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# I Do But I Don't

The Effectiveness of the Forced Marriage (Civil Protection) Act 2007 and  
Other Legislation Against Forced Marriage at Preventing Child Marriage  
in the UK

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## Abstract

This thesis assesses the effectiveness of the current system against forced marriage at protecting against child marriage in the UK. It considers the work of the Forced Marriage Unit, both inside and outside the UK, in preventing forced marriage and supporting victims. It then goes on to examine how the system could be improved, both within the current framework, and through more wide-reaching change. This was done in order to investigate the gaps between the legislation and the actual protection of children from marriage, as there is no law specifically on child marriage in the UK, leaving the possibility of children being married, both in forced and non-forced ceremonies, though only one of these is warded against. The thesis will consider legislation from 2007 onwards, as well as very recent developments from up to July 2021. This will be done through analysing relevant legislation, both on the minimum age of marriage and on forced marriage, assessing those and relevant developments against international standards, via qualitative research methods, in order to discern how well this legislation guards against the specific issue of child marriage.

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## List of Abbreviations

<i>Abbreviation</i>	<i>Meaning</i>
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEDAW Committee	Committee on the Elimination of Discrimination Against Women
CPS	Crown Prosecution Service
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
ECHR	European Convention on Human Rights
FMPO	Forced Marriage Protection Order
FMU	Forced Marriage Unit
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
PSHE	Personal, Social, Health and Economic Education
SDG	Sustainable Development Goals
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCHR	UN High Commissioner for Human Rights
UNICEF	United Nations Children's Emergency Fund

## Introduction

Most little girls dream of their wedding day. But for many across the world, that day is much closer than they imagine. Child marriage affects every region in the world, but some receive more attention than others. The West often goes unnoticed, or takes pride in its relaxed laws on the marriage of minors. Even where the official age of marriage is eighteen, there are often exceptions to this general rule. In the UK, there is legislation addressing forced marriage, but none specifically on protection against child marriage. The purpose of this thesis is to investigate whether the legislation on forced marriage provides adequate protection for children facing marriage, both forced and voluntary.

## *Research Questions*

The primary research question that this thesis will investigate is ‘To what extent does the Forced Marriage (Civil Protection) Act 2007 and other legislation criminalising forced marriage effectively protect against child marriage in the UK?’ The British legal system does not recognise a separate crime of ‘child marriage,’ instead protecting against all forms of forced marriage, regardless of the age of the victim. Arising from this are a number of subsidiary questions which will also be addressed. Does the single category of ‘forced marriage’ obscure the specific issue of child marriage? Moreover, does this legislation only look at one particular subset of child marriage? Although some forced marriages are child marriages, and some child marriages are forced, these terms are not synonymous. There are child marriages which are not forced, but this legislation does not seem to protect against them. Whether this is a detrimental aspect to the regime protecting against forced marriage is a question that will be investigated.

Are there differences in effectiveness in the protection against child marriage between the different jurisdictions in the UK, given that each jurisdiction has a slightly different set of rules which applies to it? Given these differences, and the effectiveness of the system as a whole, how can the existing mechanisms be improved to protect against child marriage? Or is more widespread change needed to fulfil this goal?

A final question is whether potentially increasing the age of marriage to eighteen might pose a risk to children’s autonomy in other walks of life, such as medical consent or voting. Does this increase limit the rights of parents to do what they think is best for their child – and more importantly, is this limitation justified?

## *Limitations to the research*

This thesis will not go into detail on the reasons why eighteen is chosen as the age for adulthood or ‘full capacity,’ as much research and discussion has already taken place in this area.<sup>1</sup> Following the Convention on the Rights of the Child (CRC), the definition of a ‘child’ that will be used in this thesis is that of ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.’<sup>2</sup> Given that the focus is on the UK, the age of majority is also eighteen, except in Scotland, where it is sixteen. The differences between these ages will not be discussed in depth.

The issue and definition of consent will also not receive much detailed examination.

Much of the research already done in the field of forced marriage in the UK has been done in the context of the large South Asian communities in the UK. This means that there has been little research specifically focused on child marriage outside of this context – for example, where children married by their own choice, or due to pressure from families or society due to a teenage pregnancy. It is largely from this literature that this thesis develops, but there remain gaps that should be looked into in this area.

## *Methodology*

This thesis will mainly use a child rights-based approach, assessing the law in the UK from the perspective of the core rights of the CRC: the right to non-discrimination; the best interests of the child; the right to life, survival and development; and the right to be heard.<sup>3</sup> It will employ qualitative research methods, gathering information from a variety of sources, including cases, international documents, and literature on the topic of forced and child marriage. An interview was also carried out with an expert working on legal change in this area, in order to gain a better understanding of the current developments in the law on child marriage in the UK. A number of other experts were contacted with a view to carrying out more interviews, but due to the sensitive nature of their work, and due to the increased workload faced by many NGOs with links to this area due to the coronavirus pandemic, this was not possible.

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<sup>1</sup> eg Angela Melchiorre, ‘The “Right” Balance: the Minimum Age for Marriage and the Convention on the Rights of the Child’ (PhD Thesis, University of London 2010); Husain Al-Hakami and Kenneth McLaughlin, ‘Debatable Marriages: Marriage and Child Marriage in Saudi Arabia’ (2016) 52(7) *Marriage and Family Review* 654.

<sup>2</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 1.

<sup>3</sup> *ibid*, arts 2, 3, 6, and 12 respectively.

## *Structure of the thesis*

The rest of the introduction will set out some of the background to child marriage: the definition of child marriage, why it is prohibited, and its prevalence. The first chapter will set out the international law governing this area, while the second chapter will describe the laws at the national level, in all three legal jurisdictions of the UK (England and Wales, Scotland, and Northern Ireland). Chapter three will examine the system protecting against forced marriage as it currently stands, including the work of the specialised Forced Marriage Unit. It will also go into the application of the national law in practice. Chapter four will investigate the strengths and weaknesses of this system, looking at what needs to be done moving forward, in order to better protect against child marriage in the future. Finally, chapter five will consist of the recommendations and conclusions.

## *What is child marriage?*

To define child marriage, there must first be a definition of a child. Under international human rights law, a child is defined as ‘every human being below the age of eighteen unless under the law applicable to the child, majority is attained earlier.’<sup>4</sup> Protection under the CRC ceases when the child reaches the age of majority. This is important, as in order to protect as many children as possible, the definition of a child ought to be as wide as possible. Thus, one long-term intention of the CRC is to protect all children up to the age of eighteen. In pursuance of this aim, the Committee on the Rights of the Child ‘has called on States parties to review the age of majority if it is set below 18.’<sup>5</sup>

Child marriage is defined as a union or marriage, formal or informal, where one or both parties are under the age of eighteen.<sup>6</sup>

There are differences between three separate terms in this area, though they do overlap. Firstly, child marriage, which refers to a union where at least one party is under eighteen.<sup>7</sup> An arranged marriage is one where the families of both spouses choose the match, but both individuals are free to accept or refuse the choice.<sup>8</sup> A forced marriage, however, is one where one or both parties do not consent freely to the marriage. This may be due to pressure, coercion or abuse on the part of a family member or by the prospective spouse, or by any other person. Forced marriages also occur when one party consents to the marriage, but later changes their mind, and yet are still made to go through with the marriage.<sup>9</sup>

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<sup>4</sup> *ibid*, art 1.

<sup>5</sup> UNHCHR, ‘Preventing and Eliminating Child, Early and Forced Marriage’ (2 April 2014) A/HCR/26/22, [4].

<sup>6</sup> *ibid*, [4]-[5]; ActionAid, ‘Child Marriage’ (24 February 2021) <[www.actionaid.org.uk/our-work/womens-rights/child-marriage](http://www.actionaid.org.uk/our-work/womens-rights/child-marriage)> accessed 24/04/2021.

<sup>7</sup> Joint General Recommendation No 31 of the Committee on the Elimination of Discrimination against Women/General Comment No 18 of the Committee on the Rights of the Child on Harmful Practices (2014) CEDAW/C/GC/31-CRC/C/GC/18 (Joint General Comment), [20].

<sup>8</sup> Home Office, ‘What is Forced Marriage?’ (2012)

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/879929/What\\_Is\\_Forced\\_Marriage\\_leaflet.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879929/What_Is_Forced_Marriage_leaflet.pdf)> 5.

<sup>9</sup> *ibid*, 4-5.

The demarcation between arranged and forced marriage is often unclear, given the ‘slippage’ between them:<sup>10</sup> where does acceptable social pressure or encouragement end and where does coercion begin? The issues in this area will be developed later on.

### *Why should child marriage be prohibited?*

Child marriage is a human rights issue, as it involves the violation of a myriad of rights. Most importantly, in many respects, it is a violation of the right to health,<sup>11</sup> as children’s bodies are not ready to bear children of their own. Due to the pressure to start having babies as soon as they are married,<sup>12</sup> many girls suffer irreparable and long-lasting health issues from becoming pregnant too young. By marrying young, the childbearing cycle also begins early, well before girls’ bodies are prepared. This results in higher chances of both mother and child morbidity.<sup>13</sup> The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) and the Committee on the Rights of the Child say that infant mortality can be up to twice as likely for children of very young mothers than those of older mothers.<sup>14</sup> Given that complications arising from pregnancy is the leading cause of death for girls aged 15 to 19 in low-income countries,<sup>15</sup> this is a serious issue. Child brides are also more vulnerable to sexually transmitted infections, such as HIV,<sup>16</sup> and given the large age differences between many brides and their husbands, and the accompanying power imbalances, as well as a lack of sexual education in general, most are unable to argue for using contraception in order to limit or space out their pregnancies.<sup>17</sup> Child brides are often subjected to domestic violence, abuse, and sexual exploitation.<sup>18</sup> Many girls are married before they understand what sex is, and are too young to be able to consent, meaning that their first sexual experience will be one of legally-sanctioned rape – rape that does not end on their wedding night, but rather may continue for years.<sup>19</sup>

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<sup>10</sup> Khatidja Chantler, Geetanjali Gangoli, and Marianne Hester, ‘Forced marriage in the UK: Religious, cultural, economic or state violence?’ (2009) 29(4) *Critical Social Policy* 587, 597.

<sup>11</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 12.

<sup>12</sup> Susan Lee-Rife and others, ‘What Works to Prevent Child Marriage: A Review of the Evidence’ (2012) 43(4) *Studies in Family Planning* 287, 288.

<sup>13</sup> Jennifer Parsons and others, ‘Economic Impacts of Child Marriage: A Review of the Literature’ (2015) 13(3) *The Review of Faith & International Affairs* 12, 16; Minh Cong Nguyen and Quentin Wodon, ‘Global and Regional Trends in Child Marriage’ (2015) 13(3) *The Review of Faith & International Affairs* 6, 7.

<sup>14</sup> Joint General Recommendation (n 7) [22].

<sup>15</sup> Alissa Koski and Jody Heymann, ‘Child Marriage in the United States: How Common Is the Practice, And Which Children Are at Greatest Risk?’ (2018) 50(2) *Perspectives on Sexual and Reproductive Health* 59, 59-60.

<sup>16</sup> *Girls Not Brides UK Briefing Paper* (11 October 2013) 1.

<sup>17</sup> Parsons and others (n 13) 14; Canan Kuygun Karci and others, ‘Evaluation of child marriage in a Turkish sample: 8 years’ data’ (2020) *Journal of Health Psychology* 1, 5.

<sup>18</sup> Rachel Vogelstein, *Ending Child Marriage: How Elevating the Status of Girls Advances US Foreign Policy Objectives* (Council on Foreign Relations 2013) 18.

<sup>19</sup> Center for Reproductive Rights, ‘Accountability for Child Marriage: Key UN Recommendations to Governments in South Asia on Reproductive Health and Sexual Violence’ (Center for Reproductive Rights 2013) 2.

Another reason for the prohibition of child marriage is that in most cases, a child bride will be removed from school in order to fulfil her domestic obligations.<sup>20</sup> Even if they do not leave school at the time of their wedding, they may be forced to leave or drop out when they become pregnant. This violates the child's right to education.<sup>21</sup> The link between education and child marriage is a double-edged sword: girls who marry young are less likely to have a good education; and girls with a good education (or who stay in school longer) are less likely to marry young.<sup>22</sup> 'The lack of education is both the cause and effect of child marriage.'<sup>23</sup>

Child marriage violates a number of other rights, including the right to non-discrimination, given the discrepancy between the number of child brides as opposed to child grooms;<sup>24</sup> the right to life,<sup>25</sup> due to the risks of maternal mortality; and the rights to freedom from slavery and torture or cruel, inhuman or degrading treatment.<sup>26</sup> The Committee against Torture has criticised child marriage laws, as such marriages amount to violence against the child as well as inhuman and degrading treatment.<sup>27</sup> The UN Special Rapporteur on Torture has likewise called to prohibit child marriage without exceptions, recognising that 'child marriage constitutes torture or ill-treatment.'<sup>28</sup> Moreover, the conditions of forced marriage may amount to slavery, especially where a woman 'is promised or given in marriage on payment ... to her parents, guardian, family or other person or group.'<sup>29</sup> This definition includes the traditions of bride price or dowry, whereby a bride's family is given money, goods or property in exchange for the bride, or where the husband's family is given money, goods or property for taking the bride.<sup>30</sup> Child marriage also violates the right to marry, specifically the right to freely choose a spouse and to enter a marriage with one's free and full consent.<sup>31</sup>

The drivers of child marriage are numerous, but they often follow a similar pattern. Poverty, and the economic aspect of marriage, are big indicators of child marriage. Poor families see girls as an economic

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<sup>20</sup> Girls Not Brides (n 16) 1.

<sup>21</sup> CRC (n 2) art 28.

<sup>22</sup> Lee-Rife and others (n 12) 288.

<sup>23</sup> Rangita de Silva de Alwis, 'Child Marriage and the Law' (2007) UNICEF Legislative Reform Initiative Paper Series, 20.

<sup>24</sup> Camellia Burris, 'Why Domestic Institutions are Failing Child Brides: A Comparative Analysis of India's and the United States' Legal Approaches to the Institution of Child Marriage' (2014) 23(1) *Tulane Journal of International and Comparative Law* 151, 158.

<sup>25</sup> Laura Davids, 'Female Subordination Starts at Home: Consequences of Young Marriage and Proposed Solutions' (2007) 5(2) *Regent Journal of International Law* 299, 315.

<sup>26</sup> de Alwis (n 23) 1.

<sup>27</sup> Anne Wijffelman, 'Child marriage and family reunification: an analysis under the European Convention on Human Rights of the Dutch Forced Marriage Prevention Act' (2017) 35(2) *Netherlands Quarterly of Human Rights* 104, 109.

<sup>28</sup> Human Rights Council, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' (5 January 2016) A/HRC/31/57, [63].

<sup>29</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (adopted 8 September 1956, entered into force 30 April 1957) ECOSOC Res 608(XXI) art 1(c).

<sup>30</sup> ActionAid (n 6).

<sup>31</sup> Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 16(1)(b).

burden.<sup>32</sup> This is especially the case in communities with a tradition of dowry, in which a young girl is worth less, and therefore her family pays a lower dowry to the husband's family.<sup>33</sup> In communities that practice the bride price, it is the other way round: a young girl can contribute more to the groom's family over time, and therefore her bride price, paid by the husband's family, is higher, thus earning the bride's family more money if she is married younger.<sup>34</sup> Child marriage is more common in poor and rural communities, where there are not many options for young girls' futures other than marriage and motherhood, and if that is the future, so the rationale goes, why delay it?<sup>35</sup>

Linked to this is the role of traditional gender roles, especially in rural areas, in driving child marriage. Davids argues that, compounded with the expectation that women be submissive to their husbands, child marriages give men the opportunity to mould their wives into passivity and subservience.<sup>36</sup> Young girls do not have enough life experience or knowledge to be able to demand better treatment, and the younger they are, the easier they are to 'train.' The high value placed on virginity and its link to family honour also perpetuates child marriage. Parents often marry off their daughters to curb their sexuality, or to protect them from sexual assault and premarital pregnancy.<sup>37</sup> In some communities, waiting too long to marry off one's daughter can raise suspicions about her 'purity,' which may make it difficult for her to marry at all, as this may damage her or her family's reputation.<sup>38</sup> Child marriage is also often a means of forging or strengthening alliances between families or clans,<sup>39</sup> or as a way of settling debts.<sup>40</sup>

### *Prevalence of child marriage*

Child marriage is most prevalent in South Asia and in sub-Saharan Africa.<sup>41</sup> Europe and Central Asia have the lowest rates of child marriage,<sup>42</sup> though it still occurs in those regions. Many European states even have legislation that specifically allows for the marriage of a child before the age of eighteen, where they have parental consent, judicial consent, or for 'exceptional reasons,' such as pregnancy.<sup>43</sup> In fact, only eight European states prohibit all marriages before the age of eighteen, without exception.<sup>44</sup>

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<sup>32</sup> Wijffelman (n 27) 106.

<sup>33</sup> Lee-Rife and others (n 12) 288.

<sup>34</sup> Vogelstein (n 18) 7.

<sup>35</sup> Nicholas L Syrett, *The American Child Bride: A History of Minors and Marriage in the United States* (University of North Carolina Press 2016) 262.

<sup>36</sup> Davids (n 25) 305-6.

<sup>37</sup> Kayode Olatunbosun Fayokun, 'Legality of Child Marriage in Nigeria and Inhibitions Against Realisation of Education Rights' (2015) 12 US-China Law Review 812, 814-5.

<sup>38</sup> Lee-Rife and others (n 12) 288.

<sup>39</sup> Farhat Bokhari and Emma Kelly, 'Child Rights, Culture and Exploitation: UK Experiences of Child Trafficking' in Gary Craig (ed), *Child Slavery Now: A Contemporary Reader* (Policy Press 2010) 151.

<sup>40</sup> Loretta M Kopelman, 'The Forced Marriage of Minors: A Neglected Form of Child Abuse' (2016) 44(1) *The Journal of Law, Medicine and Ethics* 173, 174.

<sup>41</sup> Nguyen and Wodon (n 13) 8-9.

<sup>42</sup> *ibid.*

<sup>43</sup> Usually in combination with another requirement.

<sup>44</sup> Denmark, Finland, Germany, Ireland, the Netherlands, Norway, Sweden, and Switzerland.

Both girls and boys are affected, but the latter only to a much more limited extent – some estimates say girls are almost six times more likely to marry before eighteen than boys.<sup>45</sup> UNICEF estimates that around 650 million girls and women were married before the age of eighteen.<sup>46</sup> More than 250 million of them were married before they turned fifteen.<sup>47</sup> Another 100 million are expected to marry in the next decade,<sup>48</sup> increased by a further 10 million due to the coronavirus pandemic and the closing of schools, which removed a layer of protection against child marriage for many girls.<sup>49</sup> Because of this gender disparity, this thesis will focus largely, though not exclusively, on the marriage of young girls.

The prevalence of child marriage is such a widespread problem that it was included in the 2015 Sustainable Development Goals (SDGs), adopted by the 193 Member States of the UN General Assembly. Within the fifth SGD (Achieve gender equality and empower all women and girls by 2030), Target 5.3 is to ‘Eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation.’<sup>50</sup> Prior to the beginning of the coronavirus pandemic, very few states were on track to reach this goal,<sup>51</sup> but progress was being made. The global proportion of women and girls married as children decreased by 15% between 2010 and 2020, from nearly one in four to one in five. This represents about 25 million averted marriages of girl children.<sup>52</sup> But since the pandemic began, numbers have been increasing again: Save the Children estimates that 2.5 million more girls are at risk of child marriage in the next five years than were already expected.<sup>53</sup> It called 2020 a year of ‘irreversible setbacks and lost progress’<sup>54</sup> due to this increase. It is therefore imperative that more work is done to protect girls from the effects of this pandemic, both now and in the future.

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<sup>45</sup> UNICEF, ‘115 million boys and men around the world married as children’ (6 June 2019) <[www.unicef.org/press-releases/115-million-boys-and-men-around-world-married-children-unicef](http://www.unicef.org/press-releases/115-million-boys-and-men-around-world-married-children-unicef)> accessed 06/05/2021.

<sup>46</sup> UNICEF, ‘Child Marriage: Latest trends and future prospects’ (2018) UNICEF, 2.

<sup>47</sup> Elizabeth Nahamya, ‘Child, early and forced marriages (CEFM) in the Commonwealth: the role of the judiciary’ (2017) 43(1) Commonwealth Law Bulletin 111, 113.

<sup>48</sup> ActionAid (n 6).

<sup>49</sup> UNICEF, ‘Covid-19: A threat to progress against child marriage’ (March 2021) <<https://data.unicef.org/resources/covid-19-a-threat-to-progress-against-child-marriage/>> accessed 06/05/2021.

<sup>50</sup> UN Department of Economic and Social Affairs, ‘The 17 Goals’ <<https://sdgs.un.org/goals/goal5>> accessed 04/07/2021.

