



Research Article

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Legal Dilemma on the Criminalization of Forced Marriage

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Abstract

The individual's will, defined as a fundamental condition to enter a marriage, proves that it belongs to private law, therefore marriage is not mandatory but optional. From this point of view, the right to marry shall not be understood only as an opportunity that the law provides for two individuals to enter a marriage, but also as the individuals' right to reject such a relationship [marriage] before it is entered. The European Union has addressed the problem of forced marriage both a form of human trafficking and as a manifestation of gender-based violence. Since forced marriage mainly affects vulnerable social groups, women and minors should be taken into primary consideration. Recently in Europe, there is a growing trend towards the criminalization of forced marriage. This paper identifies enforcement cases in relation to the criminal offence of forced marriage in Europe. As a result, the core aim of this article is to critically review advantages and disadvantages of the criminalization of forced marriages from a comparative point of view. In conclusion, such a criminalization cannot be seen as a priority tool to address the problem of a forced marriage.

Keywords: forced marriage, criminalization, free consent, violence, punishment, Istanbul Convention

1. Introduction

1.1 The importance of legal penal protection of marriage

The right to marry is the establishment of a binding legal relationship between a man and a woman of marriageable age: part of the basic human rights and freedoms. As such, it is a personality right acquired at birth, which, in principle, is inalienable. The right of men and women who have reached the age to marry and found a family is often combined with the right to a family life. Article 12 of the European Convention on Human Rights (ECHR) provides for: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." Consent is a condition for marriage in all Council of Europe Member States. Generally speaking, a forced marriage would violate the right to marry of the party not giving consent.

The fact that the will of the individual is defined as a fundamental condition to enter into a marriage, proves that it belongs to private law, therefore marrying is not mandatory but optional (Omari, 2012, p. 46). Also, individuals have the right to freely choose their spouse regardless of social, religious or racial affiliation. In this context, the right to marry should not only be understood as an opportunity that the law gives to individuals to enter into a marriage, but also as a right of the individual to reject such relationship before it is concluded.

Also, the right to marry does not foresee any positive obligations for the states, as it is a sanctioned right which must be exercised in accordance with the national legislation of the member states. If we refer to the ECHR in the *Ress v. The United Kingdom* judgement, it is the state that sets the conditions for the validity of this right. The right to marry is subject to national laws governing marriage, including laws prohibiting it in certain cases (i.e., marriage within the family).

The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, adopted on the 7th of November of 1962 by the United Nations General Assembly, provides that marriage cannot be contracted legally without the full and free consent between both parties, expressed by the former in person, after the required publicity, before the competent authority to formalize the marriage and witnesses, in accordance with the law (article 1), and adds that the States will adopt the necessary legal measures in order to determine the minimal age for marriage (article 2). Therefore, it reiterates that marriages must be contracted freely and with the full consent of both parties, requirements that forced marriages violate.

The Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, adopted on the 1st of November of 1965 by the United Nations General Assembly, which emphasizes, once again, the provisions of the aforementioned UN Convention regarding the minimum age and the full and free consent of both parties, establishes in its first Principle that:

“(a) No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person, after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law. (b) Marriage by proxy shall be permitted only when the competent authorities are satisfied that each party has, before a competent authority and in such manner as may be prescribed by law, fully and freely expressed consent before witnesses and not withdrawn such consent.”

However, once married, in accordance with the procedures provided by the law, individuals enjoy the right to request the dissolution of marriage, and re-gain “*status liberium*” because of the marital relationship shock or the loss of the marriage purpose. The regulation of the marriage dissolution procedures and conditions shall aim to guarantee a reasonable protection, based in a balanced way upon two fundamental principles: on one hand the individual’s responsibility for obligations undertaken with their free will and individual’s freedom on the other one at the same time.

2. Forced Marriage Seen from the Istanbul Convention Perspective

The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, known also as the Istanbul Convention, constitutes the first binding instrument addressing the issue of forced marriages in Europe, and it is focused on gender-based violence, including forced marriages as one of the main types of violence. (High Commissioner for Human Rights, 2018). The Istanbul Convention explicitly defines different manifestations of violence against women that must be sanctioned as crimes by the contracting parties to the Convention: psychological violence (article 33); stalking (article 34); physical violence (article 35); sexual violence and rape (article 36); forced marriage (article 37); female genital mutilation (article 38); forced abortion and forced sterilization (article 39); sexual harassment (article 40) and aiding or abetting an attempt (article 41). In accordance with Article 37/1 of the Istanbul Convention, Contracting Parties bear the

obligation to take the necessary measures to ensure that "*the intentional conduct of forcing an adult or a child to enter into a marriage*" is criminalized.

