apart until they have reached the minimum age. Many others choose to

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¹ For full text of speech see <http://www.guardian.co.uk/politics/2011/apr/14/david-cameron-immigration-speech-full-text>.

go abroad so that they can be with their spouse, away from their friends, family and potential support networks in the UK. Obviously, for those who choose – or are forced – to go abroad, they are in a far more perilous position than if they were able to remain in or return quickly to the UK.

Inevitably, it did not take long for a legal challenge to be brought. The lead case, *Quila*, succeeded at the Court of Appeal and at the time of writing the decision in the Home Office appeal to the Supreme Court is awaited.

The facts of *Quila* well illustrate the potentially injurious effects of the change. Amber Jeffrey met her future husband, Diego Quila, in 2006 in London. Diego is a Chilean national, Amber a British citizen. They married in November 2008 when Amber was 17, after becoming aware that the minimum age for spouse visas was about to be increased. Their immigration application once Amber was 18 was refused because of the rule change and although they decided to challenge the decision they moved to Chile, so that Diego would not be in breach of any immigration laws. Amber therefore abandoned her place to read French and Spanish at Royal Holloway College.

Introduction of the age change

The back story starts some time in 2006, when the Home Office quietly commissioned a team of researchers to examine whether increasing the visa age for spouses entering the UK would have any positive or negative impact on the occurrence of forced marriages. The team reported back in February 2007. The findings were that there was no evidence to suggest a previous rise in the spouse visa age from 16 to 18 had done anything to prevent forced marriages, there was no reason to think that a further increase would assist to prevent forced marriages in future and in fact a further rise might well harm the best interests of vulnerable young women and men, in particular by forcing them to stay abroad for longer following a foreign forced marriage until they were old enough to return to the UK.

A consultation on increasing the spouse visa age was nevertheless launched in December 2007. The research report was not mentioned and was not published by the

Home Office. It later emerged through a Freedom of Information request made by the author.²

In July 2008 the Home Office announced that it would go ahead and increase the minimum age for both the foreign spouse and the UK-based sponsoring spouse from 18 to 21. The change was effected from 27 November 2008 when the minimum age for those applying for spouse and partner visas increased from 18 to 21.

There are two exceptions: the previous age of 18 continues to apply to spouses and partners of Points Based System migrants and it also applies to members of the armed forces and their spouses. No rationale has been provided for the exceptions.

Evolution of reasons

In the 2007 consultation paper, the Home Office proposed several possible changes to immigration law in respect of spouses and partners in order to 'change practice in this area so that those who are at risk of being pressurised into marriage to a partner from overseas are protected, and that these visas are not abused.'³ The proposals were:

- (i) Raise the visa age to 21,
- (ii) Require sponsors to declare an intention to sponsor for a marriage visa before leaving the UK to get married,
- (iii) Incorporate a confidential interview with the sponsor into all marriage visa applications,
- (iv) Introduce a Code of Practice for officials and immigration judges on cases where one of the parties in a marriage visa case is felt to be vulnerable, based on significant disparities in age, the main language being spoken, education and time spent in each other's country,
- (v) Consider revoking leave if the foreign spouse later abandons the UK-based sponsor after achieving settlement.

² The research report and Home Office reasons for non-publication can be found here: http://www.whatdotheyknow.com/request/forced_marriage_research.

³ Available here: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/marriagetopartnersfromoverseas/marriagepartnersfromoverseas.pdf?view=Binary>.

The reasons proposed for raising the visa age can be seen very clearly to be based on preventing forced marriages: this is the entire context of the proposal. The reasoning behind the justification was that

'Where one of the partners is from overseas, we consider that sufficient time should be allowed for the person in the UK to have completed their education, as well as allowing them to gain in maturity and possess adequate life skills. That will help them to navigate the different pressures and opportunities that they face and should help them prepare to participate in the social and economic opportunities around them in this country.'

Elsewhere in the consultation paper there are vague assertions about broader purposes behind the changes. However, these do not seem to be reflected in the actual proposals put forward. In his foreword the then immigration minister, Liam Byrne, said as follows:

'We believe that spouses coming to the UK from abroad do best in Britain when there has been a real preparation for life in the UK. Many of the proposals here are therefore aimed at ensuring that foreign nationals who come to marry and live in Britain do so happily and successfully. We believe this means having the skills to participate in British life, and to be able to satisfy the requirements either to settle or to become a British citizen.'

