RESPONSE TO THE HOME OFFICE CONSULTATION DOCUMENT – 'FORCED MARRIAGE: A WRONG NOT A RIGHT'

November 2005

CentreLGS is the Arts and Humanities Research Centre for Law, Gender and Sexuality.

The purpose of CentreLGS is to act as a national and international focal point for academics, practitioners and policy-makers who work in the area of gender, sexuality and the law. It consists of about 70 scholars in three institutions: the Universities of Kent, Keele and Westminster.

CentreLGS aims to support current research and develop new initiatives in this field through regular policy forums and conferences, the publication of books and articles, exchange and visiting scholar programs, and the supervision of postgraduate research students.

SUMMARY

CentreLGS is against introducing a new separate criminal offence of 'forcing someone to marry'. While we recognise the need for a range of legal and social responses to the problem of violence against women, we do not believe that criminalisation would provide an effective intervention into this particular problem. Existing criminal offences (such as rape, murder, torture, kidnap, abduction and assault), together with a stronger emphasis on the Human Rights Act (which forms the practical application of the principles enshrined in international convenants)[1], the provision of more effective outreach services for women at risk, and a culturally-sensitive dialogue with minority ethnic communities, would better address the wrongs involved in forced marriage cases.

The original Home Office Working Group inquiry into forced marriage, *A Choice by Right* (Home Office Communications Directorate, 2000), concluded that no specific criminal offence is necessary. We do not see sufficient reason for the Government to change its view on this issue now. Our main concern about the criminalisation of forced marriage is the potential 'cultural backlash' against ethnic minority communities. If some young people are already facing pressures in the home, creating a specific offence that targets their communities risks exacerbating these problems. Additionally, we believe that introducing a separate criminal offence would undo the positive effect of past statements emphasising that all major religions and cultures see consent as central to a valid marriage. The new law would also encourage the idea that defenders of 'multiculturalism' have previously condoned violence against women.

We would urge the government to see this problem not just as a problem of 'culture', or of marriage, but rather as one arising from intersecting issues of gender, culture and sexuality. It should, therefore, be tackled as part of a wider agenda concerning young people's rights to sexual freedom and interpersonal intimacy. As emphasised by the UK-based organisation *The Safra Project*, many young people pushed into marriage are those who wish to have relationships outside marriage, including same-sex ones; the problem often occurs in the

[1] See our discussion of the provisions contained in the Human Rights Act later in this document.

combination of prejudices based on sexual orientation, gender identity, religion, race, culture, and sometimes immigration status.[2]

Since we acknowledge that relying only on existing criminal categories will probably not bring about the extent of social change that is necessary to tackle the issues that give rise to forced marriages, later in this paper we discuss the possibility of using the Human Rights Act as an alternative legal intervention. We also urge the Government to consider further non-legal measures.

Recommendations

In addition to the work already undertaken by the Forced Marriage and Community Liaison Unit, we recommend:

[a] Working with community organisations and NGOs to utilise resources to educate people as to the wrongs of forced marriage.

[b] A sustained and high-profile public debate about the issues involved in forced marriage, and a vehicle for discussion with community-members, especially young people themselves. (We believe that the Government is not necessarily the most appropriate voice for this particular message, for reasons given later in this paper).

[c] Culturally-familiar forums where victims and potential victims can voice their fears and concerns freely, and in which they do not feel pressurised into making any type of decision – whether or not to marry, or whether or not to take legal action.

[d] More units, refuges, outreach services, and accessible legal advice organisations for victims to seek help in pursuing existing criminal charges and to gain safe distance from those attempting to force them to marry.

[e] An examination of the scope for victims to pursue annulment of a forced marriage in family law. (Civil actions could protect the human rights of women

[2] Founded in 2001, the *Safra* project is a voluntary resource project based in the UK. Its aim is to conduct research and provide information on issues relating to lesbian, bisexual and transgender women who identify themselves as Muslim, culturally or religiously. For further information, see http://www.safraproject.org.about.htm

more effectively, since this route would not impose the stringent evidentiary burdens of the criminal law).

[f] A concerted effort to support wider initiatives on intimate autonomy, e.g., sex-education, funding of sexually-pluralistic youth projects and other means of giving people access to different cultural norms and relationships. This would constitute sensitive and non-coercive intervention into the issues underlying forced marriage.

CONSULTATION RESPONSE

CentreLGS focused on three main issues surrounding the rationale and potential operation of this new law. First, we asked how effective the law would be to help current victims facing pressure. We then considered whether the law would be useful as a deterrent over time, or as an instrument to change public perceptions. Finally, we raised questions about the international operation of this law. This led to our examination of existing protections for minority women under the Human Rights Act, which we take to be the practical application of the principles enshrined in major international covenants such as CEDAW.