Following the policies of the protection of the right to marry, with a resolution, the European Parliament called on the EU Member States to take the necessary measures in their internal legislation in order to prosecute any individual who seeks to mediate or assist organizing a forced marriage, including cases where such forced marriage takes place outside that State's territory. It also seeks from the EU Member States, which have not yet taken such a measure, to provide for in their penal codes effective and preventive sanctions for all types of violence against women and children, especially forced marriage. However, the Convention allows some discretion to provide flexibility to Parties whose legal systems provide for non-penal sanctions for these types of misconduct. However, non-penal sanctions should be effective to deter such behaviour in the future.

Criminal legislation of EU Member States as: Belgium, Bulgaria, Croatia, Cyprus, Denmark, Germany, Spain, Luxemburg, Malta, Portugal, Sweden, Austria and United Kingdom forcing a person to marry against one's will constitutes a separate criminal offense. In other EU member states, forced marriage is punishable by law only if it contains another criminal offense elements, such as rape, attempted rape, physical or psychological violence, sexual violence, bodily harm, assault, hostage-taking, kidnapping, harm to sexual integrity, honour crimes etc. However, it is necessary to identify the difference between a forced marriage and an arranged marriage. An "arranged marriage" is a process in which the family and the community play their role in making a match or an arrangement with both intending spouses' consent, whereas in a "forced marriage" either one or both individuals fail to give consent, or do so under some aspect of duress. (Uddin, 2000; Wilson, 2007) The sharp distinction is problematic for two reasons: a) duress is a nebulous and restrictive concept that is limited to threats to life, limb or liberty. (Wilson, 2007); and b) the context in which consent is given is unclear and largely unexplored and therefore each individual's experiences are complex and only able to explain a part of the general picture. (Gill; Anitha, 2009)

3. Advantages and Disadvantages of Criminalizing Forced Marriage

Recently in Europe, there is a trend towards the criminalization of forced marriage. In France, Sweden and the United Kingdom, debate has arisen as to whether or not it would be appropriate to criminalize forced marriage. Of course, both attitudes have their advantages and disadvantages.

Defining forced marriage as a criminal offense, provided for in a penal provision, means that it can be punished separately and, if elements of another criminal offense are present, punishments can be combined. Additionally, forced marriage shall be punishable unless the illegal act fulfils conditions to be considered another criminal offense. Defining it legally as a separate crime shall have a deterrent effect and "*give a strong and clear message that forced marriage violates the individual's integrity, freedom and is penally punishable*"¹

Among other things, it would increase victims' confidence to report and denounce cases of forced marriage. Supporters of such criminalization believe that providing for it as a criminal offense shall lead to a better recognition of the victims of this crime and would ensure the prosecution of responsible people.

On the other hand, the opponents of criminalizing forced marriage are controversial. They consider it quite difficult ensuring sufficient evidence "*to meet the burden of proof required to prosecute a person in order to prove that marriage was entered into by force*". (United Kingdom, Home Office, 2012) Such criminalization would prevent victims of forced marriages from seeking assistance

¹ David Cameron speech of the 8th of June 2012

or enforcing civil reparations since their families would be prosecuted and/or because of the criminal case failure. Criminalizing forced marriage may result in the victims being forced to enter into a forced marriage at a much younger age, in order to avoid the risk of criminal prosecution against their family members.

Judicial practice has taken the position of recognizing that physical and psychological threats constitute coercion. On the other hand, there is much more reluctance to accept the influence of factors that may be specific to some communities. If an individual acts in order to honour cultural, gender-based concepts, such as respect, it would be difficult for a court to consider it coercion or obligation.

