Forced Marriage in Australia: Definitely Not the 'Usual Suspects'

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Australia stands in the ranks with other western countries that are belatedly attempting to grapple with forced marriage, an ill-defined – and usually worse understood – concept that crosses national jurisdictions and leaves women and girls lost within and between legal systems. Commonly cast as a 'problem with migrants', or a characteristic of particular religions, forced marriage actually has a wide variety of forms and proves to be a multi-faceted and multi-layered dilemma involving law, politics and international relations. Drawing on observation of case management practice in Australia and related action research, this article highlights a problem shared by most countries and by no means limited to the 'usual suspects'.

For convenience and readability, this article is couched in terms of the vast majority of cases, those involving women and girls as victims. That said, there is no doubt that boys and men may also be forced into marriage, and that is not excluded here. In western countries, the impact on young men is very real – seen, for example, in poor mental health observed by a family doctor or those responsible for student welfare. The clear common factor is that men and women, boys and girls, who choose to resist or reject forced marriage in any of its forms, will almost certainly face abrogation of their fundamental human rights, estrangement from their family, dislocation from their community, and prolonged isolation in wider society. These traumas occur even in the absence of the violent forms of behaviour that are characteristically linked to forced marriage (including rape in marriage, forced pregnancy) or other profoundly debasing experiences (including servile marriage, domestic servitude, slavery and/or human traffic).

In Australia, public awareness has been heightened by recent cases that have attracted media attention. For example, a case running though 2014 and early 2015 involved a girl of 12 who was 'married' to a man of 26 (Olding and Hall, 2014; Hall, 2014), the arrangement only being discovered by authorities when the man attempted to claim social security benefits as the girl's guardian. Noting that under national legislation the age for marriage in Australia is 18 (although one partner may be 16 or 17 with court and parental approval), the girl's father and her putative 'husband' have both since been found guilty of various offences (Wells, 2015; Barker, 2015). Headlines in the case – eg. 'Islamic child bride's father labels Australian laws "stupid"' (Samandar, 2015) served more to feed ill-informed prejudice and preconceptions about 'who does this', and rather less to prompt informed public debate and to assist a coherent policy response. Such cases have also highlighted the practical difficulties of coordination across levels of governments (federal, state, municipal) and relevant departments of government (law enforcement, social services, children services, foreign relations etc) (Partridge, 2014).

To highlight current gaps in international debate on forced marriage, this article looks at the relevant concepts from international law, considers the case example of Australia, and highlights the myriad of practices from all around the world that could be considered 'forced marriage', before concluding that global reduction of forced marriage calls for international cooperation on an untidy bundle of issues jumbled together at the intersection, or more commonly the interstices, of international and state legal systems, and that necessary policy responses would in turn be better engendered by systematic scholarly attention.

The International Legal Framework

Various treaties and conventions, beginning with the UN's *Universal Declaration of Human Rights*, condemn forced marriage as a violation of human rights, mandate consent of both parties as an essential element of marriage, and rely on government registration of both marriages and births to prevent forced and/or early marriage (see also United Nations GA Res 69/156).

For example, the Article 1 of the UN's *Convention on the Rights of the Child* (CRC) defines a child as anyone under 18 years of age. The Committee on the Rights of the Child, responsible for monitoring compliance, has recognised forced child marriage as a violation of children's rights, including the right to survival and development as stated in Article 6. This is because forced child marriage exposes children to various risks, not least to their reproductive and sexual health even in relatively benign circumstances.

Similarly, the UN's *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) in Article 16(2) requires States Parties to ensure that 'the betrothal and marriage of a child shall have no legal effect' and also requires that '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.'

Taken together, such instruments both condemn forced marriage generally and child marriage specifically, and establish 18 as the reasonably universal age for marriage, at least in formal law if not in practice (noting that the CRC has been adopted more widely and rapidly that almost any other treaty – the USA is now the only member state of the UN that has not ratified or adopted the CRC, although the deposit of Somalia's ratification was still pending at the time of writing).