Later in the paper it is suggested that '[t]hose who wish to sponsor a marriage partner from overseas should be encouraged to establish an independent adult life here first, and to see that as an important way of helping their partner to integrate.' There is therefore some suggestion that increasing the visa age might assist with integration of foreign spouses in some way. No research, evidence or indeed reasons are given for explaining this link though. The real thrust of the consultation is clearly preventing forced marriages.

The July 2008 consultation response built a little further on the 2007 consultation paper.⁴ In the introduction Liam Byrne states that there are two

purposes behind the proposed changes:

'Our ambitions in preparing reform of marriage visas are two fold; first to do everything we can to prevent forced marriage and second to ensure that our policy supports our work helping to aid newcomers to rapidly integrate into British life.'

In the main body of the response slight elaboration is provided:

'We believe that there will be a number of benefits involved in raising the age, these include:

- It will provide an opportunity for individuals to develop maturity and life skills which may allow them to resist the pressure of being forced into a marriage.
- It will provide an opportunity to complete education and training.
- It will delay sponsorship and therefore time spent with a (sometimes abusive) spouse if the sponsor returns to the UK.
- It will allow the victim an opportunity to seek help/advice before sponsorship and extra time to make a decision about whether to sponsor.'

A number of other proposals were also put forward, including increasing the minimum age to 21, a requirement that foreign spouses agree to learn English, a requirement for marriage visa sponsors to declare an intention to sponsor before leaving the UK to get married and/or attend an interview with officials and to introduce stronger measures to enable revocation of leave where a spouse later abandons the sponsor.

The only measure so far taken forward is to raise the age for spouse sponsors and applicants. A timetable for the other measures, or for proposals to implement these measures, was put forward but expired many months ago with no sign of any proposals being put forward. It seems reasonable to conclude that the rest of the measures have quietly been dropped.

It can be seen that throughout the evolution of the reasons for the proposal, preventing forced marriages has

⁴ Available here:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/preentryenglishrequirement/marriageisasthewayforward.pdf?view=Binary>.

been the central, principal justification. Indeed, over time it has come more and more to the fore, to the point where it is the principal or only measure relied on by Government for preventing forced marriages.

The legal challenge

Many immigration lawyers expected that a legal challenge to the spouse visa age change would succeed. The blanket nature of the change, coupled with the odd exemptions for Points Based System migrants and members of the armed forces but not for couples who could prove that theirs was not a forced marriage, seemed to make the new rule ripe for challenge. In the case of *Baiai* [2008] 3 All ER 1094 the courts at all levels held that the Certificate of Approval for marriage scheme was unlawful because it was a classic example of using a hammer to crack a nut. The evil that scheme purported to address was that of sham marriages. The courts observed that the problem was unquantified by the Government but appeared to represent a tiny proportion of the marriages that were affected by the Certificate of Approval scheme. On this basis, and because there was no mechanism for establishing that one's own marriage was not a sham, it was held that there was an unnecessary and disproportionate interference with the right to marry, protected by ECHR Article 12.

Parallels with the visa age rules are so obvious they hardly need pointing out. Forced marriages are unquantified but seem to represent a tiny proportion of all marriages to foreign partners. There is no mechanism by which a couple can show that theirs is not a forced marriage. It very much appears that the reasoning in *Baiai* applies equally to this interference, albeit it is an interference with Article 8 rather than Article 12 ECHR.

Nevertheless, the *Quila* challenge failed in the High Court. Mr Justice Burnett held that parallels with *Baiai* were unjustified because the rule change interfered not with the right to marry, only the right to live together in the UK. He also held that the change was not perverse despite the emergence of the research findings commissioned by the Home Office.

The appeal to the Court of Appeal succeeded, however.

Evidence based policy?

As discussed earlier, it emerged after the consultation and the rule change that the Home Office commissioned

a team of independent researchers to look into the question of whether (a) raising the minimum age for sponsors from 16 to 18 had helped to prevent forced marriages and (b) whether raising the visa age further from 18 to 21 or 25 would help to prevent forced marriages.