<sup>51</sup> Sophie Cousins, ‘2.5 million more child marriages due to COVID-19 pandemic’ (2020) 396 The Lancet 1059, 1059.

<sup>52</sup> UN Department of Economic and Social Affairs (n 50) Progress and Info.

<sup>53</sup> Cousins (n 51) 1059.

<sup>54</sup> *ibid.*

## Chapter 1: International Law

This chapter will set out the international law that governs the issue of child marriage in the UK. This will be done through an examination of each relevant right, with detail added in relation to each specific treaty which contains that right. The main treaties which will be discussed are the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women. The Joint General Comment of the two Committees monitoring the implementation of those Conventions will be discussed, as it is the authoritative document on the application of the Conventions to the issue of child marriage. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights, and the European Convention of Human Rights will briefly be examined, as they provide further, if more general, support for the elimination of child marriage. The UK has ratified all of the above treaties, so they should have application in domestic law in some form. Finally, for completeness, the Istanbul Convention will quickly be considered.

### *Core principles of the Convention on the Rights of the Child*

The principal treaty in the context of child marriage is the Convention on the Rights of the Child (CRC). This treaty is governed by four core articles: the principle of non-discrimination (Article 2); the principle of the best interests of the child (Article 3); the right to life, survival and development (Article 6); and the right of the child to be heard (Article 12). All of these articles are relevant to the issue of child marriage, along with a number of others.

Firstly, however, the definition of a child must be considered. The Convention defines a child as ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.’<sup>55</sup> This already poses problems. Majority is not always reached upon the age of eighteen. It may be earlier for everyone – for example, in Scotland, the age of majority is sixteen – or it may be reached when a child is emancipated. This creates a convenient loophole: if a child may not marry, but an emancipated minor may, then the only obstacle to a child marriage is some paperwork. This does not mean that marriages of children younger than fifteen or sixteen are also allowed by this loophole, but it does suggest that the CRC is not as strong as it first appears. Another problem is where states legislate that marriage itself emancipates a minor. This reinforces the idea that marriage is reserved for adults, but also means that by going through the marriage ceremony, the child is considered an adult purely due to the fact that they are married, rather than by an objective standard of maturity.<sup>56</sup>

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<sup>55</sup> CRC (n 2) art 1.

<sup>56</sup> Arthur van Collier, ‘Child Marriage – Acceptance by Association’ (2017) 31 *International Journal of Law, Policy and the Family* 363, 368.

It cannot be said objectively that an eight-year-old spouse is an adult, but by marrying, that is the status they are accorded, with the responsibilities (though not necessarily the rights) that come with it.

Since all the core human rights treaties are interlinked, this definition applies across all these treaties. However, there is another problem here: the CRC does not explicitly prohibit child marriage. Instead, it implicitly prohibits it through a combination of rights. These will be set out, before the more explicit opinion of the Committee on the Rights of the Child is examined.

The first of the core principles of the CRC is that of non-discrimination, including that based on sex.<sup>57</sup> As already noted, the numbers on child marriage demonstrate discrimination based on sex, with almost six times as many girls being married before the age of eighteen than boys.<sup>58</sup> This discrimination therefore requires the prohibition of child marriage in order to work towards the equal treatment of girls and boys.

The second core principle is the central tenet of the CRC: the best interests of the child. Everything in the Convention is designed to achieve this ideal, whereby the welfare of the child is prioritised in all decisions affecting them.<sup>59</sup> Child marriage goes against this principle. It violates the child's rights to health and education, as direct effects of getting married, as well as the right to life and freedom from torture and slavery, by their subsequent conditions of life. Even where the law provides for protection against child marriage, for example by setting the minimum age of marriage at eighteen, there are often legal exceptions allowing for marriage before this age with parental or judicial consent, which works against the efficacy of the legal rule.<sup>60</sup> Such exceptions are often formulated with reference to the 'best interests of the child,' but do not actually look at whether the child will actually benefit from or even agree with the decision. For example, in the USA, where only four states prohibit marriage before eighteen, several states permit the granting of permission where marriage would be in the best interests of the child.<sup>61</sup> Utah even permits the court to refuse to grant an annulment if it decides that to uphold the marriage would be in the best interests of the parties or their children.<sup>62</sup> The USA has not ratified the CRC,<sup>63</sup> but the principle remains the same: the evaluation of the best interests of the child depends wholly on who is making that decision. Unless the decision is taken at the national or even international level to completely prohibit child marriage, the principle of the best interests of the child can be exploited or misinterpreted, allowing children to be married legally, despite marriage not being in the best interests of the child.

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<sup>57</sup> CRC (n 2) art 2.

<sup>58</sup> UNICEF, '115 million boys and men around the world married as children' (n 45).

<sup>59</sup> CRC (n 2) art 3.

<sup>60</sup> Vogelstein (n 18) 11.

<sup>61</sup> North Carolina GS §51-2.1; Iowa Code, Title XV §595.2.

<sup>62</sup> Utah Code §30-1-17.3.

<sup>63</sup> E Kay M Tisdall and Patricio Cuevas-Parra, 'Challenges for children's participation: Child activism for ending child marriage' (2020) 108 *Children and Youth Services Review* 104568, 1.

The next major principle of the CRC is the right to life. This recognises ‘that every child has the inherent right to life.’<sup>64</sup> The CRC goes further than other international human rights treaties, providing that ‘States Parties shall ensure to the maximum extent possible the survival and development of the child.’<sup>65</sup> This alone should be sufficient to require the prohibition of child marriage, given that many child brides die due to pregnancies conceived shortly after the wedding.<sup>66</sup> Moreover, when a marriage is concluded, the child’s development ends. Chances to improve social skills, pursue vocational training, or take advantage of economic opportunities are all lost when a girl is married, especially when, as a result, she is taken out of school. This lack of experience and education limits her ability to access the formal workforce, confining her to informal and home-based work,<sup>67</sup> thus further limiting her ability to develop herself later in life. If she is not sufficiently qualified to get a formal job, she cannot earn her own money – or at least not enough to support herself – thus leaving her dependent on her husband.<sup>68</sup>

The final of the core principles of the CRC is the right to be heard. This is closely linked to the best interests of the child. The right to be heard means that a child ‘who is capable of forming his or her own views’ shall have ‘the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.’<sup>69</sup> The child’s opinion gains weight as the child gets older: the view of a ten-year-old and that of a seventeen-year-old do not have the same weight.

The flipside of this means that the younger a child is, the more weight their parents’ or guardians’ views will have. A young child may then have to bend to the will of their father, who according to customary or religious law may have the right to decide on the appropriate age of marriage for them.<sup>70</sup> Moreover, ‘it is the ‘best interests of the child,’ not the child’s views, that ‘are to be of primary consideration.’’<sup>71</sup> Even the view of an older child must yield to their best interests. Article 12 does not provide for a right for the child to make such decisions unilaterally.<sup>72</sup> Therefore, if a parent decides that it is in their child’s best interests to marry, to secure their social and economic future, or to advance the position of the family as a whole, the child’s view is likely to be secondary.<sup>73</sup> Yet this raises another argument against

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<sup>64</sup> CRC (n 2) art 6(1).

<sup>65</sup> *ibid*, art 6(2).

<sup>66</sup> Joar Svanemyr and others, ‘Preventing Child Marriages: First International Day of the Girl Child “My Life, My Right, End Child Marriage”’ (2012) 9 *Reproductive Health* 31, 31.

<sup>67</sup> Parsons and others (n 13) 15.

<sup>68</sup> Meryem Kaynak Malatyah, Bağdat Deniz Kaynak, and Derya Hasta, ‘A Social Dominance Theory Perspective on Attitudes Towards Girl Child Marriages in Turkey: The Legitimizing Role of Ambivalent Sexism’ (2017) 77 *Sex Roles* 687, 688.

<sup>69</sup> CRC (n 2) art 12(1).

<sup>70</sup> UNHCHR (n 5) [42].

<sup>71</sup> Vanessa Pupavac, ‘Misanthropy Without Borders: The International Children’s Rights Regime’ (2001) 25(2) *Disasters* 95, 99.

<sup>72</sup> *ibid*.

<sup>73</sup> Kopelman (n 40) 177-8.

child marriage: if a child is too young to have a view on whether or not they should get married, surely that in itself is an indicator that they are too young to actually get married.

All of the core principles of the CRC are therefore violated by child marriage. Yet nowhere in the Convention is child marriage explicitly prohibited. This means that States can interpret the provisions of the Convention creatively to excuse themselves from having to take steps to end the practice. Some people have gone so far as to interpret its provisions in favour of allowing child marriage.<sup>74</sup> Article 14(2) is particularly important here, as it permits parents to control their children's educational, religious and cultural heritage.<sup>75</sup> This is used to allow parents to decide when their children should marry, even if they are younger than the legal age of marriage in that State, usually by following customary or religious laws instead.<sup>76</sup>

These are not the only rights which come into play in relation to child marriage. Both in the CRC and in other treaties, many other rights are violated by child marriage. It is to these rights that the discussion turns.

### *Rights violated by child marriage*

More generally, many other rights in the CRC are violated by child marriage. Several of these rights are also provided for in other treaties, but with different scopes of application, depending on ratification, and only the CRC provides specifically for the rights of children. These other treaties do also apply to children, meaning that examination of these provisions is also necessary to get a complete view of the protection afforded to children in relation to child marriage.

### **Right to Non-Discrimination**

The right to non-discrimination is also protected in other international treaties. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both contain a general non-discrimination right, guaranteeing the 'equal right of men and women' to enjoy the rights contained therein.<sup>77</sup> The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) requires States to take measures 'to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.'<sup>78</sup> Article 5 contains a similar right, which calls on States to 'modify the social and cultural patterns of conduct 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 or the superiority of

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<sup>74</sup> Davids (n 25) 321.

<sup>75</sup> *ibid.*

<sup>76</sup> Minzee Kim and others, 'When Do Laws Matter? National Minimum-Age-of-Marriage Laws, Child Rights and Adolescent Fertility, 1989-2007' (2013) 47(3) *Law and Society Review* 589, 593.

<sup>77</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 2-3; ICESCR (n 11) art 2-3.

<sup>78</sup> CEDAW (n 31) art 2(f).

either of the sexes or on stereotyped roles for men and women.<sup>79</sup> This obligation implies a duty to make efforts to enforce laws on the age of marriage or on marriage registration, given the disparities in the number of girls who get married young as opposed to boys. In many countries, however, this is not yet the case, despite the adoption of laws setting the age of marriage at eighteen.<sup>80</sup>

## Right to Health

The CRC recognises ‘the right of the child to the enjoyment of the highest attainable standard of health.’<sup>81</sup> This right includes a specific reference to harmful practices, whereby States must take measures to abolish ‘traditional practices prejudicial to the health of children.’<sup>82</sup> Some of the most common health effects of child marriage include a higher risk of exposure to HIV/AIDS, pregnancy complications, obstetric fistula (especially likely for girls under nineteen, getting progressively more likely and more dangerous the younger the mother is), and depression, as well as other mental health effects.<sup>83</sup>

The right to health is also protected under CEDAW, which provides that women should have access to healthcare services, with a particular emphasis on those related to family planning,<sup>84</sup> recognising that women’s health needs are different to men’s. The Universal Declaration on Human Rights (UDHR) provides for a right to health as part of the right to an adequate standard of living,<sup>85</sup> protecting this right as part of customary international law, applying to every State, regardless of ratification of a particular instrument. This right is further codified at the international level through the ICESCR, which states that States Parties should take steps to reduce the stillbirth rate and the rate of infant mortality.<sup>86</sup> Since child marriage is often followed quickly by childbearing, which carries great risks to both the mother and the child, and is worse for young mothers,<sup>87</sup> this right implies the need to take steps to prohibit child marriage, in order to minimise the risk of mother and infant mortality. Moreover, the right to health also includes the provision of steps taken to ensure ‘the healthy development of the child.’<sup>88</sup> This implies that children should not be put in a position where their health may be at risk.

The CRC specifically requires States to take all appropriate measures ‘to protect the child from all forms of physical or mental violence, injury or abuse... maltreatment or exploitation, including sexual

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<sup>79</sup> *ibid*, art 5(a).

<sup>80</sup> Quentin Wodon, ‘Child Marriage, Family Law, and Religion: An Introduction to the Fall 2015 Issue’ (2015) 13(3) *The Review of Faith and International Affairs* 1, 4.

<sup>81</sup> CRC (n 2) art 24(1).

<sup>82</sup> *ibid*, art 24(3).

<sup>83</sup> Davids (n 25) 300.

<sup>84</sup> CEDAW (n 31) art 12.

<sup>85</sup> Universal Declaration on Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 25.

<sup>86</sup> ICESCR (n 11) art 12(2)(a).

<sup>87</sup> Lee-Rife and others (n 12) 288.

<sup>88</sup> ICESCR (n 11) art 12(2)(a).

abuse.<sup>89</sup> It specifies that this protection extends while the child is ‘in the care of parent(s), legal guardian(s) or any other person who has the care of the child.’<sup>90</sup> While this could be argued to imply that once the child is no longer being looked after by a parent or guardian, the protection ceases to apply, that interpretation does not follow from the object of the Convention. Young brides are more likely to be maltreated by their in-laws and their new husbands, both physically and emotionally,<sup>91</sup> than older brides, which suggests that this protection ought to stay in place even after the child leaves her parents’ home, if it does not imply the prohibition of child marriage in order to stave off such abuse. The Convention also requires States to ‘protect the child from all forms of sexual exploitation and sexual abuse.’<sup>92</sup> Child marriage can itself be considered a form of sexual abuse,<sup>93</sup> given that parents likely know that their daughter will not consent to any sexual activities with her new husband, either through a lack of understanding or capacity or simply unwillingness, so the existence of sexual abuse in that marriage is almost a certainty. Laws which permit sexual activities between an adult and a minor become especially suspect here, particularly when the marriage itself can act as a bar to liability.<sup>94</sup> Allowing marriage to stop liability for sexual liaisons with a minor essentially prioritises the appearance of permissibility (through the veil of marriage) over the child’s safety. In order to protect children from legally-approved sexual abuse, therefore, these provisions call for the prohibition of child marriage.

The UDHR also recognises the right to life, liberty and the security of the person,<sup>95</sup> while the ICCPR and the European Convention on Human Rights (ECHR) protect the right to life.<sup>96</sup> They also recognise the right to freedom from slavery and servitude,<sup>97</sup> and the right to freedom from torture.<sup>98</sup> These all relate to the right to health, as each protects against the most severe ways in which the health of a child can be affected. Child marriage violates all of these rights, due to the risk of mother mortality in early pregnancy, and as recognised by the Special Rapporteur on Torture and the UN Economic and Social Council.<sup>99</sup>

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<sup>89</sup> CRC (n 2) art 19(1).

<sup>90</sup> *ibid.*

<sup>91</sup> Parsons (n 13) 16.

<sup>92</sup> *ibid.*, art 34.

<sup>93</sup> Karci and others (n 17) 1.

<sup>94</sup> eg Oklahoma Statutes Title 43, §3-B-2, ‘Every person under the age of sixteen (16) years is expressly forbidden and prohibited from entering into the marriage relation except when authorized by the court: a. in settlement of a suit for seduction or paternity.’

<sup>95</sup> UDHR (n 85) art 3.

<sup>96</sup> ICCPR (n 77) art 6; Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) art 2.

<sup>97</sup> UDHR (n 85) art 4; ICCPR (n 77) art 8; ECHR (n 96) art 4.

<sup>98</sup> UDHR (n 85) art 5; ICCPR (n 77) art 7; ECHR (n 96) art 3.

<sup>99</sup> Report of the Special Rapporteur on Torture (n 28) [63]; Supplementary Convention on the Abolition of Slavery (n 29) art 1(c).

## Right to Education

The next right that is greatly affected by child marriage is the right to education, recognised by the CRC,<sup>100</sup> the UDHR,<sup>101</sup> and the ICESCR.<sup>102</sup> It is also protected at the regional level by the First Protocol to the European Convention on Human Rights,<sup>103</sup> which has more direct application in the UK, as it can be enforced more easily through the national courts. Given that children, especially girl children, who do not have access to school are more likely to be married at a young age, it is imperative that States aim to improve the access of girls to education. Furthermore, if schools are more accessible and girls can stay in school for longer, parents are less likely to want to marry them off young. Parents 'are willing to postpone marriage so their daughters can attain a higher level of education,'<sup>104</sup> and if the quality of education is recognised as being better, parents may decide that the investment in girls' education may be a better long-term investment than an early marriage.<sup>105</sup>

CEDAW also protects the right to education, specifically addressing women's access to studies,<sup>106</sup> particularly in rural areas (where most child marriages occur,<sup>107</sup> often due to a lack of access to schooling),<sup>108</sup> which is often cut short by marriage.<sup>109</sup> It also addresses the need to reduce 'female student drop-out rates and the organisation of programmes for girls and women who have left school prematurely.'<sup>110</sup> Once a girl is married, she rarely returns to school.<sup>111</sup> Given the causality between marriage and girls' drop-out rates (married girls are made to leave school upon marriage,<sup>112</sup> and those who have dropped out are at greater risk of marriage),<sup>113</sup> the importance of the right to education in reducing child marriage cannot be overstated.

The right to education also has a role within the right to health in the context of CEDAW. Women should have 'access to specific educational information to help ensure the health and well-being of families, including information and advice on family planning.'<sup>114</sup> This implies, at least, having basic sex education in schools. However, many of the same communities that practice child marriage also do

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<sup>100</sup> CRC (n 2) art 28.

<sup>101</sup> UDHR (n 85) art 26.

<sup>102</sup> ICESCR (n 11) art 13.

<sup>103</sup> Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art 2.

<sup>104</sup> Lee-Rife and others (n 12) 293.

<sup>105</sup> *ibid.*

<sup>106</sup> CEDAW (n 31) art 10(a).

<sup>107</sup> Syrett (n 35) 262.

<sup>108</sup> CEDAW, 'General Recommendation No 34 on the Rights of Rural Women' (7 March 2016) CEDAW/C/GC/34, [42].

<sup>109</sup> Nicholas Kristof, 'An American 13-Year-Old, Pregnant and Married to Her Rapist' (1 June 2018) *The New York Times* <[www.nytimes.com/2018/06/01/opinion/sunday/child-marriage-delaware.html](http://www.nytimes.com/2018/06/01/opinion/sunday/child-marriage-delaware.html)> accessed 21/05/2021.

<sup>110</sup> CEDAW (n 31) art 10(f).

<sup>111</sup> *Girls Not Brides* (n 16) 2.

<sup>112</sup> Lee-Rife and others (n 12) 293.

<sup>113</sup> *ibid.*, 288.

<sup>114</sup> CEDAW (n 31) art 10(h).

not teach about reproductive health and ways to control pregnancy, such as contraception.<sup>115</sup> But even having sex education at school is no protection for girls who are married very young. Moreover, in many cases, child brides do not have sufficient confidence or authority within their own home to insist on using contraception, even if they are aware of it.<sup>116</sup> Girls should therefore be allowed to stay in school longer, in order to both learn how contraceptives work, and also to develop the ability and confidence to negotiate their use with their husbands.<sup>117</sup>

## Freedoms of Expression and Thought, Conscience and Religion

The CRC also provides for the right to freedom of expression and the right to freedom of thought, conscience and religion.<sup>118</sup> The UDHR, ICCPR and ECHR also provide for these freedoms.<sup>119</sup> This includes the right to manifest one's religion in observance and practice.<sup>120</sup> This could be argued to allow parents to marry off their children at a young age if they believe it is mandated by their religion, in the pursuance of manifesting their religion. However, this right generally includes a limitation, whereby it may be subject to such limitations as are necessary to protect, inter alia, public health or the fundamental rights and freedoms of others.<sup>121</sup> Therefore, freedom of religion cannot be used to justify the perpetuation of child marriage, as it would be a reasonable limitation in the interests of both the health of young people and in ensuring that they could enjoy their other fundamental rights. In a similar vein, the rights of minorities to 'enjoy their own culture, to profess and practice their own religion' is protected.<sup>122</sup> While this right does not contain any limitations, it can reasonably be implied that in manifesting their culture and religion, minorities may not perpetuate practices which go against the rights of others.<sup>123</sup>

Given the child's right to be heard under the CRC, combined with the freedoms of expression and of religion, it is implied that the child should be able to have a say in what path their life should take. If their parents say they should marry, they have a right to dissent, and for that opinion to be respected. Article 14 of the CRC provides that 'States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.'<sup>124</sup> This means that while deference by the

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<sup>115</sup> Koski and Heymann (n 15) 64; Marie Johnson-Dahl, 'Sixteen Candles on my Wedding Cake: Implications of Banning Child Marriage in America' (2020) 2020(3) *University of Illinois Law Review* 1045, 1074-5.

<sup>116</sup> Parsons and others (n 13) 14.

<sup>117</sup> Kathryn M Yount, Alice Ann Crandall, and Yuk Fai Cheong, 'Women's Age at First Marriage and Long-Term Economic Empowerment in Egypt' (2018) 102 *World Development* 124, 124-6.