[A]. Victims would be less likely to seek help if 'forcing someone to marry' becomes a criminal offence.

We believe that the effectiveness of this law would be questionable. The main reason is that, in its early stages of operation at least, young girls would be unlikely to have knowledge of it, and it would therefore be seldom invoked. If the law were widely publicised, there is possibly a case for thinking that it would empower individuals to a certain extent, by giving them a 'bargaining chip' with which to negotiate with their families, or by empowering parents who face pressure from their communities. However, we believe that this assumption is problematic because it wrongly presupposes that the individuals at risk feel able to 'bargain' with their family or community to any degree in the first place (which, in extreme cases, they will probably not). Moreover, even if young people were to invoke the law as a 'bargaining chip', their action would probably be perceived as a threat to the family or community. We believe that this threat would lead to the young person's alienation from the community, and, therefore, to further social and psychological pressures on him or her. As with other cases in which young people are pressurised to comply with cultural norms, there is reason to think

that forced marriage emerges particularly in conditions of rapid intergenerational social change, in which community elders feel that their ways of life are under threat from pressures of assimilation or domination by the wider society.[3] Given this situation, issuing 'threats' to the community through the criminal law risks deepening pressures on individuals.

We consider that the law would probably also bear the following results. Taken together, they suggest that victims would be much less likely to seek help in any form if this offence were introduced:

- *It would raise suspicion of minority ethnic groups, leading to the reluctance of young persons to have the police visit their house.*

- *It would increase the scope for tightening immigration controls, and, therefore, for the arrest, incarceration and deportation of black and ethnic minority men.*

- *If the penalty is to be up to 5 years' imprisonment, this places impossible burdens on children who wish to complain and seek help, but who cannot pursue prosecution for reasons for financial and emotional dependence.*

- *The thought of using criminal laws would, in the minds of young people, seem to deny the value of kinship networks in South Asian communities. They would feel as though they have to make a hard choice between their culture or their rights.*

Underlying all of the considerations noted above is the important issue of whether it is in the young person's best interests to have to testify against any family-member in open court.[4] Moreover, in light of the well-documented evidence of the

[3] This view is explicitly defended by Abdullahi an-Na'im (2000) in his paper, 'Forced Marriage' (available on-line at http://soas.ac.uk/honourcrimes/FMPaperAnNa'im.pdf). See, also, the testimonies given in Yunas Samad and John Eade's study, *Community Perceptions of Forced Marriage* (London: Community Liaison Unit, Foreign and Commonwealth Office, 2002). For an account of the way in which community elders might rigidify their customs and traditions, or practise 'reactive culturalism', when they feel their ways of life are under siege, see Ayelet Shachar, *Multicultural Jurisdictions* (Cambridge: CUP, 2001), pp. 60-1.

[4] While most studies (particularly of 'child harm') seem to document a high level of anxiety for the young person in testifying against family-members, such anxieties are associated specifically with testifying in open court. It seems likely

anxiety or trauma that young people experience in testifying publicly against family-members, it is reasonable to believe that potential victims will probably not want to criminalize those who are closest to them. Young people of minority ethnic communities often feel that talking openly about these problems to 'outsiders' at all, quite apart from in a public criminal proceeding, is a 'betrayal', and that 'outsiders' do not understand their emotional and cultural perspective.[5] For example, when Ghulam Rasool was charged in 1991 with kidnapping his step-daughter to prevent her marriage to a non-Muslim, the young woman said in court that she was reconciled with her family and that she did not want to press for prosecution.[6] It is unlikely that the prevalence of this kind of reaction would change if a new criminal offence were introduced.

[B]. The proposed law would not provide a strong deterrent. It would not be the best way of changing public perceptions.

We believe that it is unrealistic to anticipate a great number of prosecutions under this new law. Since there already exists a range of 'offences against the person' in criminal law, the proposed regulation does not appear to close a gap in the existing legislation. Much like the recent UK regulations on Female Genital Mutilation, we believe that the Government intends this law to have a primarily 'symbolic' function, intending it to work as a public message that forcing someone to marry is socially unacceptable. Therefore, in this section, we consider whether the law would be an effective deterrent, and ask whether raising public awareness of the problem could change the perceptions that lead to it.

Generally, our view is that the law would have limited success in changing perceptions, even in the long-term; and we are opposed to using the criminal law to try to achieve this kind of social change. Our main objection here is that this strategy depends on the belief that, in the UK today, one unitary legal system has

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that some of the negative or traumatic effect could be reduced through the use of closed-circuit technology. See Goodman, G. et. al., 'Face-to Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions', *Law and Human Behaviour* 1998, vol. 22/2: 165-203; and C. Wattam, 'Research Article: Is the Criminalisation of Child Harm and Injury in the interests of the Child?', *Children and Society* (1994) vol. 11/2, pp. 97-107.