The importance of the forced marriage of women could appear as a secondary priority to the forced marriage of children. While the egregious wrong of forcing marriage on a woman may be especially heinous when she is still a child, both are likely to involve, among many other harms, a lifetime of nonconsensual and/or violent sexual intercourse, forced pregnancies and deprivation of many human rights considered fundamental. Moreover, it matters little what basis is used to abrogate the essential ingredient of consent – whether from unbearable social pressure brought to bear in a so-called 'shotgun' wedding or any other marriage not of her choosing, the promising of a child in marriage for cultural reasons, or the trading of women and girls as property during conflict, or to settle family disputes or business debts. Accordingly, little is gained by an artificial dividing line when all forms of forced marriage are best understood as violence against women and girls.

Is there really a Problem in the West? Case Example: Australia

Compared to data gathered on forced marriage in developing countries (for example, United Nations Population Fund, 2012), Australia is no exception when it come to the paucity of reliable data on forced marriage in developed countries (notwithstanding government initiatives in some countries – see UK Government, 2013 – or high profile cases in others – see Rimer and Verhovek, 1993; Pilkington, 2011).

In 2010, the Australian Parliament's Anti-People Trafficking Interdepartmental Committee released a discussion paper on specific criminalisation of forced marriage, which later came to fruition in the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2012*.

After evaluating dozens of submissions on the discussion paper, in 2011 the Committee observed that the community responses suggested that 'forced marriage is likely to be more prevalent than the small number of cases that have been reported to the police would indicate' and 'the low number of reports may be attributed to the familial nature of some forced or servile marriages, or that victims may not actually identify their marriage to have been forced' (Anti-People Trafficking Interdepartmental Committee, 2011: 8).

Subsequent formal research by the National Children's and Youth Law Centre can be taken as confirming that expectation of under-reporting. Their report noted that:

Of a total of 91 survey respondents, 50 had encountered child clients in or at risk of a forced marriage in the

preceding 24 months and these experiences were estimated to have involved in excess of 250 cases. (National Children's and Youth Law Centre, 2013: 22)

Law enforcement has noted similar problems (McKenzie et al, 2014). These indications in effect are corroborated by the results of an action research project during 2012 to 2014. Project research drew on hundreds of cases related to the project by victims and caseworkers (who remained anonymous), with cases covering all relevant agency types (using the classification of agencies in National Children's and Youth Law Centre, 2013: 25). The action research experience, which culminated in an educational tool in the form of a case book for group and seminar study (Rosemount Good Shepherd Youth and Family Services, 2014), served also to highlight one of the main reasons that the problem is both under-reported and under-researched: the reluctance of individuals to speak with those they perceive to be 'the authorities'. This obviously includes government agencies generally and law enforcement specifically, but observation indicates that this also typically includes officials from UN agencies and academics.

Press coverage in Australia, again in line with other western countries, has tended to cast the issue as a 'migrant's problem' – for example, 'Girl, 14, intercepted at Sydney airport en route to Lebanon for arranged marriage' (*The Guardian* online, 29 September 2014) – or relating to particular religions (as noted above, Samandar, 2015). This probably serves only to muddy the waters, especially as Australia has reached a new post-World War II migration high (Australian Bureau of Statistics, 2014). In a total of around 23 million, as at 30 June 2014 just over 28% of the estimated resident population were born overseas, plus another 20% had at least one parent born overseas, both groups originating in any of many dozens of countries. So even if the 'migrant problem' slant were reasonable, it would provide little insight with effectively half the population linked to some part of the 'migrant community' (whatever that might be).

More than a superficial grasp of the phenomenon of forced marriage in Australia largely is confined to the handful of legal experts and researchers who specialise in related topics (especially Anti-Slavery Australia based at the University of Technology, Sydney, but also including the Australian Institute of Criminology, an Australian Government agency, and the National Children's and Youth Law Centre based at the University of New South Wales). In very general terms, Australia mimics the situation in many other western countries:

- Awareness of the problem is scattered and patchy through the community at large, even in law enforcement and the courts.
- A working knowledge of problems under the general heading of 'forced marriage' is more likely to reside in nongovernment organisations (NGOs) providing in social assistance, often helping victims pick up the pieces of their lives afterwards – including, for example, the Australian Red Cross (which has developed specific relevant expertise) along with various women's refuges involved in providing safe haven for victims (which may or may not develop much expertise depending on their size and resourcing).
- Where awareness is low or nonexistent, law enforcement and social services may deal unwittingly with symptoms – youth living on the streets, juvenile self-harm, homeless women who are irregular migrants, family violence or teenage pregnancy – without ever reaching the underlying problem of an actual or attempted forced marriage.