<sup>118</sup> CRC (n 2) arts 13-14.

<sup>119</sup> UDHR (n 85) arts 18-19; ICCPR (n 77) arts 18-19; ECHR (n 96) arts 9-10.

<sup>120</sup> eg ICCPR (n 77) art 18(1).

<sup>121</sup> *ibid*, art 18(3); ECHR (n 96) art 9(2).

<sup>122</sup> ICCPR (n 77) art 27.

<sup>123</sup> Julia Alanen, 'Shattering the Silence surrounding Forced and Early Marriage in the United States' (2012) 32(2) *Children's Legal Rights Journal* 1, 20.

<sup>124</sup> CRC (n 2) art 14(2).

State to the parents' own views is specifically legislated for, those parental rights do not automatically override those of the child. It does, however, give rise to questions on where the line delineating 'direction to the child' lies. This is especially important in the area of child marriage, which is often linked to the parents' religion, and more importantly, to cultures where the father's word is law,<sup>125</sup> thus removing the ability of a child – particularly a daughter – to refuse.

## Right to Marry

Another important right in relation to child marriage is the right to marry. This right is provided for in the UDHR, which states that 'Men and women of full age... have the right to marry and to found a family.'<sup>126</sup> The mention of 'full age' implies that children are not entitled to exercise this right until they reach the age of majority. This does not exclude all children under the age of eighteen from being able to exercise this right. Depending on the age of majority in each state, children of different ages might be allowed to marry. The same goes for the ICCPR and the ECHR, which allow for 'men and women of marriageable age' to marry and found a family.<sup>127</sup> The reference to 'marriageable age' does not limit the ability of parents to marry off their children at a young age, so long as there is some ground of recognition of that age. In a number of States, for girls, this is defined as the time of puberty, following the definition in the Quran.<sup>128</sup> This thus only explicitly prohibits very early child marriages. However, the reference to 'men and women' may imply that spouses must be adults, at least under the implied definition of the UDHR (people 'of full age'). The ICCPR and the UDHR also require the 'free and full consent' of the intending spouses,<sup>129</sup> suggesting that they must be able to understand the undertakings that marriage involves. It also means that forced marriage is prohibited, including forced child marriages.

CEDAW has the most specific provisions in relation to marriage, and by extension, child marriage. Article 16(1)(b) grants women 'The same right freely to choose a spouse and to enter into marriage only with their free and fully consent.' As with the ICCPR and UDHR provisions, this implies that marriages contracted without the 'free and full' consent of both spouses should be unlawful. This does not rule out arranged marriages, in which the spouses consent to being married, but do not themselves choose their spouse. However, in such situations, both parties should be allowed to refuse a particular match. Moreover, it implies that both parties must be of an age where they can understand what they are agreeing to. In general, children are considered to be incapable of giving such consent.<sup>130</sup> If one or

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<sup>125</sup> Joanne Hemmings and Saria Khalifa, "I Carry the Name of my Parents": Young People's Reflections on FGM and Forced Marriage' (2013) Create Youth Network, 37-8.

<sup>126</sup> UDHR (n 85) art 16(1).

<sup>127</sup> ICCPR (n 77) art 23(2); ECHR (n 96) art 12.

<sup>128</sup> Anita Raj, Charlemagne S Gomez, and Jay G Silverman, 'Multisectorial Afghan Perspectives on Girl Child Marriage: Foundations for Change Do Exist in Afghanistan' (2014) 20(12) Violence Against Women 1489, 1499-1500.

<sup>129</sup> ICCPR (n 77) art 23(3); UDHR (n 85) art 16(2).

<sup>130</sup> van Collier (n 56) 368.

both parties is too young, they cannot make an informed decision about getting married, and therefore any consent they give would not be ‘free and full.’<sup>131</sup>

CEDAW provides women with the right, on an equal basis with men, ‘to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.’<sup>132</sup> This does not directly forbid child marriage, but by implication suggests that child brides are not equipped to enjoy this right, and therefore it can be argued that child marriage is not even implicitly permitted under CEDAW. The right to decide on the number and spacing of one’s children implies that brides should understand how children are made, and ways to prevent that from happening, such as contraception. It also implies some level of equal negotiating power within the household, especially on so important and personal a topic. Both of these are denied to child brides. Linked as this right is to the right to education,<sup>133</sup> it implies that girls should stay in school at least until they are able to understand what marriage entails, both on a physical and an emotional level.

The most interesting provision is Article 16(2), which provides that ‘The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.’ The explicit prohibition of child marriage is a recognition of the harms this practice causes.

This provision is however not the end of the story. Despite CEDAW’s high rate of ratification,<sup>134</sup> it faces a number of problems. A number of reservations have been entered against Article 16,<sup>135</sup> especially by largely Muslim States, citing incompatibility with the principles of Shariah law. These reservations limit the effectiveness of Article 16(2), as it demonstrates that these States have, at the moment, no intention of attempting to reconcile their domestic or religious law with the international standard. The USA, which still has large numbers of child marriages every year,<sup>136</sup> has not even ratified CEDAW.<sup>137</sup> India continues to struggle with enforcement of the legal age of marriage of eighteen.<sup>138</sup> This shows that despite the wide ratification of CEDAW, its strength depends on the willingness of States to make the effort to comply with it – an obstacle that has not yet been crossed.

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<sup>131</sup> de Alwis (n 23) 5.

<sup>132</sup> CEDAW (n 31) art 16(e).

<sup>133</sup> *ibid*, art 10.

<sup>134</sup> As of May 2021, CEDAW has 189 ratifications and 2 signatories. ‘Ratification of CEDAW’ OHCHR (20 June 2016) <[www.ohchr.org/Documents/HRBodies/CEDAW/OHCHR\\_Map\\_CEDAW.pdf](http://www.ohchr.org/Documents/HRBodies/CEDAW/OHCHR_Map_CEDAW.pdf)> accessed 14/05/2021.

<sup>135</sup> Burris (n 24) 173.

<sup>136</sup> Unchained At Last, ‘Child Marriage – Shocking Statistics’ <[www.unchainedatlast.org/child-marriage-shocking-statistics/](http://www.unchainedatlast.org/child-marriage-shocking-statistics/)> accessed 06/04/2021.

<sup>137</sup> ‘Ratification of CEDAW’ (n 134).

<sup>138</sup> Nguyen and Wodon (n 13) 6.

CEDAW is also limited by the fact that it lacks a definition of a child.<sup>139</sup> If there is no uniform definition of a child, it is difficult to monitor the progress and implementation of Article 16(2). It also means that States do not actually have to change anything in their domestic law, as there is no minimum age under CEDAW that must be recognised as the minimum age for marriage, and it is up to each State to decide on the age of majority. With regards to marriage, this may not even be a specific age: for example, in areas that follow a conservative school of Muslim teaching (such as the Hanbali school), this may be defined as puberty.<sup>140</sup> By contrast, the absolute minimum may be an age decided a long time ago that has not changed since: the common law minimum age in the USA is twelve years old for girls and fourteen for boys,<sup>141</sup> following the old English common law. The Catholic Canon law permits girls of fourteen and boys of sixteen to marry.<sup>142</sup> The lack of a definition makes it unclear which of these variations would be impermissible.<sup>143</sup>

While CEDAW does explicitly prohibit child marriage, it therefore has a significant loophole that makes it difficult to ensure that child marriage is effectively protected against, while still allowing States to technically comply with the letter of the law – though not its spirit. However, when taken together with the CRC, the lack of a definition of a child becomes less important, as international human rights treaties should be read and interpreted holistically: one cannot be read so as not to comply with another. It can therefore be implied that the definition of a child under CEDAW should be the same as for the CRC – that is, any human being under the age of eighteen, except where majority is attained earlier in that state.

All these rights could arguably base the prohibition of child marriage. However, there was no single, definite call for the prohibition of child marriage until recently.

### *Joint General Comment on Harmful Practices*

In 2014, the CEDAW Committee and the Committee on the Rights of the Child came together to elaborate a Joint General Comment on harmful practices against women and girl children. Among those discussed were female genital mutilation, child and forced marriage, so-called ‘honour crimes,’ polygamy, and dowry-related violence.<sup>144</sup> The Committees highlighted some of the causes of such harmful practices, citing social attitudes under which women are seen as inferior to men, and the desire to control women’s bodies and sexuality,<sup>145</sup> linking these views to the wider problem of gender-based

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<sup>139</sup> Burris (n 24) 157.

<sup>140</sup> Al-Hakami and McLaughlin (n 1) 660.

<sup>141</sup> Davids (n 25) 304.

<sup>142</sup> Ladislav Orsy, ‘Marriage in the Code of Canon Law’ (1986) 88 *The Christian Law Review* 9, 13.

<sup>143</sup> Ruth Gaffney-Rhys, ‘International Law as an Instrument to Combat Child Marriage’ (2011) 15(3) *The International Journal of Human Rights* 359, 364.

<sup>144</sup> Joint General Recommendation (n 7) [7].

<sup>145</sup> *ibid.*, [17].

violence.<sup>146</sup> The practices are thus grounded in discrimination, with negative impacts on women and girls' 'dignity, physical, psychosocial and moral integrity and development, participation, health, education and economic and social status.'<sup>147</sup> The Committees reminded States that their duties under both Conventions are not limited to prohibiting these practices, but also to create systems for prevention, redress for victims, and most importantly, combating impunity for these practices.<sup>148</sup> This means that not only do States have to prohibit (and preferably criminalise) these practices, but they have to actively enforce the relevant legislation. Many States continue to allow these practices, either by not effectively or uniformly enforcing legislation,<sup>149</sup> or by retaining exceptions for religious or customary laws.<sup>150</sup> These personal laws can take priority over civil laws, especially in day-to-day life in the eyes of the community.<sup>151</sup> The civil law needs to be enforced much more strongly, in order to protect children from being subject to these personal laws that may set the age of marriage much lower than the civil prescription.

The Committees state that child marriage can be considered a form of forced marriage, 'given that one and/or both parties have not expressed full, free and informed consent.'<sup>152</sup> Other forms of marriage (which may also be child marriages) highlighted by the Committees include exchange marriages (where girls are married off to settle debts or feuds, which may be sanctioned by customary laws)<sup>153</sup> and marriages where a rapist married their victim, thus escaping criminal sanctions, usually with the victim's family's consent.<sup>154</sup> Consent is usually given in such cases in order to avoid shame falling on the family.<sup>155</sup> All these situations void any consent given by the victim, where she gives consent at all. It is often sufficient for the girl's father to consent on her behalf. This thus contravenes the right to freely enter into marriage.<sup>156</sup>

The Committees were also concerned that the practices of dowry or bride price could constitute an element in the sale of children. Under the Optional Protocol to the CRC on the sale of children, the 'sale of children' means 'any act or transaction whereby a child is transferred by any person or persons to another for remuneration or any other consideration.'<sup>157</sup> Any marriage involving a dowry or the payment of bride price could thus constitute the sale of a child. Moreover, by the inclusion of the phrase 'or any

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<sup>146</sup> *ibid*, [6].

<sup>147</sup> *ibid*, [15].

<sup>148</sup> *ibid*, [13].

<sup>149</sup> Wodon (n 80) 4; Burris (n 24) 161-2.

<sup>150</sup> Vogelstein (n 18) 11.

<sup>151</sup> Burris (n 24) 159-60.

<sup>152</sup> Joint General Recommendation (n 7) [20].

<sup>153</sup> Vogelstein (n 18) 12.

<sup>154</sup> Joint General Recommendation (n 7) [23].

<sup>155</sup> Alanen (n 123) 2.

<sup>156</sup> Joint General Recommendation (n 7) [21].

<sup>157</sup> Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (adopted 25 May 2000, entered into force 18 January 2002) (OP1 CRC) A/RES/54/263 art 2(a).

other consideration,' marriages concluded to settle a debt could also constitute the sale of a child. With 176 States Parties to the Protocol, and another nine signatories,<sup>158</sup> these practices ought to be all but forbidden. However, they continue to occur all around the world.

The General Recommendation also addresses the age of marriage. It holds that marriage should not, in general, be permitted before a child turns eighteen, with or without parental consent.<sup>159</sup> This is in line with the provisions of the CRC. However, the Committees went on to note that another of the CRC's guiding principles is 'respecting the child's evolving capacities and autonomy in making decisions that affect his or her life.'<sup>160</sup> In order to respect the child's evolving capacity, it suggests that a mature, capable child below 18 years of age may be allowed to marry in exceptional circumstances, so long as they are at least sixteen years old and a judge grants them permission, 'based on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition,'<sup>161</sup> and the child provides their 'full, free and informed consent.'<sup>162</sup> However, it does not give any examples of what might constitute 'exceptional circumstances.' This leaves open the possibility of advantage being taken of these exceptions.

These exceptions are also unlikely to have uniform application. Judges and courts may be more or less willing to grant these exceptions.<sup>163</sup> Alternatively, it has been suggested that such exceptions may indicate that a State may 'tolerate behaviour inconsistent with the law or a lack of commitment to the law's core premise.'<sup>164</sup> 'Weak' laws – those with exceptions to the minimum age of marriage of eighteen – have been suggested to be less effective than those without such exceptions.<sup>165</sup> These exceptions may create some ambiguity, meaning people might be confused as to what, exactly, is the minimum legal age of marriage.<sup>166</sup> Such exceptions may obscure the importance of prohibiting the practice: if some people can still marry below that age, why can't others?

Judges may also not be the best placed to decide when a child is mature enough to marry. This is a requirement in many US states, but much of the time, parents are the driving force behind the marriage, and judges tend to defer to their wishes.<sup>167</sup> Although the Committee does not address parental consent in these situations, it is not difficult to imagine parents pressuring their children to consent, and judges

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<sup>158</sup> UN OHCHR, 'Status of Ratification: Interactive Dashboard' OP1 CRC <<https://indicators.ohchr.org/>> accessed 22/05/2021.

<sup>159</sup> Joint General Recommendation (n 7) [55(f)].

<sup>160</sup> *ibid.*, [20].

<sup>161</sup> *ibid.*

<sup>162</sup> *ibid.*, [55(f)].

<sup>163</sup> Koski and Heymann (n 15) 61-2.

<sup>164</sup> Kim and others (n 76) 598.

<sup>165</sup> *ibid.*, 612.

<sup>166</sup> *ibid.*

<sup>167</sup> Charlotte Alter, 'Child Marriage Survivor: I Was Introduced to Him in the Morning and Handed Over That Night' (6 June 2017) TIME <<https://time.com/4807611/us-child-marriage-survivor-story/>> accessed 31/03/2021.

taking this consent to be sufficient. Children ‘may feel powerless to object – and fearful of telling a judge that they don’t want to wed.’<sup>168</sup> There is also no requirement that judges have experience recognising cases of rape or coercion, or a background in family law or working with minors,<sup>169</sup> although the Committees recognise the need for better capacity-building among all relevant professionals that may come into contact with child marriages, including judges.<sup>170</sup> The additional protection of requiring judicial consent may therefore not be enough. A stronger (and more easily monitored) solution is simply to prohibit all marriages of children under the age of eighteen, regardless of maturity.

The Committees also addressed decentralisation, and how having different laws in each area can cause problems for the protection of women and children. The Committees remind States that devolution does not obviate their obligation that the provisions of both treaties apply throughout their territories. They called on States to ensure that ‘decentralisation or devolution does not lead to discrimination with regard to protection of women and children against harmful practices in different regions and cultural zones.’<sup>171</sup> This is relevant in the context of this research due to the nature of the British legal system. Between the three legal jurisdictions and the devolution settlements currently in force, there are three separate regimes dealing with the law on child and forced marriage in the UK. Although they have their similarities, they also have their differences. England, Wales and Northern Ireland all permit marriage at eighteen without parental consent, but at sixteen with it. By contrast, Scotland permits marriage at sixteen, with or without parental consent. The devolved nature of the British system thus makes the need to have uniform legislation on child marriage more important.

The Joint General Recommendation used the combined power of CEDAW and the CRC to make an authoritative statement on the unlawful nature of child marriage. Any State that is a Party to either Convention – almost all existing States – is bound by the interpretation by the Committees. Most States have ratified both Conventions, which makes this Recommendation that much more important. However, some States have only ratified one treaty, or in the case of the USA, neither, or may have reservations to relevant provisions that they may use to argue against being bound. The Recommendation is also soft law – that is, not legally binding – which limits its effectiveness. Therefore, the rights set out in other treaties are also important in encouraging States to prohibit child marriage.

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<sup>168</sup> Kristof (n 109).

<sup>169</sup> Johnson-Dahl (n 115) 1071.

<sup>170</sup> Joint General Recommendation (n 7) [70].

<sup>171</sup> *ibid*, [46].

## *Other Instruments*

### 1962 Marriage Convention

Two other international instruments should also be mentioned. Before the adoption of the ICCPR and the ICESCR, a treaty addressing child marriage already existed. The Convention on Consent to Marriage referred to a 1954 UN General Assembly resolution which noted that certain ‘customs, ancient laws and practices relating to marriage and family’ were inconsistent with the principles set out in the UN Charter and the UDHR.<sup>172</sup> The Convention reaffirmed the duties of States to abolish such customs. It set out certain requirements to ensure that these customs were actually abolished. The first was that ‘No marriage shall legally be entered into without the full and free consent of both parties.’<sup>173</sup> It further specified that such consent shall be ‘expressed by them in person... and in the presence of the authority competent to solemnize the marriage and of witnesses.’<sup>174</sup> This means that parents may not consent on behalf of their children, and intending spouses must give their consent freely. Some argue that by ‘requiring consent of both parties, arranged marriages would not happen.’<sup>175</sup> This is not true. Arranged marriages are contracted with the consent of the parties. This provision would help to prevent forced marriages, where the consent of one or both parties is not given willingly.

The Marriage Convention also requires States Parties to ‘take legislative action to specify a minimum age for marriage,’ below which age no marriage shall be contracted, except for serious reasons for which a dispensation has been granted by a competent authority.<sup>176</sup> States in principle cannot therefore allow marriage at any age, thus removing the possibility of very young child marriages. The preamble clarifies this further, providing that States should work towards ‘eliminating completely child marriages and the betrothal of young girls before the age of puberty.’<sup>177</sup> Although this appears a step forward, in reality, it does very little to eliminate child marriage. As the Convention does not specify a minimum age, States have free reign to choose the age at which they permit marriage. States chose a variety of ages, ranging from twelve to twenty-one, while some persisted in not setting a minimum at all.<sup>178</sup> Moreover, the fact that the Convention has only ever garnered 55 States Parties suggests that does not

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<sup>172</sup> UNGA Resolution 843(IX) (17 December 1954).

<sup>173</sup> Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (adopted 7 November 1962, entered into force 9 December 1964) UNGA Resolution 1763 (XVII) (Marriage Convention) art 1(1).

<sup>174</sup> *ibid.*

<sup>175</sup> Davids (n 25) 313.

<sup>176</sup> Marriage Convention (n 173) art 2.

<sup>177</sup> *ibid.*, Preamble.

<sup>178</sup> Davids (n 25) 314.

have sufficient support to give it great authority.<sup>179</sup> It also does not have a monitoring mechanism, limiting its effectiveness.

Although the UK is a party to this Convention, it does not have much strength behind it, nor specific provisions that help to eliminate child marriage effectively, so it is better to rely on the CRC or CEDAW.

## 2011 Istanbul Convention

For completeness, the 2011 Convention on Preventing and Combating Violence Against Women and Domestic Violence (the Istanbul Convention) should also be mentioned. The UK has signed, but not ratified, this Convention, which means it does not have legal effect in the UK, thus limiting its relevance at present. It also only addresses forced, not child, marriage.

The Istanbul Convention is a Council of Europe treaty which aims to provide explicit protection against forms of gender-based violence suffered by women and girls. This violence includes forced marriage, which the Convention calls upon Parties to criminalise.<sup>180</sup> However, the Convention does not specifically mention child marriage as a separate issue, choosing instead to focus on the act of forcing someone to marry, be they an adult or a child.

The Convention also notes that ‘culture, custom, religion, tradition or so-called “honour” shall not be considered as justification for any acts of violence covered by’ the Convention.<sup>181</sup> Child marriage cannot therefore be justified by reference to any of these reasons, thus depriving it of much of its basis, given that many such marriages are concluded due to worries about family “honour” in relation to a daughter’s virginity,<sup>182</sup> or simply because child marriage is the norm.<sup>183</sup>

Having set out the international law relevant to child marriage, it is to the domestic law that the discussion turns.

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<sup>179</sup> ‘Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages’ <[https://en.wikipedia.org/wiki/Convention\\_on\\_Consent\\_to\\_Marriage,\\_Minimum\\_Age\\_for\\_Marriage\\_and\\_Registration\\_of\\_Marriages#cite\\_note:-0-1](https://en.wikipedia.org/wiki/Convention_on_Consent_to_Marriage,_Minimum_Age_for_Marriage_and_Registration_of_Marriages#cite_note:-0-1)> accessed 29/05/2021.