4. Enforcement Cases Regarding a Forced Marriage as a Criminal Offence in Europe

On the national law level, there are several countries that have introduced in their criminal legislation a forced marriage as a specific offense. On the international law level, there are several courts and tribunals that, faced with the question of whether or not a forced marriage shall be seen as a 'new' crime against humanity, have deliberated on how to legally classify it. (Haenen, 2014) Germany and the United Kingdom are among those EU member states that have provided for a forced marriage as a separate criminal offence. Germany was triggered by the roadside killing of a Kurdish girl, Hatun Surucu, shot dead by her brothers after she had left her family that wanted to marry her off against her will in February of 2005. (Tripp; Ferree; Ewig, 2013). In reference to the Article 237 of the German Penal Code, a forced marriage is punishable from 6 months to 5 years of imprisonment and, in less serious cases, up to three years of imprisonment and a fine. Article 237/2 of the German Penal Code provides for a criminal offense if a person forces another one to marry in a foreign country, or prevents this person to return to Germany from abroad.

In the United Kingdom, the 2014 legal amendment provided for that the criminal offense of a forced marriage is punishable by up to 7 years of imprisonment. Deception to leave the country for the purpose of entering into a forced marriage, is also a criminal offence. Before 2014, the UK dealt with a forced marriage mainly through civil compensation. The Forced Marriages Act (Civil Protection) empowered courts in England and Wales to issue "forced marriage protection orders" to prevent marriage or protect victims. A forced marriage protection order expressly prohibited entering, instigating, or assisting a forced marriage. Violation of such a protection order is punishable by up to 5 years of imprisonment. Such a protection order can be issued if applied directly by the victim or by the police or local authorities.

In other countries, a forced marriage is punishable if it contains the elements of another criminal offence. In Sweden, for example, a forced marriage necessarily requires subjectively, the author of the criminal offense to forcefully compel the other individual to enter into marriage through the use of assault, violence or threats.

In the Netherlands and France, the use of violence in forced marriages is being considered an aggravating circumstance that leads to an increase in the sentencing period. In accordance with the French Act against Violence against Women, the sentencing period for criminal acts of violence, torture, barbaric acts or murder is increased, if it is proven that the perpetrator of the criminal act forced the victim to marry. The 2020 amendments to the Netherlands' criminal legislation strengthened the penal policy for forced marriages by increasing the maximum sentence from 9 months to 2 years of imprisonment. In the Netherlands, the criminal offense of a forced marriage is already punishable even outside the country's territory, if it is committed by or against a person with Dutch citizenship or legal residence in the Netherlands.

Recent changes in both French and Danish penal legislations provide for the punishment of forced marriages even in those cases when it takes place abroad. The amendment of article 222-14-4 of the French Criminal Code provides that the coercion of a person to marry or enter into a marriage abroad, using fraudulent techniques to convince them to leave the French territory, is punishable by 3 years of imprisonment and a 45,000 Euro fine.

It is important to understand the difference between a forced marriage and fraudulent or sham marriages, whose purpose may be to enable one of the parties to gain residence in an EU country according to Directive 2003/86/EC, Article 16/2/b. The latter, can be a marriage without the intention of living together as spouses, which, in the absence of both spouses' external consent, shall be considered a forced marriage. The data from Europol have shown that there is an increasing trend of women trafficked under the guise of marriage, which turn out to be sham marriages or aim to defraud the law. (see Europol Early Warning Notification, March 2014)

On the other hand, there is also another form of marriage that is entered into by breaching the law, such as an arranged marriage in which one or both individuals enter into a marriage under the pressure of tradition. Marriages entered into by individuals under the legal age who do not have the capacity to act, shall also be considered in the same perspective.

In 1999, the United Nations Special Rapporteur on Violence against Women (UNSRSG) encouraged the governments to *"take steps to develop a systematic plan to address domestic violence and combat traditional beliefs, particularly those based on the 'Kanun', which contribute to domestic violence"*. (Refworld, 1999) Four years later, the Committee for the Elimination of Discrimination Against (CEDAW) expressed similar concerns about the *"resurgence of discriminatory customary law (canon law) and traditional codes of conduct in some areas of the Balkan Countries,"* and asked to *"take measures to eliminate the use of customary law and traditional codes of behaviour that discriminate women"*. In 2021, according to the International Labour Organization (ILO), more than 49.6 million people were living in modern slavery, of which 22 million in forced marriages. Mostly, forced marriages involving minors are carried out under the influence or pressure from the minor's family members. In many cultures throughout the developing world, men often have the final say in marriage-related decision-making. Structures of patriarchy often make it difficult for others, specifically women and girls, to influence or push back against the opinions of key male family members. (USAID 2015) Generally, girls are married at younger ages and there is often a large age difference between the female and male spouses (Jain ;Kurz, 2007). Based on the data provided by the United Nation Population Fund (UNFPA) for the 2001-2011 period, 11% of women aged 20-24 in the Eastern Europe and Central Asia region, are married or in a union before the age of 18. UNFPA found considerable variation in prevalence rates, from 23% in Turkey to 0.9% in Kazakhstan, in the research conducted on 12 countries across the region, including the Balkans, Caucasus, Central Asia, Turkey and Ukraine.