[5] For this reason, we suggest funding being put behind culturally-familiar forums, preferably run by persons of the same ethnic or cultural communities, where young people might voice their concerns without experiencing this sense of betrayal.

[6] Rasool's sentence (of two years' imprisonment) was confirmed on appeal: *R. v. Ghulam Rasool,* 1990-1991.

an equal impact on all communities and social groups. Yet the operation of dual systems of law in the UK has to be acknowledged. In some cases, English law is seen to be subordinate to the claims of other forms of law, which are developments from different communities' own religious laws (such as *'angrezi shariat'* or English Muslim law).[7] The need to register a civil marriage is often not observed by members of different communities, who see their own personal laws as overriding English law. If this is the case, there is also the strong possibility of a circumvention of an offence of forced marriage. Changing English law would have little deterrent effect on those who do not, in the first place, perceive it to be the dominant legal system.

Additionally, we believe that the law would fail to provide an effective deterrent for the following reasons:

- *Its success would depend on how it is perceived. It could be seen simply as a 'white' versus 'us' issue, as a 'demonisation' of particular minority cultures, and as evidence of the dominant society's lack of understanding of cultural traditions. (See the Consultation document's own reference to 'gorahs' at paragraph 2.11).*

- *The law may drive the problem 'underground' or precipitate the evasive action of taking young girls abroad for marriage purposes. (See below Section [C]).*

- *If the onus is on victims to call the police to their homes and testify against their parents, the likelihood of their doing so would be minimal. Since young persons' reluctance to invoke the law would probably be widely known, it acts as no deterrent to potential offenders.*

- *The use of force in some communities often follows from fears, on the part of community-members, about the increasing 'Westernisation' of their new generation. Arguably, interventionist laws imposed by the state would not deter, but encourage, this use of force.*

[7] Roger Ballard's work on 'cultural navigation' is a key indicator of this. See his *Desh Pardesh: The South Asian Presence in Britain* (London: C. Hurst & Co., 1994).

- *Many 'perpetrators' of forced marriage are genuinely unaware that they are coercing their sons and daughters. They see their actions as part of their legitimate parental duty.*

'Consent' and 'Coercion'. The final issue raised above is crucial. This is the problem of how legitimate consent and force are understood across cultures. In many South Asian communities, disagreement with familial decisions is not regarded as valid or appropriate, which means that neither parents nor children may believe that force is being used at any stage. In light of this problem, it is unlikely that the proposed law could work effectively as a deterrent, if many people genuinely do not think that it applies to them. The meaning of legitimate consent is so ambiguous cross-culturally that is unlikely that the criminal law can intervene to good effect here. 'Force' that is exerted in these situations can also take a number of forms – physical, emotional and psychological. If the 'force' at play is social pressure exerted over a long period of time, and does not take the form of a one-off act of extreme violence, the criminal law faces a difficult task in working out what the *actus reus*, or harmful act, was in particular cases. Therefore, if a legal means of enforcing definitions of legitimate consent must be used, then the existing family law route of interpreting and defining consent to marriage would be a better method than the arguably more confrontational use of the criminal law.

[C]. Overseas application of the new offence.

Although the Home Office's consultation paper raises the question of *whether* the proposed offence should apply overseas, our view is that, if it were introduced, its purpose would be negated if it were not applied transcontinentally. This is because one of the most crucial problems in forced marriage cases is that victims are often taken abroad to be married. (In fact, many instances of forced marriage are unreported because they occur overseas, where victims have no means of communication with sources of help. It is not clear that introducing a new UK criminal offence would help to overcome this problem, even if the law were applied internationally).[8]

[8] For a detailed examination of the problems associated with transcontinental forced marriage, see S. Hossein, 'Abduction for Forced Marriage: Rights and Remedies in Bangladesh and Pakistan', *International Family Law* April (2001): 15-24.

If introduced, the overseas application of this new law might seem at first to generate some difficulties, such as a conflict of laws, the overriding of state sovereignty, and the likely involvement of both British and non-British citizens. However, generally, the application of forced marriage regulations in countries with a high incidence of cases would not be problematic, since they too mostly ban this practice. For example, Dame Elizabeth Butler-Sloss, President of the Family Division of the High Court of England and Wales and the Hon Mr Justice Sh.Riaz Ahmad, Chief Justice of the Supreme Court of Pakistan signed a UK/Pakistan Judicial Protocol on child abduction and forced marriage cases in January 2003. Agreed Guidelines were signed at a second judicial conference held in Islamabad in September 2003. In our view, the existence of this, and other similar treaties, further undermines the case for a separate UK offence of 'forcing someone to marry'. Moreover, the debate about whether this new offence should apply abroad would seem to feed the mistaken assumption that countries in which there is a high incidence of this practice officially condone it, which they largely do not.