<sup>180</sup> Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) CETS 210, art 37(1).

<sup>181</sup> *ibid*, art 12(5).

<sup>182</sup> Azza Karam, ‘Faith-inspired Initiatives to Tackle the Social Determinants of Child Marriage’ (2015) 13(3) *The Review of Faith & International Affairs* 59, 62.

<sup>183</sup> *ibid*, 60.

## Chapter 2: Domestic Law

This chapter will examine the law relevant to child marriage in the UK. Given the three separate-but-linked legal jurisdictions within the UK, each nation is governed by a slightly different regime. Firstly, the law on marriage in each jurisdiction will be detailed. Next, the civil and criminal laws on forced marriage in each jurisdiction will be examined. There will finally be a summary of the applicable law in each jurisdiction at the end of the chapter. This will lead into the third chapter, which will assess the effectiveness of this legislation and of the system as a whole.

Before this, it must be noted that the UK has ratified all the above treaties apart from the Istanbul Convention – that is, the CRC, CEDAW, the ICCPR and ICESCR, and the Marriage Convention. This means that all the rights contained in those treaties are applicable in the UK, and can therefore be legally enforced. The treaties apply across the entire UK: all four nations, all three jurisdictions, must comply with these rights.<sup>184</sup> The UK has not entered any relevant reservations to the rights related to child marriage. Therefore, each treaty individually, but certainly all the treaties taken together, should be sufficient to prohibit child marriage across the UK.

### *The British Legal System*

It is firstly necessary to give a brief explanation of the legal system in the UK. Across the four nations (England, Scotland, Wales, and Northern Ireland), there are three separate legal jurisdictions (England and Wales, Northern Ireland, and Scotland). These arose due to the historical development of the UK and in how the unions came to be. Most laws in the UK apply across the country, but because they have different criminal law systems, they are not identical. Following the devolution settlements in 1998 and in 2016, the devolved nations have greater control over certain areas, without Westminster control. These different jurisdictions result in different regimes existing in relation to child marriage, though they have significant overlaps, and many similar features.

### *Minimum Age of Marriage*

In England and Wales, a marriage where either party is under the age of sixteen is void.<sup>185</sup> Anyone who is a ‘child’ (i.e. is under eighteen) who wishes to marry must have the consent of their parent or guardian.<sup>186</sup> There are no exceptions to the minimum age of sixteen, so this is the absolute minimum age of marriage. There are also no guidelines as to when a parent may consent. This means that anyone under the age of eighteen but over the age of sixteen may marry if their parents agree.

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<sup>184</sup> The scope of this thesis does not extend to the Crown Dependencies or other territories, but only to England, Wales, Northern Ireland, and Scotland.

<sup>185</sup> Marriage Act 1949, s2.

<sup>186</sup> *ibid*, s3.

In Northern Ireland, a similar rule applies. Marriages where one or both parties are under sixteen are void.<sup>187</sup> A marriage where one or both parties are over sixteen but under eighteen cannot be solemnised unless the consent of the parents or guardians of such young persons is obtained.<sup>188</sup> Like in England and Wales, there are no other conditions to fulfil for a young person to marry.

In Scotland, there is no requirement of parental consent. Anyone over the age of sixteen may marry, with or without parental consent.<sup>189</sup> This makes it the least restrictive regime in the UK.

This means that child marriage is permitted across the UK. Despite ratifying all the above treaties, the UK continues to allow the marriage of children in all three legal jurisdictions. The CRC Committee has commented on this, and in 2016 recommended that the UK raise the minimum age of marriage to eighteen across the country.<sup>190</sup> It went on to recommend that the UK ‘Take effective measures to ensure that marriage of children aged 16 and 17 years takes place only in exceptional circumstances and is based on the full, free and informed consent of the concerned children.’<sup>191</sup> However, the Committee did not expand on what constituted ‘exceptional circumstances.’ The UK has not yet followed this recommendation, as the minimum age of marriage remains below eighteen. The fact that this has been highlighted at the international level, however, suggests that the issue of the child marriage in the UK is one which requires more attention.

Some measures have been taken to ensure that the minimum age of marriage is not abused. The UK has several statutes which prohibit forced marriage, which in many circumstances are the worst forms of child marriage, because in non-forced marriages, at least the child has a choice. It is to these that the following sections are dedicated.

It must be noted however that the UK does not have any specific legislation on *child* marriage. The entire regime deals exclusively with forced marriage.

### *Forced Marriage (Civil Protection) Act 2007*

The Forced Marriage (Civil Protection) Act 2007 was the first piece of legislation in the UK targeting forced marriage. It creates a civil – not a criminal – offence of forcing someone to marry.

The Act sets out the offence of forcing someone to marry, whereby ‘a person (“A”) is forced into 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.’<sup>192</sup> It further specifies that ‘it does not matter whether the conduct of

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<sup>187</sup> Age of Marriage Act (Northern Ireland) 1951, s1(1).

<sup>188</sup> The Marriage (Northern Ireland) Order 2003, s22.

<sup>189</sup> Marriage (Scotland) Act 1977, s1(1).

<sup>190</sup> Committee on the Rights of the Child, ‘Concluding Observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland’ (12 July 2016) CRC/C/GBR/CO/5, [20].

<sup>191</sup> *ibid.*, [47(a)].

<sup>192</sup> Forced Marriage (Civil Protection) Act 2007, s63A(4).

B which forces A to enter into a marriage is directed against A, B or another person.’<sup>193</sup> This means that if B threatens to make A’s sister take her place as the bride, or B threatens to kill themselves if A does not go through with the marriage, liability could still be established, as well as where the threat is to A themselves. Moreover, the Act does not limit its protection to legally recognised marriages: “‘marriage’ means any religious or civil ceremony of marriage (whether or not legally binding).”<sup>194</sup> It also therefore protects against customary or community marriages.

The Act defines ‘force’ as including ‘coerce by threats or other psychological means.’<sup>195</sup> Outright physical threats are not the only possible forms of force. Appeals to guilt, emotional pressure, and the denial of freedom or money may all amount to force.<sup>196</sup> This is itself a good step towards protecting against child marriage, because physical threats are not employed as often against child victims of forced marriage. Pressure from the family and the community can have a profound impact on children, influencing them to agree to something they do not want.<sup>197</sup>

The Act creates a new civil injunction, called a Forced Marriage Protection Order (FMPO). These are used to prevent a person from forcing the victim into a marriage. They can be taken out against the direct perpetrator, but also against any persons who ‘are, or may become, involved in other respects,’<sup>198</sup> such as ‘aiding, abetting, counselling, procuring, encouraging or assisting another person to force, or to attempt to force, a person to enter into a marriage,’ or ‘conspiring to force, or to attempt to force, a person to enter into a marriage.’<sup>199</sup> The victim or a relevant third party may apply for such an order.<sup>200</sup> Failure to comply with an FMPO can lead to the respondent’s arrest.<sup>201</sup>

Such Protection Orders may be granted in respect of conduct both within and outside the territory of England and Wales.<sup>202</sup> An FMPO may be granted if there is a risk of the respondent taking the victim outside England and Wales to force them to marry elsewhere, where the age of marriage or other marriage requirements may be less stringent, or less stringently enforced. The granting of an FMPO may also be used to facilitate the repatriation of victims who have been taken overseas, if they have told people back home in the UK that they are at risk of, or have already been forced into, marriage.<sup>203</sup>

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<sup>193</sup> *ibid.* s63A(5).

<sup>194</sup> *ibid.* s63S.

<sup>195</sup> *ibid.* s63A(6).

<sup>196</sup> Home Office, ‘What is Forced Marriage?’ (n 8) 5.

<sup>197</sup> Home Office, *Forced Marriage – A Consultation: Summary of Responses* (Home Office 2012) 8.

<sup>198</sup> Forced Marriage (Civil Protection) Act 2007, s63B(2)(b).

<sup>199</sup> *ibid.* s63B(3)(a)-(b).

<sup>200</sup> *ibid.* s63C(2).

<sup>201</sup> *ibid.* s63H.

<sup>202</sup> *ibid.* s63B(2)(a).

<sup>203</sup> Aisha K Gill and Deborah Gould, ‘The role of family coercion, culture, expert witnesses and best practice in securing forced marriage convictions’ (2020) 4(1) *Journal of Gender-Based Violence* 89, 91.

The 2007 Act applies in England and Wales. Section 2 of the Act provides that Schedule 1 (containing identical provisions) applies to Northern Ireland.

### *Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011*

In 2011, a Scottish Act was passed dealing with the same issues as the 2007 Act. The terms of the Scottish statute are very similar to the 2007 Act. In its definition of ‘force,’ the 2011 Act includes ‘coerce by physical, verbal or psychological means, threatening conduct, harassment or other means,’ as well as ‘knowingly tak[ing] advantage of a person’s incapacity to consent to marriage or to understand the nature of the marriage.’<sup>204</sup> This is an expansion on the 2007 Act’s terms, suggesting that the drafters of the Scottish statute learned from the previous iteration of forced marriage legislation and tried to strengthen it.

Like the 2007 Act, the Scottish Act describes a person (“A”) as being ‘forced into marriage if another person (“B”) forces A enter into a marriage (whether with B or another person) without A’s free and full consent.’<sup>205</sup> The threat can be directed against A, B, or another person.<sup>206</sup>

The Scottish Act also introduces a system of Forced Marriage Protection Orders, under similar terms to those in the 2007 Act. It provides for protection both within and outside Scotland.<sup>207</sup> It expands on the potential terms of an FMPO, providing that such an order may require a person to, inter alia, ‘refrain from violent, threatening or intimidating conduct,’<sup>208</sup> ‘to refrain from taking the protected person from, or to, such place as the court may specify,’<sup>209</sup> (thus protecting them from being removed from the country to be forced into marriage elsewhere), or ‘to submit to the court such documents (including passports, birth certificates or other documents identifying the person and travel documents) as the court may specify’<sup>210</sup> (making it harder for the respondent to travel or to take the protected person to another place).

The main difference between the Acts is that the Scottish one provides that breaching an FMPO constitutes an offence. A person who has breached an FMPO is liable under the 2011 Act for up to two years in prison, a fine, or both.<sup>211</sup>

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<sup>204</sup> Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2001, s1(6).

<sup>205</sup> *ibid*, s1(4).

<sup>206</sup> *ibid*, s1(5).

<sup>207</sup> *ibid*, s2(2)(a).

<sup>208</sup> *ibid*, s2(3)(c).

<sup>209</sup> *ibid*, s2(3)(f).

<sup>210</sup> *ibid*, s2(3)(h).

<sup>211</sup> *ibid*, s9(4).

## *Anti-Social Behaviour, Crime and Policing Act 2014*

Following a consultation with practitioners, experts, NGOs and relevant communities in 2011,<sup>212</sup> the government decided that the protection against forced marriage could benefit from the criminalisation of a separate offence of forced marriage, rather than relying on other offences in order to prosecute the perpetrator of a forced marriage, such as false imprisonment, kidnapping, and violence.<sup>213</sup>

Section 120 of the Anti-Social Behaviour, Crime and Policing Act 2014 equalises the system in England and Wales to that in Scotland, whereby breaching an FMPO constitutes as offence. A person convicted of breaching an FMPO is liable to up to five years' imprisonment, a fine, or both.<sup>214</sup> This remains a civil offence, but this provision adds teeth to a previously unarmed offence.

The 2014 Act also introduced a new offence of forced marriage. This is a criminal offence, punishable by up to seven years' imprisonment.<sup>215</sup> This offence is committed where a person 'uses violence, threats or any other form of coercion for the purpose of causing another person to enter into a marriage,'<sup>216</sup> and 'believes, or ought reasonably to believe, that the conduct may cause the other person to enter into the marriage without free and full consent.'<sup>217</sup> This means that a person may not intentionally coerce another into entering a marriage. The Act also provides that it is an offence to trick someone into leaving the UK in order to carry out the same conduct in another place.<sup>218</sup>

'Marriage' is defined as 'any religious or civil ceremony of marriage (whether or not legally binding),'<sup>219</sup> allowing for protection against customary marriages, or marriages where one spouse was underage in the UK.

The Act provides that the offence may be prosecuted in three separate situations: where the conduct took place in England or Wales; when neither party (the defendant or the victim) are in England or Wales, but one or both are habitually resident in England or Wales (for example, where the victim has been taken abroad temporarily); or where neither party is present in the UK but at least one is a UK national.<sup>220</sup> This expands the statute's scope of protection, meaning that so long as there is a territorial, nationality or residence-based link to the UK, the perpetrator of a forced marriage may be prosecuted under domestic law.

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<sup>212</sup> Home Office, *Forced Marriage Consultation* (Home Office 2011); Home Office, *Summary of Responses* (n 197).

<sup>213</sup> Aisha K Gill, Pamela Cox, and Ruth Weir, 'Shaping Priority Services for UK Victims of Honour-Based Violence/Abuse, Forced Marriage, and Female Genital Mutilation' (2018) 57(4) *The Howard Journal of Crime and Justice* 576, 578.

<sup>214</sup> Anti-Social Behaviour, Crime and Policing Act 2014, s120.

<sup>215</sup> *ibid*, s121(9).

<sup>216</sup> *ibid*, s121(1)(a).

<sup>217</sup> *ibid*, s121(1)(b).

<sup>218</sup> *ibid*, s121(3).

<sup>219</sup> *ibid*, s121(4).

<sup>220</sup> *ibid*, s121(7).

An identical provision was also enacted in Scotland. Forced marriage is thus a criminal offence in England, Wales, and Scotland, under the Anti-Social Behaviour, Crime and Policing Act 2014.

A similar provision was enacted in Northern Ireland a year later, criminalising forced marriage there as well. The same definition of the offence and the same definition of marriage apply there. The scope of the offence is also replicated, providing protection for nationals and habitual residents of Northern Ireland.<sup>221</sup>

### *Summary of the Regime in each Jurisdiction*

#### England and Wales

In England and Wales, a child may marry at sixteen with parental permission, or at eighteen without it. Protection against forced marriage is achieved through civil FMPOs, established by the Forced Marriage (Civil Protection) Act 2007, which may be used to prevent conduct linked to forced marriage, as well as forcing someone to enter into marriage, and through the criminal offence of forced marriage, introduced in 2014 by the Anti-Social Behaviour, Crime and Policing Act. The breach of a FMPO is punishable by five years in prison.

#### Scotland

In Scotland, a child may marry at sixteen under any circumstances. Protection against forced marriage began in 2011, under the Forced Marriage etc (Protection and Jurisdiction) (Scotland) Act 2011, which introduced a FMPO system like that in England, though the breach of an FMPO is only punishable by two years in prison. The Anti-Social Behaviour, Crime and Policing Act 2014 also criminalised the offence of forced marriage in Scotland.

#### Northern Ireland

In Northern Ireland, a child may marry at sixteen with parental consent, and at eighteen without it. The Forced Marriage (Civil Protection) Act 2007 introduced the FMPO system here, while the crime of forced marriage was not introduced until 2015, under the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

Thus far, the international and domestic law relating to child marriage in the UK has been set out. The analysis now turns to the way in which this system works in practice, and whether the system works effectively.

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<sup>221</sup> Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, s16.

## Chapter 3: The System in Practice

This chapter will begin to address the primary research question of this thesis: to what extent does the Forced Marriage (Civil Protection) Act 2007 and other legislation criminalising forced marriage effectively protect against child marriage in the UK?

Firstly, the working definition of forced marriage, used by government authorities in assessing cases, will be examined. Here, the differences between forced and arranged marriages will be explored. Secondly, the way in which the system works in practice will be discussed. Finally, the problems associated with this regime will be considered. A number of the secondary research questions will also be raised.

### *The British Definition of Forced Marriage in Practice*

#### Forced vs Arranged

In regards to how well the legislation on forced marriage in the UK protects against child marriage, it must be noted that, since it only deals with *forced* marriage, with no separate provisions on child marriage, there already exists a gap in the protection of children. It does not ward against marriages where the child consents or initiates the marriage. However, it is not only forced child marriages which are prohibited by international law: all marriages concluded where one party is under eighteen should be unlawful.<sup>222</sup>

The British Home Office defines a forced marriage as one ‘in which one or both spouses do not... consent to the marriage but are coerced into it.’<sup>223</sup> It notes that this can involve ‘physical, psychological, financial, sexual and emotional pressure.’<sup>224</sup> In an arranged marriage, however, ‘the families take a leading role in choosing the marriage partner, but both individuals are free to choose whether they want to enter into the marriage.’<sup>225</sup> The Home Office has said that there is ‘a clear distinction between a forced marriage and an arranged marriage,’<sup>226</sup> but this is not the case. There can be significant blurring or ‘slippage’ between arranged and forced marriages. If a marriage has been arranged, and then one party subsequently does not agree to the match, they may be forced into it anyway.<sup>227</sup> There are also cases where no force has actually been applied, thus making it difficult to prove that a forced marriage has been concluded, even if the victim did not consent freely.<sup>228</sup>

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<sup>222</sup> CRC (n 2) art 1; CEDAW (n 31) art 16.

<sup>223</sup> Home Office, *Forced Marriage Consultation* (n 212) 5.

<sup>224</sup> *ibid.*

<sup>225</sup> Home Office, ‘What is Forced Marriage?’ (n 8) 5.

<sup>226</sup> Home Office, *Preventing and tackling forced marriage: a consultation* (Home Office 2018) 7.

<sup>227</sup> Chantler, Gangoli, and Hester (n 10) 597.

<sup>228</sup> Home Office, *Summary of Responses* (n 197) 9.

## *Family Pressure*

This is closely linked to the socio-cultural milieu in which many arranged marriages are concluded. Many arranged marriages are concluded to reinforce kinship ties.<sup>229</sup> In a small community, parents' standing may be affected where their child does not obey them in their choice of partner. In such circumstances, it becomes harder to decide where the line between forced and arranged marriage lies. A child may not feel able to refuse a match, or may feel obligated to comply with their parents' expectations, in order to uphold family honour or simply in the name of family harmony.<sup>230</sup> If the pressure is subtle and begins at a young age, does this count as force? Does 'reluctant' or 'resentful' consent count?<sup>231</sup>

Consent is largely judged through a white male lens.<sup>232</sup> Social norms affecting women, especially from minority communities, may affect their ability to outright refuse a match. History and cultural expectation may tell a woman that refusing would bring 'the full force of physical or emotional threats' down on her, and that she would end up consenting anyway.<sup>233</sup> She may see how siblings or friends have been treated, and agree in order to ward off such threats being directed at her.

The line between what sorts of pressure to accept a match are acceptable and those that are not is unclear. In one 1994 case (well before the forced marriage legislation was passed), Lord Prosser noted that 'parents, and indeed others, are well entitled to exert their influence, and indeed to apply pressure, upon a person who is refusing to marry, with a view to producing a change of mind.'<sup>234</sup> He also noted the role of culture and tradition in the evaluation of such pressure, including that of 'authority and deference between parent and child,' saying that 'Anyone ignorant of these traditions would perhaps be inclined to make an assumption that arranged marriages involve an inherently "forceful" imposition of the parents' will, overbearing the will of the child.'<sup>235</sup> The way in which consent must be evaluated, therefore, must have regard to the milieu in which it was given.

The family itself may pose more pressure to the girl. The patriarchal social system of communities that practice arranged marriages mean that women and girls may not have a voice in many decisions, while their father's words may be seen as 'holy' or 'sacred,' meaning that girls must do as he says, without argument.<sup>236</sup> Where a girl tries to refuse, she may be met with violence and abuse, as in the case of a

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<sup>229</sup> Bokhari and Kelly (n 39) 151.

<sup>230</sup> Carolina Villacampa, 'Forced Marriage as a Lived Experience: Victims' Voices' (2020) 26(3) *International Review of Victimology* 344, 354.

<sup>231</sup> Sundari Anitha and Aisha Gill, 'Coercion, Consent and the Forced Marriage Debate in the UK' in Robert Leckey (ed), *Marital Rights: The Library of Essays on Family Rights* (Routledge 2017) 140.

<sup>232</sup> *ibid*, 139.

<sup>233</sup> *ibid*, 140.

<sup>234</sup> *Mahmud v Mahmud* [1994] SLT 599 (Court of Session, Scotland) 601.

<sup>235</sup> *ibid*.

<sup>236</sup> Hemmings and Khalifa (n 125) 37-8.

father who threatened to ‘slit [his daughter’s] throat if she didn’t comply.’<sup>237</sup> The outright orders of the father may be supported by more subtle methods employed by the mother, which tend to be more emotionally coercive. Mothers are argued to be a nation’s ‘cultural reproducers’, thus holding an important role in transmitting ‘appropriate’ cultural values.<sup>238</sup> Mothers pressure daughters into agreeing using a variety of methods, from threatening suicide,<sup>239</sup> to guilting them into giving in. The rest of the family – siblings, aunts, uncles, cousins, and other extended family – may all play a role in exerting pressure,<sup>240</sup> both before and after the marriage, in order to make her stay.<sup>241</sup>

Because of the number of arranged marriages that take place within the extended family (often cousins, but also more distant relations, but often within the clan or *biraderi*)<sup>242</sup> there is another risk if a child refuses a match. Cousin marriage may place the mother in a difficult position, whereby to permit their child to refuse a match would mean rejecting their own family.<sup>243</sup> This could exacerbate the pressure put on the child to comply.