The overwhelming conclusion of the team was that age made very little difference if any and that further raising the visa age would not only have little if any beneficial impact but might put potential victims of forced marriage in more danger.⁵ The fear was that sponsors would be taken abroad until they reached the age of 21, at which point the couple (and any children) would then relocate. At the moment the established pattern is a short term removal for the marriage to take place followed by return to the UK, but in future removal from the UK would be longer term, removing any realistic possibility of the victim securing advice, help or assistance from professionals.

The findings included the following:

'[10.2] Generally, respondents from the different aspects of the research tended to see a rise in age to 21 or 24 as a potentially negative step. None of the organisations interviewed for the familiarisation visits wholeheartedly endorsed an increase to either 21 or even partially to 24 years. Only four out of 45 (8.9%) stakeholder organisations interviewed wholeheartedly endorsed an age increase to 21 and only three (6.7%) wholeheartedly supported an increase to 24 years. (See Appendix One for totals and percentages). Benefits associated with greater maturity and access to education and potential financial independence were most frequently cited, but these were perceived as largely outweighed by the risks. Risks included young people being taken abroad to marry, the discriminatory nature of the proposals as largely to do with immigration, breaching of human rights, and not actually tackling domestic/EU forced marriages.

...

⁵ This conclusion is restated in a further article, "Protecting Victims of Forced Marriage: Is Age a Protective Factor?" by Geetanjali Gangoli and Khatidja Chantler in the journal *Feminist Legal Studies*, available here: <http://www.springerlink.com/content/e518664w38u13372/fulltext.pdf>.

[10.4] A significant minority of organisations who took part in stakeholder and familiarisation interviews (37.8% of stakeholders and 50% of familiarisation visit participants) opposed any increase as they considered age to be an irrelevant variable in forced marriage. These were all organisations with substantial face-to-face experience of working with victims of forced marriage e.g. NAWP, SBS, Central Manchester Women's Aid, Birmingham Women's Aid, Bradford Police).'

This report was not published and only emerged initially in summary form, before a Freedom of Information request by the author led to full disclosure.

was irrelevant or that there might be some benefits to raising the visa age but there were significant dangers. Survivors of forced marriage were interviewed. They felt the same. Focus groups were also interviewed, with the same results. The evidence pointed overwhelmingly in one direction.

In contrast to this careful and thoughtful research, the statistical analysis relied on by the Home Office was significantly flawed. See Figure 1 for the table of data cited in *Marriage Visas: The Way Forward*.⁶

Firstly, the sample size was tiny in comparison to the number of marriages and spouse visas issued to the age groups in question. It is ironic that the UKBA sample size is considerably smaller and less representative than that used in the research report into the visa age and forced marriages which was rejected by the Home Office

Age of victims of forced marriage dealt with by the Forced Marriage Unit ⁶																		
YEAR	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28
2005	0	0	1	8	7	9	20	16	12	16	10	9	6	7	10	5	1	1
2006	0	0	1	3	7	9	15	18	12	14	15	14	12	6	6	11	6	2
2007	1	0	3	3	13	19	24	21	28	20	15	12	15	8	4	7	9	13
2008	0	0	1	1	9	10	9	17	16	10	10	11	12	9	9	14	8	6
Total	1	0	6	15	36	47	68	72	68	60	50	46	45	30	29	37	24	22

Age of victims of forced marriage dealt with by the Forced Marriage Unit																	
YEAR	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	51	52
2005	4	1	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0
2006	2	0	3	5	1	1	2	1	0	0	0	0	0	0	0	1	0
2007	2	1	1	2	0	0	1	0	0	0	0	0	0	1	0	0	0
2008	2	2	3	0	1	4	1	2	2	2	1	0	1	0	1	0	1
Total	10	4	7	7	2	6	4	4	2	2	1	0	1	1	1	1	1

Figure 1

The reasons for non publication might politely be described as 'thin'. Essentially, it was said that some unspecified assertions in the research report were unsupported and the sample size was small.

The researchers used established and reputable research methods. Stakeholders such as police forces, social workers, Home Office officials and the Forced Marriage Unit were interviewed. They felt either that age

because of a small sample size.

Secondly, even the statistics themselves only show a reduction in forced marriages in two of the four sample years and suggest that the previous increase in the sponsor age from 16 to 18 had not eliminated the problem for 16- and 17-year-olds.