If we refer to Germany in 2012, out of 63 cases suspected of forced marriage criminal offense, in 56 of them the perpetrator and the victim were blood related². In this context, in Germany, they have carried out activities focused on prevention, including the training of professionals from the private and public sectors, support and advice to members of the family (especially families from ethnic minorities) and awareness campaigns aimed at religious communities.

The Istanbul Convention obligates contracting parties to implement comprehensive and coordinated policies involving government agencies, NGOs as well as national, regional and local parliaments and authorities, so that policies to prevent and combat violence against women and domestic violence are carried out at all levels of government and by all relevant agencies and institutions. As a result, in Germany is initiated a public debate in order to raise awareness and educate society about forced marriages. In a number of EU members, there have been implemented policies specifically addressing forced marriages, including policies to assist victims, to prevent and to raise awareness. Germany, Denmark, Finland, Ireland, Latvia, the Netherlands, Poland, Romania, Spain, Sweden and the United Kingdom are among the EU member states that have developed such public policies. (Psaila, 2016)

However, in general, a forced marriage is virtually absent from the policy sphere and does not

² Data from the Publications Office of the European Union, 2014

appear in policing and domestic violence policy despite its recognition by social service providers and appearance in recent media discourses. (Bennhold, 2013; Roy, 2011) As a consequence, there is little reliable data available to show the prevalence of forced marriages, the needs and challenges of at-risk individuals, survivors and victims, and the responses available to them. (Sri and Raja 2013).

5. Conclusions

In conclusion, although there is a clear obligation to criminalize forced marriages as a result of the Istanbul Convention, this does not necessarily mean that a separate criminal offense should be provided for. Forced marriages occur both against women and men, but the number of female victims is disproportionately higher, since it is estimated that around 85 per cent of victims of forced marriages are women and girls. (Heaton; McCallum; Jogi, 2009) Although not a uniform practice, it is influenced by and exercises its influence in social, economic and cultural conditions in a particular country. The fact that a forced marriage mainly affects vulnerable social groups such as women and minors shall be taken into primary consideration, and, as a result, it can also be defined as violence against women and children. Depending on the domestic legal system, there may be other ways to make forced marriages a punishable act. If there is not a separate legal provision that regards it as a criminal offense, it is important to avoid loopholes and to take measures to ensure that actions carried out abroad by nationals or residents are also criminalized. Criminalization is only one of the tools to deal with a forced marriage. However, this measure alone is insufficient, and can do little to address the root causes of the problem. It seems that parents influence their daughters, who are later trafficked to other countries, to marry foreign and older men. On the other hand, culturally backward families force their children to marry because of religion, race or tradition. For example, in the Roma communities, such a practice is perceived neither as child - nor as a forced marriage: it depends on family decisions more than on the individual's will, and it is considered an important part of the Romani tradition that contributes to family values' preservation (e.g., the girl's virginity) and Romani identity by avoiding mixed marriages (see Human Rights Report of Council of Europe, OHCHR 2018). The decision to marry before the age of 18, whether made by individuals themselves or their parents, cannot be down to just one reason: it shall be made under the influence of different intersecting factors, shaping both the belief about what age is considered appropriate for marriage as well as the practical economic and social realities (Hoare, 2014).

Individuals under the age of 18 may be forced to enter into a marriage without their free will in order to avoid criminal prosecution against their family members. They cannot denounce and bring to justice their parents for victimizing them even if they want to for they may be excluded from their tight communities. Summing up, a forced marriage criminalization can "make girls go underground" because "nobody wants to drag their parents through the courts" (Chantler, 2019).

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