Removing oneself from the family situation is also generally not an option. South Asian teens and young adults rarely leave the family home prior to marriage.<sup>244</sup> Doing so is a last resort, and often comes with the side-effect of losing the support of the community they were raised in. When a woman tries to leave a forced marriage, social ostracization and the loss of relationships may be seen as too high a price for freedom from the marriage.<sup>245</sup> Asking whether there was a ‘reasonable alternative’ to consenting to marriage (such as leaving home) means that the social pressures surrounding women facing forced marriage are ignored.<sup>246</sup> Comparing an individualised Western view to the community-centred reality of a woman facing forced marriage disregards her situation and does not do justice to the complexities of her circumstances.

### *Family Honour*

Intertwined with this is the idea of family honour. The concepts of *izzat* and *sharam* (honour and shame) are based on the idea that ‘the bodies and actions of women represent community or individual honour.’<sup>247</sup> The honour of the family, and by extension the community as a whole, depends on girls and

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<sup>237</sup> Gill, Cox, and Weir (n 213) 578-9.

<sup>238</sup> Khatidja Chantler and Melanie McCarry, ‘Forced Marriage, Coercive Control, and Conducive Contexts: The Experiences of Women in Scotland’ (2020) 26(1) *Violence Against Women* 89, 95.

<sup>239</sup> *Sohrab v Khan* [2002] SCLR 663 (Court of Session, Scotland) [2].

<sup>240</sup> Chantler and McCarry (n 238) 101.

<sup>241</sup> *ibid*, 100.

<sup>242</sup> A name for the clans/families of the Pakistani community, both in the UK and in Pakistan.

<sup>243</sup> Chantler and McCarry (n 238) 96.

<sup>244</sup> Gill and Gould (n 203) 100.

<sup>245</sup> Stefano Bonino, ‘Policing Forced Marriages Among Pakistanis in the United Kingdom’ in Margaret Malloch and Paul Rigby (eds), *Human Trafficking: The Complexities of Exploitation* (Edinburgh University Press 2016) 165.

<sup>246</sup> Anitha and Gill (n 231) 143.

<sup>247</sup> Geetangali Gangoli, Melanie McCarry, and Amina Razak, ‘Child Marriage or Forced Marriage? South Asian Communities in North East England’ (2009) 23 *Children & Society* 418, 424.

women being subject to certain rules and expectations, such as sexual chastity prior to marriage,<sup>248</sup> or staying in a marriage in order to avoid divorce. These norms help pressure young girls into agreeing to marriages, either by deference to their parents, or in order to avoid tarnishing the family name. The risk of falling victim to ‘honour-based’ abuse is also present, whereby a family may resort to violence to control the behaviour of a family member to ‘protect perceived cultural and religious beliefs and/or honour.’<sup>249</sup> The case of Shafiea Ahmed demonstrates that girls who do not comply may even be killed by their families,<sup>250</sup> to ‘get rid of what is damaging the honour.’<sup>251</sup>

These elements blend together in a complex formation that must be understood, or at least recognised, when assessing the line between forced and arranged marriages. Where a marriage may be arranged in the eyes of the family or community, or even that of the bride, given the operation of these forces, it may be difficult to delineate which elements may push the marriage over the line into being forced.

Even where the tradition of arranged marriages is not part of a community or cultural mindset, the family name may be a driving factor behind forced marriages. Where a young girl becomes pregnant, either through consensual sex or through rape, the so-called ‘shotgun wedding’ remains a cause of child marriage. This is where family members pressure the couple to wed in order to avoid the stigma attached to premarital pregnancy.<sup>252</sup> This occurs throughout the West, but is especially associated in pop culture with the USA.<sup>253</sup> It becomes even more problematic where a statutory rape charge (where an adult has sex with a minor under a certain age, or where two people have a specified age difference and at least one of them is a minor) can be dropped if the couple are married. Heather, fourteen, became pregnant when her 24-year-old boyfriend raped her while she was drunk. Her father thought that marriage was what the Bible advised in that situation, so they drove to Missouri (seventeen hours away) to marry the couple in a state with less restrictive marriage requirements than their home state of Idaho.<sup>254</sup> Such situations remain one of the main reasons why Western, predominantly Christian, States continue to allow child marriage: if a girl gets pregnant, she should be able to get married in order not to have the child out of wedlock.<sup>255</sup> This comes from the view that premarital sex (and pregnancy) is something shameful or wrong. In the US, these views are linked to people who subscribe to a particular form of social conservatism, often with a level of religiosity ‘that both emphasises marriage and shuns childbirth

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<sup>248</sup> *ibid.*

<sup>249</sup> Crown Prosecution Service, ‘Violence Against Women and Girls Report 2018-19’ (2019) 18-19.

<sup>250</sup> Gill and Gould (n 203) 99.

<sup>251</sup> Adrian Goldberg, ‘Tale of gay woman forced to marry to protect “honour”’ (24 October 2010) BBC News UK <[www.bbc.com/news/uk-11613992](http://www.bbc.com/news/uk-11613992)> accessed 13/04/2021.

<sup>252</sup> Koski and Heymann (n 15) 64.

<sup>253</sup> Alanen (n 123) 7.

<sup>254</sup> Anjali Tsui, ‘Married Young: The Fight Over Child Marriage in America’ (14 September 2017) PBS Frontline <[www.pbs.org/wgbh/frontline/article/married-young-the-fight-over-child-marriage-in-america/](http://www.pbs.org/wgbh/frontline/article/married-young-the-fight-over-child-marriage-in-america/)> accessed 31/03/2021.

<sup>255</sup> Allie Morris, ‘NH House kills bill that would raise minimum marriage age to 18’ (3 September 2017) Concord Monitor <[www.concordmonitor.com/bill-on-whether-minors-can-marry-8581515](http://www.concordmonitor.com/bill-on-whether-minors-can-marry-8581515)> accessed 31/03/2021.

out of wedlock.<sup>256</sup> This view is also present in the UK, though not to such an obvious extent.<sup>257</sup> It is possible that such cases also happen in the UK, but there is little research on this, given the focus on South Asian communities in the area of child marriage in British academia.

### *The Vulnerabilities of Children*

These factors are almost more important in cases of child marriage. Although young adults over eighteen often still live at home, within the same family and community structures, they at least have the option of going to university or getting a job. In fact, education is frequently used as a delaying tactic to avoid getting married young.<sup>258</sup> Children do not have this freedom. They may be surrounded by only one view about what is appropriate for them, and thus may not be aware that they were the victim of a crime.<sup>259</sup>

Prior to the age of eighteen, children may only marry with parental consent (in England, Wales and Northern Ireland). Between sixteen and eighteen, a child's consent is seen as insufficient to ground full consent to a marriage. Instead, a parent, who is a 'full' adult, may consent for them, and with such agreement, the child's consent is assumed to be acceptable. However, in many cases around the world, a parent's consent is seen as more important than the child's. Ignoring the child's tears,<sup>260</sup> not asking questions about the child's age, or even not asking whether the child agreed at all, instead taking the parent's consent as agreement from them both, are all circumstances that could constitute forced marriage, as the child's opinion is all but completely ignored.<sup>261</sup>

Parental consent allowing children under eighteen to get married should therefore be removed. It can easily be taken advantage of, and begs the question, if a child cannot agree to get married by themselves, how can they be mature enough to take on the responsibilities of marriage? Parental consent requires parents to act in their child's best interests. But what they perceive to be in their best interests, in the name of honour, security, or pride, may not actually be in the best interests of the child, or may prioritise the parent's views over the child's. If there must be an exception allowing mature sixteen- or seventeen-year-olds to marry, this should be replaced by an interview with a judge trained in family or criminal law, preferably with a background in recognising coercion or domestic abuse,<sup>262</sup> in order to establish whether the child's consent is genuine.

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<sup>256</sup> Syrett (n 35) 264-5.

<sup>257</sup> Imogen Ball, 'Political and Religious Identities of British Evangelicals' (15 August 2017) Theos <[www.theosthinktank.co.uk/comment/2017/08/15/political-and-religious-identities-of-british-evangelicals](http://www.theosthinktank.co.uk/comment/2017/08/15/political-and-religious-identities-of-british-evangelicals)> accessed 16/06/2021.

<sup>258</sup> Chantler and McCarry (n 238) 103.

<sup>259</sup> Thomas Courtenay, 'Conflict of Cultures? A Case Study of Forced Marriage Management Strategies in the United Kingdom' (PhD thesis, University of Southampton 2019) 201.

<sup>260</sup> "Don't cry. This is supposed to be the happiest day of your life." Kristof (n 109).

<sup>261</sup> Kristof (n 109); *Sohrab v Khan* (n 239) [10].

<sup>262</sup> Johnson-Dahl (n 115) 1071.

It is therefore difficult to delineate between forced and arranged marriages, given that consent and coercion are not one binary. Instead, they lie at opposite ends of a continuum, between which shades of expectation, persuasion, pressure, threat and force blend into each other.<sup>263</sup> Better protection at the national level is needed to ensure that children facing any kind of marriage – forced, arranged, or otherwise – are protected.

## *The British System in Practice*

### The FMU

The British approach to forced marriage is generally coordinated by the Forced Marriage Unit (FMU). This is a joint Home Office and Foreign, Commonwealth and Development Office unit which works to support potential and actual victims of forced marriage, as well as people in contact with victims who need advice on how to support them. This applies to people within the UK and British nationals or residents of the UK who are not currently present on British territory.

This does not mean that anyone who has any link to the UK can be protected by the FMU. There must be a sufficient link to permit the FMU to act. The Family Division for instance held that three children who were British citizens who had lived in Somalia for ten years could not be made the subject of a FMPO merely because they were British citizens living in Somalia and thus potentially at risk of a forced marriage without some more concrete reason.<sup>264</sup>

In 2019, the FMU gave advice in 72 cases which took place entirely inside the UK.<sup>265</sup> The rest involved some kind of international element, either where the victim was at risk of being, or already had been, taken abroad. Of the 1,355 cases reported to the FMU in 2019,<sup>266</sup> 559 were related in some way to Pakistan, and another 144 to Bangladesh.<sup>267</sup> This suggests that the majority of forced marriage cases in the UK are related to South Asian communities in Britain. However, not all forced marriages relate to South Asian communities, and those communities do not always practice forced marriage. 22 cases related to Romania, 31 to Somalia, and 72 were entirely domestic.<sup>268</sup> Religion is not a recorded characteristic,<sup>269</sup> so this may warrant more research into who is affected by forced marriage.

When victims, or people worried about them, get in contact before they are taken out of the country, the FMU can advise them on how to prevent the marriage taking place, or what to do if they have run

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<sup>263</sup> Anitha and Gill (n 231); Sundari Anitha and Aisha K Gill, 'A Moral Panic? The Problematisation of Forced Marriage in British Newspapers' (2015) 21(9) *Violence Against Women* 1123, 1124.

<sup>264</sup> *In re KBH and Others (Forced Marriage Protection Order: Non-Resident British Citizen)* [2018] EWCH 2611, [7]-[8].

<sup>265</sup> Forced Marriage Unit Statistics 2019 (25 June 2020) Home Office and Foreign and Commonwealth Office, (FMU Statistics 2019) 4.

<sup>266</sup> *ibid*, 3.

<sup>267</sup> *ibid*.

<sup>268</sup> *ibid*.

<sup>269</sup> *ibid*, 5.

away. It can also put them in contact with local networks that can support them.<sup>270</sup> Social workers and police officers may be invaluable resources, if the victim can tell them what is happening.

When the victim has already left the country, it becomes more complicated. If a child has been reported missing, or where a friend or family member contacts the FMU to notify them that the victim has been taken out of the country, the FMU ‘will try to trace their location and repatriate them to the UK.’<sup>271</sup> This may be difficult where there is a lack of information or if the FMU cannot coordinate with the destination country.<sup>272</sup> The FMU therefore emphasises the importance of notifying them early, if possible, in order to ensure they can work effectively. In order to get permission to get them repatriated to the UK, the FMU can take out an FMPO for the victim, using it to facilitate bringing the victim home.<sup>273</sup>

FMPOs can be used to repatriate children, but there may be difficulties in actually carrying out the order. In one case, an FMPO was taken out to protect three children taken to a country in North Africa. It ordered the children to be returned to the UK within 24 hours of service of the orders, but the father refused to consent to the documents authorising their return.<sup>274</sup> He was charged with breaching the FMPO by not providing written agreement and making travel arrangements to return the children to the UK. It took almost two months for him to agree to bring all the children home.<sup>275</sup> Parents’ unwillingness, or more generally difficulties in serving notice of the orders, may be obstacles to the effective use of FMPOs to repatriate children at risk of forced marriage outside the UK.

In 2017, the FMU managed to rescue 27 victims taken abroad to get married. It was found that the Foreign Office was charging many of them with the costs of their repatriation.<sup>276</sup> Given the victims’ vulnerability, as well as the fact that they are not to blame for being stuck abroad, this is not the right way to approach such cases. Cavendish argues that the families who arranged to have the victims taken abroad should have to pay, rather than the girls themselves.<sup>277</sup> This would be an improvement to the girls paying themselves, but both create a further hindrance in identifying cases and harming the child, who may be held responsible. It is therefore suggested that the Foreign Office should pay for the repatriation of victims, but charges be instituted against the families of victims if possible.

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<sup>270</sup> Foreign and Commonwealth Office, ‘Forced Marriage: A Survivor’s Handbook’ (2020) 9.

<sup>271</sup> Bokhari and Kelly (n 39) 152-3.

<sup>272</sup> *ibid.*

<sup>273</sup> Gill and Gould (n 203) 91.

<sup>274</sup> *Brighton and Hove City Council, The Chief Constable of Sussex v MQ, FQ, CQ, DQ, EQ (By their Children’s Guardian Lesley Beveridge)* [2018] EWHC 3979 (Fam), [41] and [45].

<sup>275</sup> *ibid.*, [55] and [61].

<sup>276</sup> Camilla Cavendish, ‘Forced Marriage is a clear case of the West ignoring women’s rights’ (4 January 2019) *Financial Times*.

<sup>277</sup> *ibid.*

## FMU Statistics

The FMU reported a total of 1,355 cases in which they gave advice or support in 2019. This is roughly the average for the last five years (2015-2019), with a high of 1,507 (2018) and a low of 1,197 (2017).<sup>278</sup> Due to the hidden nature of the crime, the FMU recognises that these figures do not accurately represent the full scale of the abuse, as these are only the cases reported to the Unit.<sup>279</sup> A 2009 study estimated that between 5,000 and 8,000 cases of forced marriage occurred in the UK in the previous year.<sup>280</sup> Less than a fifth of reported cases were reported by the victims themselves (18%). 64% were reported by professionals (teachers, social workers, lawyers, and health workers) or other third parties. The rest were reported by friends, family members, partners or anonymous callers.<sup>281</sup> The lack of self-referrals suggests that victims still fear reprisals from their family if they report what is happening to them.<sup>282</sup> This may indicate that more needs to be done to support people at risk of forced marriage, as well as spreading awareness, both to professionals (so they can be on the lookout for cases) and to schools and communities (so victims can recognise the situations they find themselves in). Many victims are unaware that what they are experiencing constitutes a forced marriage,<sup>283</sup> due to media or other depictions that may not match with their own experiences.<sup>284</sup> If there is greater awareness of the variety of forms forced marriage takes, there may be more cases reported, and thus a more accurate reflection of the actual situation in the UK.

Of the cases that were reported in 2019, 80% (1,080) involved female victims. This demonstrates that women are much more likely to be victims of forced marriage than men. However, the 19% (262) cases involving male victims shows that the number of male victims is not negligible.<sup>285</sup>

29 cases involving LGBTQ+ individuals were identified in 2019,<sup>286</sup> though this only covers individuals who chose to disclose this information. The FMU does not generally ask for this information, so the actual number of LGBTQ+ individuals affected by forced marriage may be higher. Here, the number of men involved in cases appears to be higher,<sup>287</sup> suggesting that parents may intervene and force their children to marry where their sexuality does not conform to their community's heteronormative

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<sup>278</sup> FMU Statistics 2019 (n 265) 7.

<sup>279</sup> *ibid.*, 4.

<sup>280</sup> Home Office, *Preventing and tackling forced marriage* (n 226) 7.

<sup>281</sup> *ibid.*

<sup>282</sup> *ibid.*

<sup>283</sup> Bonino (n 245) 167-8; Courtenay (n 259) 201.

<sup>284</sup> Chantler and McCarty (n 238) 94.

<sup>285</sup> The remaining 1% of victims' genders is unknown. FMU Statistics 2019 (n 265) 9.

<sup>286</sup> *ibid.*, 13.

<sup>287</sup> Goldberg (n 251).

expectations, or as a ‘cure’ for their ‘deviant’ sexual behaviour.<sup>288</sup> It must also be noted that this is not restricted to people who follow a religion which does not permit homosexuality.<sup>289</sup>

The more relevant factor here is the age of the victim. In 2019, the FMU reported that 15% of reported victims were aged fifteen and under, and 12% were sixteen or seventeen.<sup>290</sup> Over a quarter of cases (363) thus involved a real or potential child marriage. Some of the cases involving older victims may have referred to a marriage concluded before they turned eighteen, but which was only reported later. Forced child marriage is thus a demonstrable problem in the UK, especially when considering the number of cases estimated to go unreported. Though the work of the FMU is invaluable in monitoring this situation, more must be done to unearth these cases and to prevent such marriages from taking place. Although marriages have been nullified even before the entry into force of the Forced Marriage (Civil Protection) Act 2007 on the grounds of vitiated consent through pressure or other means,<sup>291</sup> including of children,<sup>292</sup> there have been other cases where the pressure used to make the victim consent, though reluctantly, was not enough to annul the marriage.<sup>293</sup> These victims therefore would need to go through divorce proceedings, which may have a cultural or religious stigma attached to it, complicating their position and prolonging their suffering. Some may not even be able to get divorced, as the bride price (if relevant to their tradition) must be repaid as a condition of divorce, which may lead their families to pressure them into staying in the marriage, even if it is abusive.<sup>294</sup> More needs to be done to ensure that such marriages do not take place at all, to prevent victims (especially children) from enduring the conditions of a forced marriage.

It is perhaps not surprising, given the weighting of the population in the four nations,<sup>295</sup> that the overwhelming majority of cases take place in England. In 2019, 3% of forced marriages came from Wales, 2% from Scotland, and less than 1% from Northern Ireland.<sup>296</sup> Almost 80% came from England

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<sup>288</sup> Chantler, Gangoli, and Hester (n 10) 603.

<sup>289</sup> *ibid*, 603-4.

<sup>290</sup> FMU Statistics 2019 (n 265) 9.

<sup>291</sup> *Mahmood v Mahmood* [1993] SLT 589 (Court of Session, Scotland); *Hirani v Hirani* [1983] 1 WLUK 855.

<sup>292</sup> *Sohrab v Khan* (n 239).

<sup>293</sup> *Singh v Singh* [1971] P 226.

<sup>294</sup> ‘A Childhood Lost: A Report on Child Marriage in the UK and the Developing World from the UK All-Party Parliamentary Group on Population, Development and Reproductive Health’ (2012) 32.

<sup>295</sup> England’s population in 2019 was around 56.3 million people, compared to 5.5 million in Scotland, 3.2 million in Wales, and 1.9 million in Northern Ireland. Office for National Statistics, ‘Overview of the UK population’ (14 January 2021)

[www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/january2021](https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/articles/overviewoftheukpopulation/january2021) accessed 11/06/2021.

<sup>296</sup> FMU Statistics 2019 (n 265) 10.

(the origins of the other 16% were unknown).<sup>297</sup> Most cases were traced back to London, the North West, and the West Midlands,<sup>298</sup> which corresponds to some of England's most populous cities.<sup>299</sup>

In past years, the FMU has reported a 'spike' in cases around the time of school holidays (although the risk continues throughout the year).<sup>300</sup> This suggests that when a close eye is not being kept on children's presence at school in person, it becomes easier for child marriages to be contracted. Due to the coronavirus pandemic, school has largely been online for the last fifteen months. It is possible that there has therefore been an increase in the number of forced marriages over the pandemic, as the protective effect of school is less present.<sup>301</sup>

The FMU thus does important work in tackling forced marriage in the UK, including of children. But is their work – and the system of FMPOs and the offence of forced marriage – truly effective at preventing child marriages in the UK?