This is less surprising given the recent advent of specific legislation pertaining to forced marriage. Some had argued that the existing laws provided sufficient protection, and certainly systemic registration of births and marriages does put Australia well in front of many jurisdictions which are rather less comprehensive in these practices. While the legislation appears to have fulfilled an important function, the variety of circumstances revealed strongly suggests that much wrongful conduct would, if actioned, most likely be classified as symptomatic rather than be the root cause. That is, a teen runaway may be cared for without identifying a threat of forced marriage as the catalyst; family violence against a girl may be evaluated without detecting that the violence was intended to enforce a promised marriage arrangement; a homeless irregular migrant woman would be held responsible for her circumstances rather than considering the hypothesis that she has been trafficked or otherwise duped about her 'marriage'. Forced marriage related conduct can readily escape detection and/or specific response, and therefore ongoing educational work is crucial (for example, see Anti-Slavery Australia, 2015).

Thus, observation suggests, and work elsewhere seems to confirm, that forced marriage actually knows no national, cultural, religious or other boundaries (OHCHR, 2012; see also Burke, 2012; Tahirih Justice Centre, 2012), being practiced to some extent in all places at some time. Accordingly, three legal definitional problems are the core of understanding the nature of forced marriage, and these are discussed in the next section.

Unbundling the Problem

For the purposes of this discussion only, marriage is understood to be some form of enduring cohabitation arrangement between a male and a female person, usually but not necessarily involving sexual intercourse and/or child-bearing by the woman or girl. (For many purposes, the material here may apply equally to same sex relationships, and the author has certainly assisted with case work in such circumstances. They are left aside here only in the interests of brevity.)

Notwithstanding the involvement of religious hierarchies in many countries, regulation of marriage is primarily a function of government, and three key questions of law are involved in unbundling the variety of conduct that may be engaged in forced marriage. These questions are:

- *What is a marriage?* Does it include, for example, arrangements not 'solemnised' and duly registered in a fashion recognised by that jurisdiction as binding on the parties? What of 'common law' marriages or*de facto* relationships, binding betrothals, or children promised for future marriage unbeknown to them?
- *What is consent?* In that 'forced' necessary to imply a lack of consent, can a marriage arrangement be contracted without the express consent of the parties? If not, what constitutes, and what impedes, consent for these purposes? In particular, can a child (or any other group with limited legal capacity) provide consent within this definition at law?
- *What is a child?* Is age the only determinant of status as a child? If so, what is that age? Is there a parental right to impose consent?

On the definition of marriage (for an informative historical reflection, see Grossi, 2014, particularly the introductory chapters), relevant circumstances must be assessed regardless of their label. For example, forced marriage may be found in the form of a solemnised marriage registrable under prevailing law, as well as in a 'common law marriage', 'de facto relationship', 'cultural marriage' or 'religious marriage', arrangements for a 'promised bride' or a formal betrothal that is said to be irrevocable, and polygamous marriages whether or not registrable in that place. In fact, any definition of forced marriage needs to embrace all forms of 'marriage' considered as such by the parties and their community. This is particularly important when dealing with child marriages, as the frame of reference for the child/ren involved will typically be dictated by their family and community – the child may simply not know any alternative concepts. That is, it matters much less what the law says than what their family or community dictates (for example, see Sauti Yetu Centre for African Women and Families, 2012).