Finally, we would emphasise that existing international covenants and laws, such as the CEDAW General Recommendations 21 1994,[9] hold that women's right to freely determine their marriage partner is a right that should be upheld by all states.[10] Whilst we recognise that the direct application of international covenants is problematic (in practical terms, states must first explicitly incorporate international recommendations into domestic law), and whilst we acknowledge that the enforceability of the principles enshrined in these covenants is equally tortuous, UK domestic law has already incorporated the principles enshrined in CEDAW in various provisions of the Human Rights Act. For example, article 8 (the right to private and family life), in conjunction with the article 12 right to marry might be applied to good effect in a forced marriage case, especially when taken together with Article 14's right to the prohibition of discrimination. Arguably, using these legal provisions would protect women from forced marriage, particularly since Article 14 demands that laws be equally applied, without discrimination against minority women facing pressure and coercion within their communities. As suggested at the outset of this paper, we urge the Government

[9] The Home Office document itself makes reference to some relevant articles of CEDAW, as well as some of the relevant sections of the Human Rights Act, which we discuss in detail here.

[10] The UN Committee on the Elimination of All Forms of Discrimination against Women, CEDAW (General Recommendations No. 21, UN Document HRI\GEN\1\Rev1 (1994) at p. 90, para. 16.

to consider seriously whether and how HRA could be invoked as a more effective measure than criminalisation in protecting young people's rights.

CONCLUSIONS AND FURTHER RESPONSES TO CONSULTATION QUESTIONS:

Do you think that non-legislative means of working with communities to change views is more important than putting money into creating a new offence?

Yes. As the Home Office Consultation document points out, the creation of a new offence is very costly.[11] Therefore, a large amount of money would be wasted if there were very few prosecutions and if the deterrent effect of the law were minimal. One option we prefer would be to give the resources that would have been used for creating a new offence to community organisations to enable them to educate members of the community about forced marriage, as well as to resource the wider agenda of promoting young people's rights to interpersonal autonomy, in which we believe the problem of forced marriage should be situated. As suggested in the introduction to this paper, the funds could also be used to ensure that more practical help is made available, such as advice and outreach units, and in ensuring that legal advice centres are resourced to give speedy, efficient and accurate information and advice to help those wishing to avoid forced marriage. The funds, in short, could be used in ways that would protect young people's rights, whilst avoiding the situation that we envisage arising from the use of criminal law, namely vitiating mediation between the young people and their families and communities.

How important is bringing perpetrators to justice to victims and to the community at large?

It is not possible to generalise about whether victims would find it important for the wrongs against them to be recognised publicly. Some victims may feel the need to see justice done in order to move on and heal. However, for others, since

[11] The Annex of the Home Office document suggests that the set-up and implementation costs in the first year of a new offence would alone cost in the region of £420,000. On top of this, there would then also be staffing and policing costs, as well as an estimated annual cost for administrative hearings of £200,000.

the perpetrators might be close family members (such as parents or siblings), in their cases, prosecution might be undesirable. The central problem is that criminalisation would exclude the possibility of reconciliation, which is the desire of most victims of forced marriage. Our view is that protection, empowerment and education are key to this issue. Moreover, although the community at large has a general interest in ensuring that human rights and the law are being respected, great care should be taken to ensure that undue emphasis is not placed in this respect on human rights issues seen to be arising predominantly in ethnic minority communities, since this could be seen as discriminatory, and, as discussed above, could lead to an entrenching of practices in response to what is taken to be interference by 'outsiders'.

FURTHER INFORMATION

Method of Consultation

This response is the result of collaboration between Centre members across the three participating institutions in the UK. Members were invited to send their comments on the consultation to the response co-ordinators, Dr Monica Mookherjee (University of Keele) and Rupa Reddy (University of Westminster).

The final response was written by Monica Mookherjee and Rupa Reddy with valuable input from:

Professor Davina Cooper (University of Kent, Director CentreLGS)
Sonja Fernandez (University of Kent, member of CentreLGS)
Suhraiya Jivraj (University of Kent, Honorary Fellow CentreLGS)
Professor Anne Phillips (London School of Economics, Member of UK Advisory Board for CentreLGS).

Contact Details

For further information, please contact Emily Grabham at:

AHRB Research Centre for Law, Gender and Sexuality
Kent Law School, Eliot College
University of Kent at Canterbury

Canterbury, Kent
CT2 7NS.

E mail: e.grabham@kent.ac.uk
Direct Line: 01227 827136.
Fax: 01227 827831.
http://www.kent.ac.uk/clgs/