## *Problems of the British System*

### *Numbers*

#### *Reporting*

The first issue with the effectiveness of the regime tackling forced marriage in the UK is the hidden nature of the crime. This immediately makes the work of the FMU significantly harder, but is to be expected, given how most of these crimes are committed: a family member is pressured by the rest of their family to consent to something they do not want. The obstacle of having to report one's own family is one that many victims do not wish to overcome, especially if their families then face imprisonment.<sup>302</sup> FMPOs themselves do not entail criminal liability for family members against whom they are taken out. Even the breach of one is not a criminal offence: it is a civil offence of contempt of court.<sup>303</sup> When the criminalisation of forced marriage was being debated, a number of NGOs and community groups raised the risk that victims would report even fewer cases, if their family members might end up being imprisoned.<sup>304</sup> It appears this risk was unfounded, as numbers of reported cases actually increased when the government announced it would criminalise forced marriage.<sup>305</sup>

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<sup>297</sup> *ibid.*

<sup>298</sup> *ibid.*

<sup>299</sup> Such as London, Birmingham, Liverpool, and Manchester. *The Geographer*, '100 Largest Cities and Towns in the UK by Population' (2019) <[www.thegeographer.com/uk-cities-population-100/](http://www.thegeographer.com/uk-cities-population-100/)> accessed 11/06/2021.

<sup>300</sup> FMU Statistics 2019 (n 265) 7-8.

<sup>301</sup> UNICEF, 'Covid-19: A threat to progress against child marriage' (n 49).

<sup>302</sup> Chantler and McCarry (n 238) 101.

<sup>303</sup> Poonam Taneja, 'Forced marriage: Girl aged five among 400 minors helped' (30 March 2012) BBC News <[www.bbc.com/news/uk-17534262](http://www.bbc.com/news/uk-17534262)>.

<sup>304</sup> Home Office, *Summary of Responses* (n 197) 5.

<sup>305</sup> Bonino (n 245) 167.

However, the continued underreporting is still an issue. Many more cases than are reported are estimated to be taking place,<sup>306</sup> but the obstacles victims face are difficult to overcome. Aside from not wanting to get their families in trouble, victims may not identify their own experiences as forced marriage, or they may find it difficult to speak out.<sup>307</sup> The importance of shame and family honour may also prevent a victim from talking about their experiences.<sup>308</sup> Families may prevent them from getting help,<sup>309</sup> or may manipulate social workers, health professionals, or police officers who come to investigate, thus further isolating the victim and removing their ability to get help.<sup>310</sup>

There is the added problem that many people in such positions do not trust the police. Tensions between minorities and the police may exacerbate existing unwillingness to report abuse,<sup>311</sup> even where making such a report is possible. NGOs receive many more calls than the police and the FMU about forced marriage,<sup>312</sup> but do not necessarily have the resources to help the callers. This means that fewer cases are being fully addressed than are being reported.

### *Prosecutions*

The other big issue is the lack of prosecutions for forced marriage since its criminalisation. By early 2019, there had only been four convictions for forced marriage.<sup>313</sup> The first conviction involved a man raping a Muslim woman systematically, then ensuring her silence by threatening to release a video of her showering. He later forced her to marry him by threatening to kill her parents.<sup>314</sup> He played on her faith and fear of shame from her community to get her to submit, and was sentenced to sixteen years in jail for four counts of rape, forced marriage, bigamy and voyeurism.<sup>315</sup>

In another case, a thirteen-year-old girl was taken to Pakistan in 2012. She was married in a non-civil ceremony, her husband then raping her.<sup>316</sup> She returned to the UK shortly thereafter. In 2016, her mother induced her to return to Pakistan, promising her an iPhone for her eighteenth birthday if she went. While they were there, in the days after she turned eighteen, her mother pressured her, psychologically and emotionally, into entering a civil marriage with the same man, now 34, threatening to destroy her passport and disown her in the process.<sup>317</sup> As this would leave her stuck in a foreign country, alone, and

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<sup>306</sup> Home Office, *Preventing and tackling forced marriage* (n 226) 7.

<sup>307</sup> Chantler, Gangoli, and Hester (n 10) 592.

<sup>308</sup> Anitha and Gill (n 231) 144-5.

<sup>309</sup> Home Office, *Forced Marriage Consultation* (n 212) 5.

<sup>310</sup> Chantler and McCarty (n 238) 100.

<sup>311</sup> Bonino (n 245) 171.

<sup>312</sup> Hannah Summers, 'Thousands enslaved in forced marriages across UK, investigation finds' (28 May 2018) The Guardian <[www.theguardian.com/global-development/2018/may/28/thousands-enslaved-in-forced-marriages-across-uk-investigation-finds](http://www.theguardian.com/global-development/2018/may/28/thousands-enslaved-in-forced-marriages-across-uk-investigation-finds)> accessed 14/04/2021.

<sup>313</sup> Home Office, *Preventing and tackling forced marriage* (n 226) 7.

<sup>314</sup> Liz Fitzpatrick, 'First forced marriage conviction in the UK' (29 June 2015) IBB Law <[www.ibblaw.co.uk/insights/blog/first-forced-marriage-conviction-uk](http://www.ibblaw.co.uk/insights/blog/first-forced-marriage-conviction-uk)> accessed 12/06/2021.

<sup>315</sup> *ibid.*

<sup>316</sup> Gill and Gould (n 203) 92.

<sup>317</sup> Summers (n 312).

with no one to turn to, the victim eventually, but unwillingly, participated in the marriage ceremony.<sup>318</sup> She managed to use her mother's phone in secret to tell her sister what had happened. Her sister told their father, who alerted the police. When the mother returned to the UK, she was summonsed to the High Court, as FMO proceedings had been initiated. She lied to the court, denying that she had forced her daughter to marry. An FMO was made ordering the mother to return the victim to the UK. She did, and in 2018 the mother was found guilty of forced marriage, and was sentenced to four and a half years imprisonment.<sup>319</sup>

A third case, also from 2018, involved a nineteen-year-old girl being taken out of school to Bangladesh to visit family. There, her parents told her she was to marry her cousin. When she refused, her father threatened to 'chop her up' if she disrespected him.<sup>320</sup> Her sister contacted the British High Commission in Bangladesh, and working with both the FMU and the Bangladeshi police, managed to get the girl home to the UK.<sup>321</sup> Her parents were found guilty of forced marriage and were sentenced to three-and-a-half and four-and-a-half years in jail.

These are some of the very few cases that have been successfully prosecuted on the basis of forced marriage, rather than other criminal offences, such as rape or kidnap. It is not only the fact that very few cases have been successfully prosecuted that is an issue; rather, it is the very small number of cases that are prosecuted at all. Compared to the number of cases estimated to be taking place, or even those actually reported, the number of prosecutions is miniscule. There are reasons for this: victims do not want to press charges against their family, or are reluctant to testify against family members if the case comes to court,<sup>322</sup> out of either love or fear,<sup>323</sup> especially where a conviction could bring a long prison sentence for a parent, which most victims do not want.<sup>324</sup> Where a victim does not want to press charges, the Crown Prosecution Service (CPS) may bring a case without the victim's consent or involvement, but only where they have sufficient evidence as to ground a 'realistic prospect of conviction.' However, this will often depend on the victim's testimony. Without the victim's support, most prosecutions are likely to fail due to a lack of evidence.<sup>325</sup>

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<sup>318</sup> Gill and Gould (n 203) 93.

<sup>319</sup> Summers (n 312).

<sup>320</sup> Gill, Cox, and Weir (n 213) 578-9.

<sup>321</sup> *ibid.*

<sup>322</sup> Quentin Hunt, 'Forced Marriage and the Law' Quentin Hunt Barrister

[www.bestcriminaldefencebarrister.co.uk/criminal-defence-barrister-blog/2020/forced-marriage-and-the-law](http://www.bestcriminaldefencebarrister.co.uk/criminal-defence-barrister-blog/2020/forced-marriage-and-the-law) accessed 24/04/2021.

<sup>323</sup> Chantler and McCarty (n 238) 101; Cavendish (n 276).

<sup>324</sup> Tehmina Kazi, 'Let's criminalise forced marriage: secular and Islamic perspectives' (20 January 2014) OpenDemocracy [www.opendemocracy.net/en/5050/lets-criminalise-forced-marriage-secular-and-islamic-perspectives/](http://www.opendemocracy.net/en/5050/lets-criminalise-forced-marriage-secular-and-islamic-perspectives/).

<sup>325</sup> Hunt (n 322).

Coercion is also difficult to prove. Given that the onus of responsibility is on the victim to prove coercion, and that emotional pressure can be difficult to demonstrate,<sup>326</sup> it is possible that fewer cases are reaching the trial stage because of doubts that coercion can be proven. However, a number of cases from before the introduction of forced marriage as a separate offence showed that courts recognised different forms of emotional pressure,<sup>327</sup> so this may not prove to be a major reason for a lack of prosecutions. Moreover, the three cases outlined above covered physical, emotional, and psychological pressure, showing that all types of pressure, if well presented in court, can be proved.

### Differences in effectiveness between jurisdictions

There is also the question of whether there is any perceptible difference in effectiveness between jurisdictions. One measure of this could be the number of FMPOs granted in each jurisdiction. In England and Wales, for example, there were 239 applications for FMPOs and 294 orders in 2020.<sup>328</sup> By contrast, in Scotland, 16 FMPOs have been granted in total between 2011 and 2020.<sup>329</sup> There are no available statistics for FMPOs instituted in Northern Ireland, which combined with the very few cases reported to the FMU suggests that very few or even no FMPOs have been granted since they were introduced in Northern Ireland in 2007.

This may suggest that the system in England and Wales is more effective than in Scotland and Northern Ireland. However, the number of reported cases in the latter jurisdictions must also be noted, in order to have a proportionate comparison. Of the 1,355 cases reported to the FMU in 2019, 22 came from Scotland, and less than five from Northern Ireland.<sup>330</sup> Either forced marriage is not as big a problem in those jurisdictions as in England, or fewer people are reporting in those areas, and therefore are also less likely to apply for an FMPO. The former seems more likely. Since 95% of reported cases in 2019 had an overseas element,<sup>331</sup> it would follow that areas with larger immigrant populations – such as London – would have higher rates of reported forced marriage. 22% of cases in 2019 came from London alone.<sup>332</sup> Areas with both more people and more people with links to other countries would logically have more cases of forced marriage, suggesting that Scotland and Northern Ireland, with their smaller populations, would have fewer cases of forced marriage. However, three of the main forced marriage cases before the current system was implemented came from Scotland,<sup>333</sup> suggesting that while there

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<sup>326</sup> Chantler and McCarry (n 238) 102.

<sup>327</sup> Anitha and Gill (n 231) 138.

<sup>328</sup> Ministry of Justice, 'Family Court Statistics Quarterly: October to December 2020' (25 March 2021) <[www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2020/family-court-statistics-quarterly-october-to-december-2020#forced-marriage-protection-orders-and-female-genital-mutilation-protection-orders](http://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2020/family-court-statistics-quarterly-october-to-december-2020#forced-marriage-protection-orders-and-female-genital-mutilation-protection-orders)> accessed 15/06/2021.

<sup>329</sup> Chantler and McCarry (n 238) 90-1.

<sup>330</sup> FMU Statistics 2019 (n 265) 10.

<sup>331</sup> *ibid*, 4.

<sup>332</sup> *ibid*, 10.

<sup>333</sup> *Mahmood v Mahmood* (n 291); *Mahmud v Mahmud* (n 234); *Sohrab v Khan* (n 239).

may have been fewer reported cases in Scotland recently, it is still an issue, and more emphasis needs to be placed on encouraging victims to come forward.

There do appear to be differences in the results of the forced marriage regimes in the different jurisdictions in the UK, but these seem to be due to the population composition of the four nations, rather than a lack of support for victims in Scotland and Northern Ireland. But this is not certain. More research needs to be done on the regimes in these jurisdictions, to ensure that population differences are the cause of the variations in numbers of reported cases and applications for FMPOs. Efforts should be made to ensure that people are aware of the legislation against forced marriage in Scotland and Northern Ireland, and that there is sufficient support for victims, so they feel able to come forward, should this prove to be a barrier to reporting.

## Gaps

There are also a number of gaps in the legislation governing forced marriage in the UK. This raises the question of whether focusing only on forced marriage detracts from other types of marriage which may affect children, such as willing arranged marriages where one spouse is under eighteen, or 'love matches' where the child or children are themselves pushing for marriage. There is little literature on such cases in the UK. There is some in the USA, especially within the context of arguing against banning child marriage, in order not to remove the freedom of a minor to marry because they wish to, either from love or due to an unexpected pregnancy.<sup>334</sup> In the US, the perspective often adopted is that doing so would go against religious freedom, especially for older teenagers. A similar argument may be made in regards to Article 12 CRC, whereby the views of the child should be given weight in relation to their age and capacity. Older teenagers, since they are close to the 'cut-off' age of eighteen, should therefore be given greater control over their choices than younger children, so sixteen- and seventeen-year-olds should be allowed to marry. However, this argument is flawed. If older teenagers are only permitted to marry for certain reasons, or with parental or judicial consent, there is still a limit on their autonomy. This limit demonstrates that they do not yet have the capacity to make decisions that may affect them for the rest of their lives without some oversight. If they cannot make this decision themselves, how can they take on the responsibilities of married life? Even willing marriages between children, or between a child and an adult, should therefore not be permitted. By focusing entirely on forced marriages, the British system does not regulate children who marry willingly. As the only requirement in England, Wales, and Northern Ireland is parental consent, and this is not required in Scotland, the bar is very low for children who wish to get married. There is no medical or judicial assessment that the child is mature enough or has the capacity to understand what they are committing to, or whether it is in their best interests. If the marriage is not forced, the British system cannot act to

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<sup>334</sup> Johnson-Dahl (n 115) 1072, 1090.

protect children from these marriages, though willing marriages lead to many of the same ills as forced ones: an end to education, early pregnancy, mental health issues, and generally to divorce.<sup>335</sup>

A related issue is whether the single category of forced marriage obscures the specific issue of child marriage. Not all forced marriages are child marriages, and not all child marriages are forced. There are overlaps, but by only focusing on forced marriage, the British system only looks at one subset of child marriage.

It is difficult to find specific statistics on the age at marriage of young people in the UK, data generally being grouped as ‘under 20’ or ‘16-19’ rather than a separate group of those under eighteen. The data used here is therefore not directly comparable, but may be used for a rough estimate as to the prevalence of child marriage across the UK. It is data from 2014, as this is the most recent record with disaggregated data for England and Wales.

In 2014, 200 girls and 40 boys aged 16 and 17 were married in England and Wales.<sup>336</sup> In Scotland, 60 boys and 176 girls aged 16-19 were married,<sup>337</sup> along with 71 boys and 98 girls aged 16-19 in Northern Ireland.<sup>338</sup> Comparing this to the number of cases involving a minor aged 16-17 reported to the FMU in 2014 (11% of 1,267, or around 139 cases),<sup>339</sup> it becomes clear that there is a gap. Even if every reported case corresponded to one child getting married, there are more marriages than reported cases. This would be unsurprising, given the reluctance of victims to report. However, the difference in numbers is still stark: if an estimated one fifth of the marriages of 16-19-year-olds in Scotland and Northern Ireland involved a sixteen- or seventeen-year-old (as far fewer sixteen- and seventeen-year-olds marry than those over eighteen), there would still have been around 81 minors married in those jurisdictions. If then the estimate is that 321 minors married across the UK in 2014, but there were only 139 reported cases of forced marriage in that age group, even if every one of those reported cases involved a forced marriage that actually took place (which is unlikely),<sup>340</sup> there are still many more

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<sup>335</sup> Yann Le Strat, Caroline Dubret, and Bernard le Foll, ‘Child Marriage in the United States and Its Association With Mental Health in Women’ (2011) 128(3) *Pediatrics* 524, 528-30.

<sup>336</sup> Office of National Statistics, ‘Number of 16 and 17-year-olds entering into marriage in 2014 or civil partnership in 2016, England and Wales’ (19 October 2017) <[www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/adhocs/007634numberof16and17yearoldsenteringintomariagein2014orcivilpartnershipin2016englandandwales](https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/adhocs/007634numberof16and17yearoldsenteringintomariagein2014orcivilpartnershipin2016englandandwales)> table 1.

<sup>337</sup> National Records of Scotland, ‘Vital Events Reference Tables 2018, Section 7: Marriages and Civil Partnerships’ <[www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/general-publications/vital-events-reference-tables/2018/section-7-marriages](https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/general-publications/vital-events-reference-tables/2018/section-7-marriages)> Table 7.01b.

<sup>338</sup> Northern Ireland Statistics and Research Agency, ‘Registrar General Annual Report 2019 Marriages’ (16 December 2020) <<https://www.nisra.gov.uk/publications/registrar-general-annual-report-2019-marriages>> Table 7.1.

<sup>339</sup> Home Office, *Forced Marriage Unit Statistics January to December 2014* <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/895078/FMU\\_Stats\\_2014.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895078/FMU_Stats_2014.pdf)> 1.

<sup>340</sup> *ibid*, footnote 2. ‘Victim includes people thought to be at potential risk of future forced marriage, those currently going through a forced marriage and those who have already been forced to marry.’

minors getting married than are reporting a forced marriage. This demonstrates a gap which needs to be researched more thoroughly, but also shows that forced marriage legislation does not sufficiently protect children from getting married, which, willing or forced, still constitutes child marriage.

The final gap is whether focusing only on forced marriage narrows research in the area to certain sectors of the population. The implication of the government differentiating between ‘forced’ and ‘arranged’ marriages<sup>341</sup> is that it shifts the focus onto those communities and groups that practice arranged marriages. In the UK, this shifts the attention around early marriage to immigrant communities, specifically from South Asia, and Muslim communities,<sup>342</sup> while other groups are all but ignored. In the USA, where there is significant literature on child marriage, rather than forced marriage, the focus is on more conservative, Christian communities, such as conservative Protestants, Catholics, and Mormons.<sup>343</sup> It is unlikely that the same communities – and, to some extent, the same ideals – do not also exist in the UK. One estimate suggested that there were somewhere between 650,000 and 1.3 million fundamentalist Christians in the UK.<sup>344</sup> Although fundamental Christians are not as ‘hardline’ as those in the USA, they do still tend to be more socially conservative,<sup>345</sup> suggesting that they may favour young marriages as an alternative to pregnancies out of wedlock, for example. This is a perspective that has not received much attention from researchers on either forced or child marriages in the UK.

By focusing solely on forced marriages, and on those communities where the expectation may be of arranged marriages, other communities where religion may play a significant role in a child’s path through life are ignored, as are marriages initiated by the child or which may otherwise be voluntary. Looking at child marriage through the lens of forced marriage is like putting blinders on: you can see straight ahead, but anything beyond that is obscured.

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<sup>341</sup> Home Office, ‘What is Forced Marriage?’ (n 8) 4-5.

<sup>342</sup> Khatidja Chantler, ‘Recognition of and Intervention in Forced Marriage as a Form of Violence and Abuse; (2012) 13(3) Trauma, Violence, & Abuse 176, 177.

<sup>343</sup> Syrett (n 35) 264-5; Koski and Heymann (n 15) 60; Johnson-Dahl (n 115) 1074; VVB, ‘Why America still permits child marriage’ (3 January 2018) The Economist <[www.economist.com/the-economist-explains/2018/01/03/why-america-still-permits-child-marriage](http://www.economist.com/the-economist-explains/2018/01/03/why-america-still-permits-child-marriage)> accessed 06/04/2021.

<sup>344</sup> Jonny Scaramanga, ‘How Many Christian Fundamentalists Are There in the UK?’ (23 April 2012) <[www.patheos.com/blogs/leavingfundamentalism/2012/04/23/uk-fundamentalists/](http://www.patheos.com/blogs/leavingfundamentalism/2012/04/23/uk-fundamentalists/)> accessed 16/06/2021.

<sup>345</sup> Ball (n 257).

## Chapter 4: Moving Forward

This chapter aims to address some of the issues arising from the previous chapter, as well as assessing ways in which the system in the UK could be improved to protect more effectively against child marriage. The conviction rate for the crime of forced marriage will be addressed, and whether the low number of convictions is in fact a cause for concern. Next, what more could be done within the framework of the system will be discussed. Finally, the possibility of more wide-reaching change will be examined, through increasing the age of marriage to eighteen, and the pitfalls of such a course of action.

### *Is the conviction rate an issue?*

Very few cases of forced marriage have been successfully prosecuted since the Anti-Social Behaviour, Crime and Policing Act 2014 criminalised forced marriage as a separate offence in England, Wales and Scotland. The first conviction was in 2015,<sup>346</sup> but it took three years before the next was secured.<sup>347</sup> There were only four convictions by 2019,<sup>348</sup> and between 2016 and 2019 there were only 12 convictions for a breach of a Forced Marriage Protection Order.<sup>349</sup> Compared to the almost 8,000 cases reported to the FMU between 2014 and 2019,<sup>350</sup> this discrepancy is a cause for concern.

