

Guest Editorial

Legislating to Prevent Forced Marriage: Time to Reassess the Legal Approach?

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The idea of what marriage should be, and what limitations should be put on it by the government have changed in England and Wales with the Marriage (Same Sex Couples) Act 2013—allowing for the first time the word "marriage" to be used in recognition of a formal same-sex relationship. Until 2004, there were no options in the law whatsoever for same-sex couples to have a formal recognition of their relationship. In 2004, the Civil Partnership Act provided a marriage-like formal arrangement, but the word "marriage" remained reserved for opposite-sex relationships until 2013. This demonstrates the law's evolution and flexibility in setting new legal boundaries for social relationships. As society evolves, so does the law. But in one area, the ability to effectively regulate marriage remains troubled, and that is in the realm of forced marriage.

Justice Munby has explained the difference between an arranged marriage and a forced marriage—that the individuals within an arranged marriage retain the final decision of giving consent to the arrangement (*NS v MI*, [2006] EWHC 1646). It is not a marriage made against the will of either potential spouse. Forced marriage, on the other hand, is one where the consent of one or both of the prospective spouses is not contemplated as a necessary ingredient of the union. Indeed, the marriage may occur against their expressed wishes. The Forced Marriage (Civil Protection) Act 2007 recognises a forced marriage as one which someone enters into without their "free and full consent."

The Forced Marriage (Civil Protection) Act 2007 creates civil protections for the prevention of forced marriage. It focuses on identifying and trying to prevent the circumstances in which it might occur, both within England and abroad. It recognises the family and social dynamics through which a forced marriage might be procured. For instance, it provides for a Forced Marriage Protection Order that may be accessed by third parties concerned that a forced marriage may be occurring, as well as by those who might be entering into a marriage by force.

More recently, there have been criminal sanctions enacted. The Anti-Social Behaviour, Crime and Policing Act 2014 makes it a criminal offence to force someone into a marriage. A breach of a Forced Marriage Protection Order is also now a criminal offence. The combination of civil and criminal sanctions ought to provide a strong barrier of protection against the incidents of forced marriage. But they do not. The problem remains a more fundamental one—and that is how the law treats the need for consent in marriage.

Lack of valid consent to a marriage only renders that marriage voidable—that is, something that can be annulled under the law, but is only done so at the behest of one of the parties to the marriage—and is not done automatically. (Matrimonial Causes Act 1973, s 12 (c)). Accordingly, a forced marriage remains a legally recognised and valid one, until or unless one of the parties to the marriage steps forward to challenge the validity of the consent given to the marriage. There are time bars in being able to pursue this. The proceedings to nullify the marriage generally must be brought within 3 years of the marriage ceremony. (Matrimonial Causes Act 1973 s 13(2)).

The time limitation to raise an objection to a forced marriage on the basis of lack of valid consent means that many victims of forced marriage will remain in one because of not raising a legal claim to end the marriage in time. Occasionally a sympathetic judge might find another way to end the marriage, such as *B v I* (Forced Marriage) [2010] 1FLR 1721 which was found to be a non-marriage, when too much time has passed since the marriage ceremony to attempt to nullify it on the basis of lack of consent.

There are indications that there is tension within the legal system about the way in which valid consent should be determined. There are two contradictory tests that can apply to determine if consent is valid. One is a harder to meet objective standard that assesses the reasonableness of the situation, through an assessment of the type of force or threat used to obtain consent. This test, as used in the case of *Szechter v Szechter* [1970] 3 All ER, modifies a test developed in the case of *Buckland v Buckland* [1967] 2 All ER 300. It requires proof that the consent to the marriage was obtained through fear caused by a threat of real and immediate danger to life, limb or property.

It can be very difficult to satisfy this objective test. The courts have countered with the development of a subjective test, one that is much easier for a victim to meet, to establish that there was no valid consent to the marriage. The case of *Hirani v Hirani* [1983] 2 FLR 232 revived a much older subjective test, which considers the circumstances of the individual and the way in which consent to the marriage was obtained in deciding if it was obtained through duress. Despite the courts having resort to the easier to meet subjective test, there has been no resolution of these two conflicting standards. And the problems of meeting the three year time limitation remain. Considering a marriage consent obtained through duress as voidable rather than void remains at the heart of the problem of regulating against forced marriages.

The distinction is an important one. A void marriage is treated as never having had any legal existence—it is legally null from its inception. Not so with a voidable marriage.

Simply making a forced marriage void rather than voidable could do much in the way of prevention without a further high cost to the victim of the marriage. It is a curious thing that lack of consent to a marriage—surely one of the most fundamental elements of marriage—is treated in a relatively light way by the law. It sends the message that consent is not taken as seriously in this jurisdiction as other elements needed for marriage. Indeed, until very recently, it was of far more legal importance that the couple marrying be of the opposite sex than having validly

consented to the marriage. Proponents of marriages that lack valid consent can hardly have missed this message in the law. Consent seems to be of relatively little importance compared to other factors needed to make a marriage legally valid.

A change in the law, making lack of consent as an element that voids a marriage, rather than simply a time limited one which might make the marriage voidable—could do much to reduce the incidence of forced marriage. If it is not legally valid, it may deter family members for procuring it against the wishes of one of the intended spouses. It becomes far easier for the victim to exist. It deters forced marriages by never recognising them as legally valid in the first place. Consent should be given a far more important place in the construction of a legally valid marriage; it should be repugnant to law that marriage would ever be entered into against the will and wishes of one or both of the intended spouses.

Legislation that makes forced marriages void is not insensitive to a multi-cultural society. There is, as noted, a wide gulf and distinction between arranged and forced marriages. It might well be said that the insensitivity to a multi-cultural society arises from the current legal arrangements in which the real costs of resisting a forced marriage or in seeking prosecution of family members fall disproportionality on the victim. The individual becomes a victim twice over if, as a result of criminal prosecutions, family relationships and living situations are disrupted and if the victim becomes an unwilling outcast of the family and community. That, for some, is too high a price to pay. Legal reform that addresses the role that consent should play in the validity of a marriage should also address ways in which victims of forced marriage can be helped, both in the prevention of such marriages, and afterwards, if they come forward wishing to challenge the arrangement and risk losing contact with other family members and their community. Isolation is a real risk of those who choose to challenge a forced marriage.

Considerable efforts have been made to craft legal solutions and yet one of the most fundamental aspects of the law that contributes to the problem of forced marriage has been ignored. The current message in the law is a mixed and confusing one—where although considerable effort has been made with civil and criminal litigation to prevent forced marriage—it remains the current position of the law that a marriage made without valid consent is only voidable, and not void, and unless contested in a relatively small window of time, is embraced within the law as a valid one.

REFERENCES

The Anti-Social Behaviour, Crime and Policing Act 2014

B v I (Forced Marriage) [2010] 1FLR 1721

Buckland v Buckland [1967] 2 All ER 300

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Forced Marriage (Civil Protection) Act 2007

Hirani v Hirani [1983] 2 FLR 232

Marriage (Same Sex Couples) Act 2013

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