Thirdly, the conclusions drawn took no account at all of the fact that the number of marriages at the ages in

⁶ See *Marriage Visas: The Way Forward* (July 2008) available at the following internet address: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/closedconsultations/preentryenglishrequirement/marriagevisasthewayforward.pdf?view=Binary>.

question might be different in affected communities, thereby rendering the numbers utterly meaningless: there may well be more marriages in affected communities of those aged 16 to 21 than those over 21, so it is no surprise that the number of forced marriages also rises for the younger age group. The Home Office relied on potentially meaningless absolute numbers rather than analysing the proportion of those affected.

Lastly, there is also no data at all to show that forced marriages are more likely to occur if the marriage is to a foreign national. This raises some obvious questions regarding discrimination against foreign nationals.

The reasons advanced by the Home Office for raising the spouse visa age are therefore seriously defective. Further, there is strong evidence to suggest that raising the visa age might actually do as much or more harm as good. In this context, one has to wonder whether in fact there was another agenda underlying the changes.

Conclusion

Lord Justice Sedley sums up the problem at the outset of his judgment in *Quila*:

'Forced marriage is not merely a cultural or social problem. A woman forced into marriage is in the law of this country a victim of false imprisonment and rape, and those arranging and procuring it are likely to be guilty of kidnapping and conspiracy. The Home Office is justified in doing everything it properly can to prevent or inhibit it. But is immigration control an appropriate means of doing so, and if it is, is the method adopted in the rules lawful?'

The justification relied on by the Home Office for raising the spouse and partner visa age is to prevent forced marriages. As we have seen, there is no research and no reliable statistical evidence to support the assertion that raising the visa age will do anything to help prevent forced marriages. Indeed, there is good reason to think that raising the age will make little or no difference and will actually be harmful to the young people the Home Office purports to be seeking to protect.

Anne Cryer, the Member of Parliament for Keighley from 1997 to 2010, advanced a range of controversial social and economic arguments in favour of restricting immigration from the Asian community and one of her proposed means of doing so was to increase the spouse visa age to 21. Was this perhaps the real reason behind the change when it was made in 2008 and behind the present Government's decision to seek to uphold the rule by appealing to the Supreme Court.

Part II of this article will appear in the next issue (Summer 2011).

⁷ See, for example, her submission dated 15 February 2006 to the Home Affairs Select Committee: <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/775/775awe11.htm>.

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Quotations

Quotations should be indicated by single quotation marks, with double quotation marks for quotes within quotes. Where a quotation is longer than five or six lines it should be indented as a separate paragraph, with a line space above and below.

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Cross-references (including in footnotes)

English terms (eg above/below) should be used rather than Latin (i.e. it is preferable NOT to use 'supra/infra' or 'ante/post' and similar terms where there is a suitable English alternative).

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Author, title of work + full reference, unless previously mentioned, in which case a shortened form of the reference may be used, e.g. (first mention) J Bloggs, *Title of work* (in italics) (Oxbridge University Press, 2010); (second mention) if repeating the reference - J Bloggs (2010) but if the reference is already directly above, - J Bloggs, above, p 000 will be sufficient, although it is accepted that some authors still use "ibid" despite having abandoned most other Latin terms.

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These should always be italicised unless they are so common that they have become wholly absorbed into everyday language, such as bona fide, i.e., c.f., ibid, et seq, op cit, etc.

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If abbreviations are used they must be consistent. Long titles should be cited in full initially, followed by the abbreviation in brackets and double quotation marks, following which the abbreviation can then be used throughout.

Full points should not be used in abbreviations. Abbreviations should always be used for certain well known entities e.g. UK, USA, UN. Abbreviations which may not be familiar to overseas readers e.g. 'PRFD' for Principal Registry of the Family Division of the High Court of Justice, should be written out in full at first mention.

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1 May 2010

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Numbers from one to nine should be in words. Numbers from 10 onwards should be in numerals.

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Children Act 1989, Sch 1

Family Proceedings Rules 1991 (SI 1991/1247), r 4.1 (SI number to given in first reference)

Art 8 of the European Convention

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J. Bloggs and J. Doe 'Title' [2010] Fam Law 200

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