There are some mitigating factors. Hunt argues that ‘a significantly larger number of prosecutions are brought related to forced marriage (described by the CPS as ‘FM-flagged’), and these are rising year on year.’<sup>351</sup> If this is the case, then it suggests that more cases of forced marriage are receiving legal attention, but that the present legislation, and the offence of forced marriage as it currently stands, is not as effective as it should be. The purpose of the offence of forced marriage was to create an offence which recognised the ongoing nature of the crime, and how the suffering of the victim extends over a long period of time, as the conditions are created for ‘continuous ill-treatment.’<sup>352</sup> When cases of forced marriage were prosecuted before the entry into force of the current legislation, prosecutors relied on offences such as rape, kidnap, and physical and sexual assault.<sup>353</sup> Forced marriage goes beyond this. But if common offences such as these are being used to prosecute a crime for which there is a specific offence, it suggests that the specific offence is not as effective as the drafters may have hoped.

Simply because the legislation is not being used to prosecute perpetrators does not necessarily mean that it is ineffective. It could mean that the regime against forced marriage is working, with the criminal

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<sup>346</sup> Cavendish (n 276).

<sup>347</sup> Gill, Cox, and Weir (n 213) 578.

<sup>348</sup> Hunt (n 322).

<sup>349</sup> UK Parliament, Question for Home Office, UIN HL 13499 (8 March 2021) <<https://questions-statements.parliament.uk/written-questions/detail/2021-02-22/HL13499>> accessed 18/06/2021.

<sup>350</sup> FMU Statistics 2019 (n 265) 7.

<sup>351</sup> Hunt (n 322).

<sup>352</sup> Kazi (n 324).

<sup>353</sup> *ibid.*

legislation acting as a deterrent.<sup>354</sup> Victims can use the legislation as a bargaining tool with their parents, in order not to get married.<sup>355</sup> The threat of the criminal legislation may be a part of why so few cases of forced marriage have been prosecuted, as it may be being used indirectly to prevent forced marriages. The criminal legislation may have a sufficiently strong deterrent effect as to prevent forced marriages before they occur.

Although this would be a nice solution, and while the legislation may prevent some forced marriages from taking place, or at least help to delay them, it appears that the criminalisation may also have a deterrent effect on those it is intended to protect.<sup>356</sup> The criminal process means that family members of the victim may go to jail for their crimes, and if they do not, they may continue to pose a threat to the victim.<sup>357</sup> This is something that many victims of forced marriage do not want, “because you love them.”<sup>358</sup> Even if a victim comes forward, they often decide not to press charges, because ‘they would not want to see family members being prosecuted in a criminal court.’<sup>359</sup> Aside from family loyalty, fear for their community as a whole may also play a part. By voicing their experiences of forced marriage and possible abuse, there is the chance that this might contribute to reinforcing stereotypes and normalise the image of abuse within minority ethnic communities.<sup>360</sup> This may limit a victim’s willingness to press charges.

There is also a concern with the pressure on victims to press charges. The threat of being charged themselves with wasting police time or even perjury, if they start the process of charging someone with forced marriage and then later decide to withdraw their allegation, is a sufficient deterrent to stop some from pressing charges at all.<sup>361</sup> Since the onus is on the prosecutor to prove that there was coercion, the victim’s experiences are likely to be revisited in great detail, which may be difficult for the victim.<sup>362</sup> However, the assumption that the prosecution of this crime is victim-led is one that obscures any other reasons for the lack of prosecutions. The CPS guidance on prosecuting this crime is that where there is sufficient evidence, and where it is in the ‘public interest’ to proceed, they should move ahead with the prosecution.<sup>363</sup> Wilson claims that there is the ‘chilling possibility’ that if a victim does not consent to

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<sup>354</sup> Gangoli, McCarry, and Razak (n 247) 420.

<sup>355</sup> Charlotte Rachel Proudman, *Forced & Arranged Marriage Among South Asian Women in England and Wales: Critically Examining the Social and Legal Ramifications of Criminalisation* (Lambert Academic Publishing 2011), cited in Kazi (n 324).

<sup>356</sup> Bonino (n 245) 166.

<sup>357</sup> Gill, Cox, and Weir (n 213) 587.

<sup>358</sup> Chantler and McCarry (n 238) 102.

<sup>359</sup> Kazi (n 324).

<sup>360</sup> Anitha and Gill (n 231) 142.

<sup>361</sup> Amrit Wilson, ‘Criminalising forced marriage in the UK: why it will not help women’ (13 January 2014) OpenDemocracy <<https://www.opendemocracy.net/en/5050/criminalising-forced-marriage-in-uk-why-it-will-not-help-women/>> accessed 04/04/2021.

<sup>362</sup> Chantler and McCarry (n 238) 102.

<sup>363</sup> Anup Manota, ‘Our View on the Forced Marriage Convictions’ (29 May 2018) Karma Nirvana <<https://karmanirvana.org.uk/our-view-on-the-forced-marriage-convictions/>> accessed 18/06/2021.

moving forward with the case, the CPS might continue anyway.<sup>364</sup> But this ignores that this is standard CPS procedure: prosecuting crimes is not a victim-led endeavour. The State prosecutes crimes that it thinks is in the public interest to have punished. Work done by Karma Nirvana suggests that this situation actually helps victims, as they ‘appreciate being able to say to their family, “this isn’t me pursuing a conviction – it is the state”’.<sup>365</sup>

But if the State is the main prosecutor, why aren’t more cases being prosecuted?

Karma Nirvana’s answer is that a lot is misunderstood.<sup>366</sup> Local authorities and the police often do not take the steps they should for fear of offending minority communities in their area and ‘being perceived as culturally insensitive.’<sup>367</sup> The risk of offending those communities means that protecting victims is being side-lined, in favour of maintaining good community relations.<sup>368</sup> It needs to be made clear to police and social services that the fear of cultural insensitivity does not take priority over the safety of women and girls. Viewing forced marriage as a cultural issue removes it from the wider issue of violence against women.<sup>369</sup> Instead, police and other officials must examine forced and child marriage through a lens of violence against women, and prosecute accordingly. Without this approach, women continue to be hidden victims, even where their cases are known to the police.

### *What more needs to be done?*

Some other things could be done in order to improve the situation as it stands within the framework of the current system.

Forced marriage should be a topic discussed in schools. Not only forced marriage, but also degrees of consent and coercion, especially within the family context. If schoolchildren are taught to recognise what constitutes a forced marriage, then the risks of children being married goes down – either because they can challenge their parents, or because they can identify what is happening to them and tell someone (a teacher, a friend, or the police). A big problem in reporting forced marriage is that victims do not recognise it because they do not think it matches with their own experiences,<sup>370</sup> especially when it comes to recognising emotional coercion. By teaching children from a young age what constitutes coercion, what is necessary for consent, and the harms of forced marriage, they may be protected in the long run, as well as less likely to perpetuate the practices with their own children if they understand why forced and child marriage are harmful. The UK All-Party Parliamentary Group on Population, Development and Reproductive Health has suggested something similar, recommending the ‘inclusion

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<sup>364</sup> Wilson (n 361).

<sup>365</sup> Manota (n 363).

<sup>366</sup> *ibid.*

<sup>367</sup> Chantler (n 342) 180.

<sup>368</sup> *ibid.*, 181.

<sup>369</sup> Anitha and Gill (n 231) 134.

<sup>370</sup> Chantler and McCarry (n 238) 94.

of consent in marriage and sexual relations in the Personal, Social, Health and Economic Education (PSHE) curriculum.<sup>371</sup> If they are aware of the issue, and are taught where to look for help, then they can make use of those facilities should the need arise, or they can direct friends to them if they need to. This is a long-term suggestion that may be of more practical use than having a specific crime of forced marriage. By including it in the national curriculum, the information should reach every child of school age, rather than relying on other methods of dissemination of this information, which are less likely to have as wide a reach. Moreover, teaching children about coercion and consent would not limit the use of that knowledge to marriage: other relationships throughout their lives, both personal and professional, could benefit from a better understanding of the differences between coercion and consent.

Better training is needed for everyone potentially involved in dealing with forced marriage cases. Without such training, relevant actors do not feel able to intervene appropriately, citing fears for the victim's safety and interpretation by the relevant community of the intervention as antagonistic.<sup>372</sup> This approach is very harmful to the safety of victims of forced marriage. Their safety is the price for an unnuanced conception of multiculturalism: by trying to allow for cultural and religious differences, state authorities do not apply the standards of protection that they would to someone from another group, either because they do not understand the culture and therefore do not want to intervene, or believe the practice to be a part of that culture and therefore decide not to intervene, in order to not offend those communities. However, this 'moral blindness' means that women whose rights are being violated are not getting the help they need,<sup>373</sup> because of officials' views that it is 'their' culture and therefore that they shouldn't intervene. Better training is needed to improve the ability of officials to intervene and assist in these cases.

There is also a need for better engagement between the police and communities affected by forced marriage. Partnerships between the police and local community groups and members need to be fostered, based on trust and communication.<sup>374</sup> If this is achieved, it becomes easier for victims to come forward, as there is already a trust-based relationship there. Furthermore, cooperation between local groups, NGOs, and the police is necessary to cover as much ground as possible, giving the right kind of support in the right cases. Given that one of the biggest issues with victims reporting forced marriages is due to lack of trust in the police and the criminal justice system,<sup>375</sup> direct community partnerships may help the victim feel safe coming forward. This trust must be developed into trust between the police

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<sup>371</sup> 'A Childhood Lost' (n 294) 9.

<sup>372</sup> Courtenay (n 259) 201, 214.

<sup>373</sup> Hannana Siddiqui, 'Calling from the margins: ending child marriage and early forced marriage in the UK' (28 June 2014) OpenDemocracy <<https://www.opendemocracy.net/en/5050/calling-from-margins-ending-child-and-early-forced-marriage-in-uk/>>.

<sup>374</sup> Bonino (n 245) 170.

<sup>375</sup> *ibid*, 171.

and the individual victim,<sup>376</sup> so that the victim feels able to go through with the case and their testimony can be relied upon.

If more research is done on other forms of forced marriage outside of minority communities (particularly following the American approach of looking at strict Christian communities), then the issue of forced marriage would become less stigmatised as a ‘minority issue.’ If there is a crackdown on all forms of forced marriage, then not only would more women and girls be protected, but an important message would be sent that no matter the religion, culture, or community associated with forced marriage, there is a consequence, as the rights of women are not negotiable on the basis of religion.

### *New Legislation*

A very recent development in this area has been the announcement by Sajid Javid, the former Home Secretary, that he would propose a bill on raising the age of marriage in England and Wales to eighteen.<sup>377</sup> The government – specifically the Ministry of Justice – has indicated that it will support the bill. It does not have a text yet, as the second reading is not scheduled until the 19<sup>th</sup> November 2021, which is when the content of the bill will be examined by the House of Commons. However, the indication of support by the government suggests that it is likely to pass with little contention.

This development is interesting as it follows three other attempts to raise the minimum age of marriage in England and Wales to eighteen in the last five years. In 2016, a bill originating in the House of Lords proposed to remove the clause permitting marriage at sixteen with parental consent, leaving eighteen as the only legal age for marriage and civil partnership.<sup>378</sup> However, this bill did not get through to the House of Commons due to the end of the Parliament – any bills which have not passed by the end of the Parliament fail automatically. A new bill was introduced in 2019, then again in 2020, by Pauline Latham MP in the House of Commons, where the same thing happened both times – they essentially timed out. This is because Private Members’ Bills do not get much time on the Parliamentary agenda, unless the bill is supported by the government, as the government decides on the agenda, prioritising its own bills, while others come in later. Pauline Latham had been in contact with the Secretary of State for Justice at the time of the introduction of her second bill,<sup>379</sup> suggesting that the government might have been willing to support the bill at that time, although the time constraint meant that this did not happen.

A strong push for the government to support this bill may have been the recent development in Bangladesh, where the age of marriage, previously set at eighteen, was lowered to sixteen. Ministers

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<sup>376</sup> Gill and Gould (n 203) 94.

<sup>377</sup> Tom Newton Dunn, ‘Marriages under 18 will be outlawed’ (12 June 2021) *The Times*.

<sup>378</sup> Girls Not Brides, ‘British legal loophole continues to sanction child marriage’ (27 February 2017) <<https://www.girlsnotbrides.org/articles/british-legal-loophole-continues-sanction-child-marriage/>> accessed 12/04/2021.

<sup>379</sup> Email from Richard Miller to author (24 June 2021).

and lobbyists in Bangladesh reportedly referenced the British laws to justify the new minimum age.<sup>380</sup> This is certainly embarrassing for the British government, as they continue to advocate to end child marriage in the developing world, but continue to permit child marriage at home.<sup>381</sup> (It must however be noted that this is not a uniquely British problem – large swathes of the Western world do the same.<sup>382</sup>) This may have been the trigger to ensure that this bill passes. When Javid was then appointed Health Secretary, he had to transfer his Private Member’s Bill to a backbench MP to sponsor.<sup>383</sup> The Bill is now back with Pauline Latham, meaning that this bill will benefit from at least two years’ worth of research and campaigning, as well as the support of Javid as a member of the Cabinet, to support its journey through Parliament.

Apart from technical difficulties in getting the bill passed, other challenges face the bill. Research done during previous attempts suggests that most people, when presented with a bill aiming to raise the age of marriage, when the aims are described as safeguarding children, especially girls, from the harms of early marriage, are supportive of the bill.<sup>384</sup> The main opposition has been from people who believe that if a girl can get pregnant at sixteen, then she should also be able to get married at that age.<sup>385</sup> The counterargument is that girls can get pregnant at fifteen, and fourteen, or even younger, but marriage is not permitted at such a young age. It seems to be an anachronism that children legally have to stay in school until they are eighteen, but can get married at sixteen,<sup>386</sup> which has been shown to lead to higher rates of children dropping out of school.<sup>387</sup>

Another issue is Scotland. The age of marriage there is sixteen, and does not look set to change any time soon. This poses an issue if the law in England and Wales changes. If a parent wanted their child to marry before the age of eighteen, but the law in England and Wales wouldn’t allow it, it is possible that they could simply take the child across the border and have them marry there. This already happens in the US – parents wanting their children to get married at a younger age than is permitted in their own state often cross state borders into a state with a more permissible regime.<sup>388</sup> For this reason, campaigners in England and Wales are starting to work to try and convince the Scottish government to raise the age of marriage there to eighteen, with or without parental consent, in order to stave off such attempts to marry children early.<sup>389</sup>

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<sup>380</sup> Dunn (n 377); Girls Not Brides (n 378).

<sup>381</sup> Girls Not Brides (n 378).

<sup>382</sup> Tsui (n 254); Vogelstein (n 18).

<sup>383</sup> Email from Richard Miller to author (2 July 2021).

<sup>384</sup> Interview with Richard Miller, Parliamentary Assistant to Pauline Latham (Vienna, 11 May 2021).

<sup>385</sup> *ibid.*

<sup>386</sup> *ibid.*

<sup>387</sup> Girls Not Brides, ‘UK parliamentarians hear testimony on child marriage; Girls Not Brides reflects’ (27 June 2012) <<https://www.girlsnotbrides.org/articles/uk-parliamentarians-hear-testimony-on-child-marriage-girls-not-brides-reflects/>> accessed 10/04/2021.

<sup>388</sup> Tsui (n 254); Johnson-Dahl (n 115) 1093.

<sup>389</sup> Interview with Richard Miller (n 384).

It is also possible that people might travel to Northern Ireland, but this seems less likely, as it is harder and more expensive to reach from England.

The law should also act as a deterrent: if it is illegal under all circumstances to marry a child under the age of eighteen, the hope is that this would encourage the view that to do so is unacceptable, and that it should deter people from trying to do it at all.<sup>390</sup> Even if it does not stop everyone, at least fewer people should be trying to do it, especially if the law in Scotland changes as well.

Raising the age of marriage would improve the UK's implementation of the international human rights treaties discussed above. The Committee on the Rights of the Child in 2016 recommended that the UK raise the minimum age of marriage to eighteen across the entire country.<sup>391</sup> If this bill passed, this would be a step towards the fulfilment of that recommendation. There would still be the issue of the lower age of marriage in Scotland and Northern Ireland, but it would demonstrate the UK's willingness to work towards complying with all the elements of the CRC. Moreover, if the Committee on the Rights of the Child takes notice of the development in England and Wales, it is likely to comment on the Scottish government's inaction, which would help pressure Scotland into following in England's footsteps.

There has been significant media interest in forced marriage in the last few years, heightened further by the coronavirus pandemic. Since children have been stuck at home, not in physical schooling, there is a greater risk that they could be married early.<sup>392</sup> Given that teachers no longer have regular physical contact with these children, it is harder for them to tell if something is amiss, which means that that layer of protection – or at least notice – is denied to children under these circumstances.<sup>393</sup> Raising the age of marriage might afford a level of protection denied to children thus far, exacerbated by the current situation which has removed the ability of a third party to notice any signs that a child may be at risk.

This legislation would fill an important gap in the law on forced marriage. The FMU apparently does not feel as though it can act in certain cases involving children, because it 'only acts where there is evidence of coercion.'<sup>394</sup> Given that victims – especially younger ones – of grooming and forced marriage may not realise what is happening to them, the FMU is not able to intervene. If it appears that the child consents (if they are over sixteen), then the FMU cannot do anything,<sup>395</sup> leaving the child in a marriage that threatens their health and their development. By contrast, if the law categorically stated that no one under the age of eighteen could marry, without or without parental consent, then the FMU (or any other relevant official) could take action if there was evidence that a marriage was planned or had taken place.

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<sup>390</sup> *ibid.*

<sup>391</sup> CRC, 'Concluding Observations' (n 190) [40].

<sup>392</sup> Interview with Richard Miller (n 384).

<sup>393</sup> *ibid.*

<sup>394</sup> *ibid.*

<sup>395</sup> *ibid.*

The current situation is therefore problematic: if the FMU does not feel like it can intervene in situations where it appears that the child consents, and police, social workers and teachers are reluctant to intervene in cases involving (children of) minorities,<sup>396</sup> then the protection afforded to children under the current system is in fact fairly limited. Raising the age of marriage to eighteen, at least in England and Wales, would offer better protection to children, and remove the argument that cultural sensitivity should allow for a margin of appreciation in deciding which cases to pursue. Child marriage is not a minority issue; it is a rights issue, and one that applies to everyone.

This development would change the system more generally. Firstly, it would afford better protection to children who do not wish to get married, but who do not feel able to disagree with their parents. Now, they could point to the law and remind their parents that it is illegal. Then, by the time they turn eighteen, the hope is that they are more independent: they might be going to university, or undertaking further training, or simply start working.<sup>397</sup> As children become more independent, they might be more able to disagree with their parents, or feel more able to contact someone who can help if their parents pressure them into a marriage.

Secondly, it would mean that there was a double layer of protection for children who continue to be forced to marry. Either through cultural marriages, or by being taken to another country where the age of marriage is lower, it is certain that some children will continue to be forced to marry. While coercion can be hard to prove, especially if the marriage took place outside the UK and it is therefore harder to amass evidence, demonstrating that a victim was married before they turned eighteen is relatively simple, even if they have since reached that age. So long as the date of the wedding and the victim's birthdate are known, it can be proved that the wedding took place before they turned eighteen. This would also cover children taken abroad who are held in a foreign country until they turn eighteen, then return to the UK.<sup>398</sup> Victims who return from a marriage abroad could therefore still be protected by this change in the law. With the protection from both the prohibition of marriage if either spouse is under eighteen and the prohibition of forced marriage, children forced into marriage would benefit from protection on both sides of this crime.

### Potential Drawbacks

There are, unfortunately, possible problems with raising the age of marriage to eighteen in all circumstances. There is the problem with the differences between jurisdictions allowing people to sidestep the rules and make use of the variations in the regimes to their own advantage, as mentioned above. But there is also the risk that raising the age of marriage might bring the practice of forced marriage further underground. This argument arose at the time when the government was considering

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<sup>396</sup> 'A Childhood Lost' (n 294) 60; Chantler (n 342) 180.

<sup>397</sup> Interview with Richard Miller (n 384).

<sup>398</sup> Bokhari and Kelly (n 39) 152.

criminalising forced marriage as a specific offence, when some people argued that criminalising it would send forced marriage underground, as victims would not want to report their family members, as they would risk a prison sentence.<sup>399</sup> This never materialised, with reported cases instead doubling after the announcement of criminalisation.<sup>400</sup> It is possible that the same thing would happen here: fears that do not come to fruition.

A more likely possibility is that more children might be married in cultural ceremonies. These are harder to track, as they often go unregistered,<sup>401</sup> and many children are already forced into such marriages, even before they turn sixteen.<sup>402</sup> If this is already happening when the age of marriage is sixteen where the parents consent, then this is likely to continue if the age of marriage is raised. These community-recognised marriages are as binding in their eyes as a civil ceremony is in the eyes of the law,<sup>403</sup> but if they are unregistered, it is difficult to provide assistance to the victim or to even realise that the marriage has taken place. In some cases, such a marriage may take place before the legal minimum age of marriage, and a civil marriage is concluded when the child reaches that age (or later).<sup>404</sup> In other cases, a child's marital status might only be disclosed as and when necessary, selectively according to what is permitted by the laws of the State.<sup>405</sup> It is possible that raising the age of marriage to eighteen may make this more common, as religious or cultural ceremonies may still take place, but only be registered once both spouses have reached the age of eighteen.

If this were to prove to be the case, both the provisions on the raised age of marriage and on forced marriage would continue to have effect to protect such victims. Especially if combined with greater awareness-raising in children at school (so they know who to contact if it were to happen to them), as well as training in the police, social services and other professionals, such as teachers, so that they would be able to recognise the signs of an early marriage, and take appropriate action, such marriages may well be caught and nullified. Coordination and cooperation between these groups would also be of benefit, so that communication and trust-building with relevant communities are employed to ensure that as many people as possible know how to react when they learn of a threat of forced marriage. Additionally, the double threat of sanctions from both provisions should act as a strong deterrent.

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<sup>399</sup> Bonino (n 245) 167; Chantler and McCarry (n 238) 101.

<sup>400</sup> Proudman (n 355).

<sup>401</sup> Girls Not Brides, 'Child marriage happens in the UK too, warn British MPs' (5 December 2012) <<http://www.girlsnotbrides.org/a-childhood-lost-uk-parliamentarians-launch-new-report-on-child-marriage>>.

<sup>402</sup> *Re: I and Others (Children)* [2016] 11 WLUK 430, [7]; Gill and Gould (n 203) 92.

<sup>403</sup> Federica Sona, 'Reformulating Transnational Muslim Families: The Case of Shari'ah-Compliant Child Marriages' (2020) 40(1) *Journal of Muslim Minority Affairs* 84, 94.

<sup>404</sup> *ibid.*

<sup>405</sup> *ibid.*, 96.

## The threat to children's autonomy

Another question to be considered here is whether raising the age of marriage to eighteen poses a risk to children's autonomy, both in relation to marriage and in other walks of life.

Children's autonomy should be looked at from the perspective of the CRC. Article 12 states that 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'<sup>406</sup> A child of sixteen or seventeen, therefore, ought to have relatively great weight accorded to their opinion. It is argued by some that children aged sixteen or seventeen should thus be allowed to get married, if they so wish.<sup>407</sup> Parental consent is needed to validate the child's consent, the argument runs.<sup>408</sup>

The question, therefore, is whether completely removing children's ability to marry in England and Wales would go against this right. If they genuinely consented, and genuinely wished to marry, should respect for this right not require that they be allowed to marry?

The answer is no. There are many things which children aged sixteen or seventeen may wish to do, but cannot until they are eighteen – drinking alcohol and smoking, for example. No one would argue that preventing them from doing so is against their rights. A similar argument could be made here: due to the inherent health risks of child marriage, both to the child's physical and mental health, the state should not permit children to marry before the age of eighteen, when it is generally acknowledged that they have reached a sufficient level of development and knowledge to be able to balance the risks for themselves. Furthermore, if it is already recognised that the consent of a child – even one of seventeen – is not sufficient on its own to allow them to marry, and that they need parental consent as well, it means that before the age of eighteen, legislators have decided that children are not ready or able to consent to marriage. If the intention is for the child's view to be heard and given weight, in a decision so important as whether or not to get married, surely only the child's opinion is of importance, so they should have to wait to marry until their view is the only one that can be considered.

Some argue that because children mature at different rates, forbidding every child under eighteen from getting married discriminates unfairly against those children who are mature enough to make that decision for themselves. This argument advocates for a lower minimum age for marriage, combined with a case-by-case assessment of whether the child is mature enough to get married.

There are several counterarguments to this. On a practical level, this is difficult and time consuming, and it is difficult to truly assess how 'mature' a child is. There is no simple test, no objective boundary

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<sup>406</sup> CRC (n 2) art 12(1).

<sup>407</sup> Melchiorre (n 1) 231.

<sup>408</sup> Alanen (n 123) 8.

delineating ‘mature’ and ‘not mature,’ and inevitably some children who are mature will be deemed not mature, and vice versa. Lawyers cannot judge a child’s maturity, and even psychologists and other medical professionals cannot do so easily. It is more practical for laws to ‘ensure that the minimum age corresponds with an objective standard of maturity, i.e., the age of eighteen, rather than subjective perceptions of the party’s maturity.’<sup>409</sup>

Secondly, the age of consent is intended to safeguard those incapable of consenting. ‘Choosing the appropriate age requires a weighing up of the wrong done to those deemed to have capacity to consent, who in reality do not; and the wrong done to those deemed not to have capacity to consent, who in reality do. They are not equal.’<sup>410</sup> Children who are ‘mature’ enough to get married, but are not allowed to, are suffering an interference with their autonomy, but children who are not mature enough to marry, but are allowed to, run a much greater risk than the first group.<sup>411</sup> It is therefore better to have a higher minimum age of marriage, in order to protect as many children as possible, rather than run the risk of some younger children who are not ready for marriage being married off due to a younger age of marriage. It is preferable for a number of children under eighteen who are mature enough to marry not to be allowed to, and so have to wait until they turn eighteen. This is not a severe interference: it is time-limited (at a maximum of two years), and can be justified by reference to the protection of the rights of those other children who do not have the capacity to consent.<sup>412</sup> If a child has to wait those two years before they get married, that in itself could be a demonstration of their maturity.<sup>413</sup> Given the very high rates of divorce of people married as minors<sup>414</sup> – one US study reported that over a quarter (27%) of ever-married children had separated, divorced, or been widowed before they turned eighteen,<sup>415</sup> while another reported that 70-80% of child marriages end in divorce<sup>416</sup> – enforcing the age of marriage as eighteen might prevent more children from divorcing, with the associated ills (such as mental health problems and poverty) that early marriage and then divorce brings. If the child is initiating the marriage (that is, they are not being forced by their parents or their potential spouse) because they want to marry their significant other at sixteen or seventeen, making them wait until they are both eighteen might be a step towards ensuring that this is not a spur of the moment decision, testing their commitment and making sure they are ready for marriage.

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<sup>409</sup> ‘Establishing a Minimum Age for Consent’ Stop Violence Against Women, cited in Alanen (n 123) 9.

<sup>410</sup> Jonathan Herring, ‘The Age of Consent in an Age of Consent’ in Chris Ashford, Alan Reed, and Nicola Wake (eds), *Legal Perspectives on State Power: Consent and Control* (Cambridge Scholars Publishing 2016) 86.

<sup>411</sup> *ibid.*, 86-7.

<sup>412</sup> *ibid.*

<sup>413</sup> ‘Those who are mature and capable of making healthy decisions will be able to wait until 18, for the sake of the others who are less mature.’ ‘Esther’s Story’ (2017) Unchained At Last <<https://www.unchainedatlast.org/about-arranged-forced-marriage/esthers-story/>> accessed 31/03/2021.

<sup>414</sup> Le Strat, Dubertret, and le Foll (n 335) 530.

<sup>415</sup> Koski and Heymann (n 15) 61.

<sup>416</sup> VVB, ‘Why America still permits child marriage’ (n 343).

The next issue is whether raising the age of marriage to eighteen poses a threat to children's autonomy in other areas. Some examples of when children may make decisions themselves before the age of eighteen are in sexual consent and medical consent, the age of which are set at sixteen in the UK, and voting, which is permitted only at eighteen in England, Wales, and Northern Ireland, but is allowed at sixteen in Scottish elections.

Voting is a very different decision to consenting to marriage, but it is often heralded as the biggest political marker of adulthood. If a child cannot decide who to vote for before the age of eighteen, but is viewed as able to commit to a marriage (with their parents' agreement), then there is something wrong with how these decisions are viewed. Given how different these two decisions are,<sup>417</sup> altering the age of one should not require the alteration of the other. If the age of marriage were to increase, the voting age would probably not change; if anything, the rest of the UK might, in time, follow Scotland's example and permit sixteen-year-olds to vote. This would be a better implementation of the child's right to be heard than allowing children to get married at an age where it could be harmful to them, since they are not physically or emotionally ready for marriage.<sup>418</sup>

In the UK, the age of medical consent is set at sixteen. Medical consent also involves a very different set of decisions than consenting to marriage. The difference in context is also important. Before a procedure, a doctor must explain everything to the patient, in order to ensure they can make an informed decision.<sup>419</sup> This is an independent party explaining the factual circumstances and outcomes of all the possible steps that a patient can take in their specific situation, and advising them from a position of professional care. By contrast, when it comes to marriage, especially forced marriage, and especially marriage involving a child, influential figures (either family members or respected members of the community) pressure the child into agreeing to something they may not understand or are not aware of.<sup>420</sup> It may then make sense for the age of medical consent to be lower than the age of consent to marriage, given the different influences on the young person at the time of each.

The age of sexual consent is much more closely linked to that of marriage. This is especially so for people who believe that sex shouldn't happen outside marriage, or that if a girl gets pregnant, she should get married before the baby is born.<sup>421</sup> However, these two ages do not have to be equal. The age of marriage should not be disproportionately higher or lower than the age of sexual consent.<sup>422</sup> The age of marriage should also not be lower than the age of sexual consent, as this creates the strange position that a person cannot have sex with someone under that age, but they can marry them (and thus

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<sup>417</sup> Girls Not Brides (n 378).

<sup>418</sup> *ibid.*

<sup>419</sup> Interview with Richard Miller (n 384).

<sup>420</sup> *ibid.*; Gill and Gould (n 203) 95.

<sup>421</sup> Syrett (n 35) 264-5; Kopelman (n 40) 174.

<sup>422</sup> Melchiorre (n 1) 125.

presumably have sex with them), which is the situation in some US states.<sup>423</sup> Having a higher age of marriage than of sexual consent would be reasonable, since that still permits sixteen- and seventeen-year-olds to experiment sexually, if they wish, but means that they cannot decide something that may have much longer-term effects.

In the case of a girl who becomes pregnant at sixteen or seventeen, not being able to marry for another year or two might also help her in the long term. Although her family or community – or she herself – may believe it is better to avoid having children out of wedlock, not having a shotgun wedding as soon as she discovers she is pregnant may be better for her. Having time to think about it, or not being pressured in a time of crisis by her family, is likely to lead to a better outcome for everyone involved. Having sixteen as the age of sexual consent, but the minimum age of marriage as eighteen, would still be a reasonable solution. In order to prevent children under eighteen getting pregnant and then dealing with parental and community judgement, however, it might be advisable to ensure everyone has access to better sexual education, including safe sex, and easy and affordable access to contraception, so that the prevalence of pregnant children can be reduced, thus limiting the strength of the argument that such children should be able to marry.

In past attempts to raise the minimum age of marriage, campaigners have presented it as a safeguarding issue, rather than as an age issue.<sup>424</sup> By presenting it as an attempt to protect a number of victims from harm, rather than with the argument that children under eighteen are not able to make decisions for themselves, they have generally avoided arguments over other age-restricted decisions and the comparisons between them. Since all the decisions described above involve very different circumstances, and are generally not dependent on one another, there is no reason why they should all be at the same age – and, indeed, they are not.

Raising the age of marriage to eighteen does not pose a risk to children's autonomy in other walks of life. Moreover, it does not amount to an unjustified interference with a child's right to be heard: it takes better notice of a child's development and ensures that when they do consent to marriage, it is entirely their own choice, rather than partly their own and partly their parents', and is justified by the need to protect children from the physical, mental and emotional harms that child marriage causes. It also in their best interests, by waiting until they have full capacity to make their own decisions. Finally, it helps ensure non-discrimination, as it is generally girl children who are married before they turn eighteen. Raising the age of marriage would help equalise treatment between boys and girls.

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<sup>423</sup> Syrett (n 35) 263; Kristof (n 109); Tsui (n 254).

<sup>424</sup> Interview with Richard Miller (n 384).

## Parental Rights

The final question is whether raising the age of marriage to eighteen constitutes an interference with parental rights to decide what is in the best interests of the child, and if so, whether that interference is justifiable. The CRC provides that ‘States Parties shall respect the responsibilities, rights and duties of parents ... to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.’<sup>425</sup> This right is reiterated in relation to the right to freedom of thought, conscience and religion.<sup>426</sup> This means that parents have a right to guide and direct their children in their development, though this should be done with the child’s best interests in mind. However, this is not always done. The best interests of the child, in the parents’ view, may not actually be what is in their best interests. Parents may force their child into marriage ‘in an attempt to “save” their child from a worse fate,’<sup>427</sup> though what constitutes a ‘worse fate’ varies, from becoming ‘too liberated, become too empowered,’<sup>428</sup> to preventing them from having a child out of wedlock.<sup>429</sup> Alternatively, the best interests of the family may be prioritised over the interests of the individual child.<sup>430</sup> Since parents are generally the ones initiating a forced marriage,<sup>431</sup> leaving them to decide what is in the best interests of the child is not itself in the best interests of the child.

Child marriage can never be in the best interests of the child. For health, education, and development reasons, there is every motivation to delay marriage at least until the age of eighteen. Pregnancy alone is not enough to justify that marriage is in the child’s best interests.<sup>432</sup> A decision cannot be in the child’s best interests ‘where it conflicts with the provisions of the [CRC].’<sup>433</sup> Allowing for parental consent to permit marriage at a younger age reflects respect for the deference to parental authority, but it also means that parents can decide when their child is mature enough to marry.<sup>434</sup> This delegation is not in the child’s best interests: parents agree to a marriage when it is in their own interests, not necessarily the child’s.

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<sup>425</sup> CRC (n 2) art 5.

<sup>426</sup> *ibid*, art 14(2).

<sup>427</sup> Hemmings and Khalifa (n 125) 43.

<sup>428</sup> Sarah Millar, ‘Girls as young as ten being forced into marriage; 14 million child brides married every year’ (14 July 2014) News Corp Australia Network <<https://www.news.com.au/lifestyle/relationships/marriage/girls-as-young-as-ten-being-forced-into-marriage-14-million-child-brides-married-every-year/news-story/e3d6841ceaa1dd1494da469d580641ec>>.

<sup>429</sup> VVB, ‘Why America still permits child marriage’ (n 343).

<sup>430</sup> Kopelman (n 40) 177-8.

<sup>431</sup> Johnson-Dahl (n 115) 1070.

<sup>432</sup> *ibid*, 1090.

<sup>433</sup> John Tobin, ‘Beyond the supermarket shelf: using a rights based approach to address children’s health needs’ (2006) 14 International Journal of Children’s Rights 275, 287.

<sup>434</sup> Vivian E Hamilton, ‘The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage’ (2012) 92(6) Boston University Law Review 1817, 1862.

Without an objective third party being involved, there is no way to ensure that the decision by the parents to consent to the marriage of a minor is actually in their best interests. But even this is not enough. Though an argument may be made for allowing sixteen- or seventeen-year-olds to get married, the same argument cannot be made for a twelve-year-old. Yet in the USA, girls as young as twelve have been permitted to marry with judicial approval,<sup>435</sup> despite their physical and emotional immaturity. The youngest girls would have required both parental and judicial consent. This demonstrates that even the double requirement of parental consent and judicial oversight is insufficient to protect children from getting married. The interference in the rights of parents is therefore justified, in order to protect children from something they are not ready for, physically, if not also emotionally.

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<sup>435</sup> Tsui (n 254).

## Chapter 5: Conclusion and Recommendations

The primary research question of this thesis was whether the Forced Marriage (Civil Protection) Act 2007 and the subsequent statutes criminalising forced marriage effectively protected against child marriage in the UK. Overall, it has been concluded that while this legislation does protect to some extent against the forced marriage of children, it does not do enough. By not having any specific provisions aimed at children, they are subsumed into the wider category of ‘victims of forced marriage,’ without any regard to how this affects them differently from older victims, as well as the slightly different – and more intense – pressures on them, making it more difficult for them to take steps to protect themselves or to get help. Focusing solely on forced marriage means other forms of child marriage, such as voluntary arranged marriages, or ‘love matches,’ go unnoticed. The research on forced marriage in the UK also largely focuses on South Asian communities, limiting the understanding of the different forms and causes of child marriage in other communities across the UK. Overall, the protection afforded by the Forced Marriage (Civil Protection) Act 2007 and subsequent Acts on forced marriage does not protect children sufficiently from child marriage in the UK. If it was, there would be no need for a law raising the age of marriage to eighteen.<sup>436</sup>

A secondary question looked at the differences in effectiveness in the regimes in the different jurisdictions in the UK. The effectiveness appeared to vary, given the differences in numbers of reported and prosecuted cases, but this might be explained by firstly, the population distribution between the nations (where there are more people, there are likely to be more forced marriages, and England has by far the largest population), and secondly, the larger number of immigrant communities in England, as a side-effect of the lens of forced marriage focusing on South Asian communities. To be more certain, however, more research needs to be done in this area.

Attempts to raise the age of marriage to eighteen raise the question of whether doing so would pose a risk to the autonomy of children in other areas of life, such as medical consent or voting. It was concluded that raising the age of marriage should not impact these areas, as it is not intended as a limitation on children’s autonomy. Such a limitation already exists, in the requirement of parental consent for minors (apart from in Scotland), thus demonstrating that children under eighteen do not have the capacity to consent to marriage on their own. By removing their ability to marry before eighteen at all, this ensures that when they do marry, their consent is the only relevant factor, rather than what their parents think.

Relatedly, there is the question of whether parental rights are infringed by raising the age of marriage to eighteen. If they think it is in the best interests of the child to marry earlier, would removing that possibility interfere with their rights? It is argued that child marriage can never be in the best interests

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<sup>436</sup> Interview with Richard Miller (n 384).

of the child, due to the manifold risks associated with it, and despite the trust placed in parents to prioritise their child's interests, it is often their own that are prioritised when agreeing to a child marriage, such as by aligning with a powerful family,<sup>437</sup> or for economic reasons where the bride price or dowry are practiced.<sup>438</sup> It is therefore argued that parental rights are not infringed by raising the age of marriage to eighteen, but that even if they were, it is justified by the need to protect the child's rights to health, education, and freedom from sexual and other physical abuse.

### *Recommendations*

It is recommended that **the age of marriage be raised to eighteen across the UK**. This is already in progress in England and Wales, but Scotland and Northern Ireland should do the same. This would bring the law into line with internationally recommended standards, and remove the option of avoiding the English law by travelling to another part of the UK with more permissive rules.

If this is not possible immediately, an alternative safeguard should be introduced to the requirements for a minor to marry. **Judicial approval should be required instead of parental consent**, preferably from a judge experienced in family law, consent, and coercion, in order to remove the ability of parents to drive a marriage forward without the child's full consent.

**The FMU should be given an explicit mandate in relation to child marriage**, allowing it to investigate further into suspected cases of forced child marriage more easily, where the force may not be obvious, but the child was still pressured.

**Alternatives may need to be considered to charging family members with a criminal offence**, given the difficulties associated with victim cooperation in these circumstances, in order to mitigate the fear of a prison sentence being given to a family member of the victim.

More should be done around awareness raising and training in this area. **Forced marriage, consent and coercion should be discussed in schools**, as part of the PSHE curriculum in order to reach as many students as possible. This would give students the resources to know who to contact or what to do if someone tried to force them into marriage, either in the short or long term, while also being able to help others in that position. By teaching children from a young age about consent and coercion, they would be able to transfer that knowledge to other areas (such as relationships) as well as help eradicate forced marriage from the UK over time.

**Root causes of child marriage**, such as gender inequality, poverty, and the difficulties of immigration – such as the need to retain one's cultural identity in a different society,<sup>439</sup> and efforts to prevent one's

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<sup>437</sup> Hemmings and Khalifa (n 125) 24.

<sup>438</sup> Wijffelman (n 27) 106, 108-9.

<sup>439</sup> Chantler, Gangoli, and Hester (n 10).

family from becoming too Westernised<sup>440</sup> (though virtually every state has ratified the CRC, meaning avoiding child marriage is not a sign of Westernisation) – **need to be tackled throughout society**, in order to minimise the prevalence of child marriage in general. **Awareness-raising is needed at the community level, and trust needs to be built between communities, the police, and other professional sectors.** The police and social services must be better trained in this area, with an understanding of the cultures associated with these practices, particularly the everyday ways in which the line between consent and coercion may be blurred, and how social factors may make it difficult for children to refuse their parents. A more nuanced understanding of forced marriage may be more beneficial to community relations than simply not acting in cases of forced marriage for fear of being perceived as culturally insensitive.

Finally, **more research should be done on non-forced child marriage in the UK**, specifically those that do not necessarily take place within the South Asian community. This would bring a better understanding of the different causes of child marriage in the UK, rather than retaining the forced marriage lens used over the the last fifteen years. Following the pattern in the US, for example, a number of child marriages might be concluded in more conservative parts of the UK, due to unexpected pregnancies, which might not be recognised as forced marriage under current perceptions. These marriages are just as harmful to the child’s health, education, and future as those where the child is coerced, but no attention is given to such cases in the UK.

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<sup>440</sup> Gangoli, McCarry, and Razak (n 247) 428.

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