Thus, as a legal, policy and international relations phenomenon, perhaps the greatest difficulty in understanding the true breadth and depth of forced marriage is the challenge posed by the array of arrangements perpetrated without the full and free consent of both parties. In a little more detail, such arrangements include:

- forms of binding betrothal that the parties are not able to repudiate on their own behalf, such as those negotiated by parents without the consent of their child (of any age) – including, for example, the (largely lapsed) 'promised bride' practice of indigenous Australians (see McGlade, 2006) which appears to have a continuing counterpart in many Pacific nations;
- practices defended as 'traditional' or 'cultural' practices that, for example, are not based on consent of both parties, contravening international legal commitments under relevant conventions – including 'promised brides' as covered by ABC reportage (2003, 2005, 2006 and 2008), and also a range of continuing marriage by capture/bride kidnapping practices – for example, in central Asia (see Abdurasulov 2012; UN Women, 2013; Handrahan, 2004);
- forced child marriage, where at least one party does not consent to their marriage and is a child under prevailing law (which should include all those under 18 in states that have ratified the CRC, noting that

many have yet to implement necessary domestic legislation) – this includes situations in which parental consent effectively is imposed on the child, the fact of which might commonly be observed in so-called 'shotgun' marriages of adolescents in western countries;
- child marriages more generally – a common, albeit not universal, view is that since the child lacks the legal capacity to consent, it is always a forced marriage per se (for example, see Broughton, 2009), and a similar problem may apply to others not able to consent in their legal circumstances (eg. an appointed guardian imposes the marriage – see, for example, UK Government, 2013);
- similarly, marriage-like relationships where one party is a child, again given that a child by definition is a person legally incapable of consenting to that arrangement;
- servile marriage, being any arrangement that treats one of the parties to the 'marriage' as property, for example where a woman or girl is inherited, gifted, bought or sold into that relationship (as provided by the *International Convention to Suppress the Slavery Trade and Slavery 1926*);
- arrangements touted as 'marriage' but used to camouflage or provide superficial legitimacy to human trafficking (Lyneham, 2013), in particular by forcing the marriage of underage women to hide unlawful movement across national boundaries;
- state imposed marriage, such as coerced under the Khmer Rouge in Cambodia (depicted in the documentary film *Red Wedding* and topical in trials in the Extraordinary Chambers in the Courts of Cambodia);
- forced 'marriage' during conflict, including as prosecuted as a possible war crime in Sierra Leone, where the practice of kidnap and forced cohabitation of 'bush wives' has proven problematic to prosecute successfully (due in part to some official squeamishness about terming these arrangements 'marriages'); and
- forced marriage as a gender-related form of persecution in refugee law (see generally Dauvergne and Millbank, 2010).

During the action research on which this article draws, an example of each of these (and many of some) was related directly by a victim, or indirectly by case workers. These cases involved women and girls from a range of religious backgrounds including no religious connection at all, both with and without migrant community connections. Noteworthy as well, recent migrants were as likely to be from various island nations of the Pacific as from many dozens of countries in Asia, Africa, Europe, and the Americas.

In terms of consent, Millbank and Dauvergne (2010: 899) note that 'policymakers and others either completely conflate arranged and forced marriage or else pose (consensual) "arranged" and "forced" marriages as if they are diametric opposites'. In very general terms, an arranged marriage arises where the families of the spouses play a leading role in making the match, but both spouses have the right and ability to accept or refuse the arrangement. There is nothing inherently unlawful about contracting a marriage by this pathway – or, indeed, by contemporary means such as online marriage brokers. Consent has to be real for an arranged marriage to be valid and lawful, but the channel by which the match is made cannot, of itself, definitively indicate the veracity of consent – and should certainly not be employed as an indicator of such.

Conclusion

Forced marriage comprises an untidy bundle of wrongs lost at the intersection of international relations and state sovereignty on the one hand, and of human rights, war crimes and criminal accountability for a wide range of offences on the other. Responses are plagued by a mixture of necessarily complex (and consequently indistinct) legal conceptualisation, mixed with murky and often incomplete legislation/policy. Within and between national legislatures and those developing policy, essential knowledge of international law and/or consequent domestic legal obligations may well be patchy.

As the examples given here show, the essential concept of 'forced marriage' may be clear, but it has such a plethora of faces around the world that it so far escapes comprehensive definition and, accordingly, would benefit significantly from systematic scholarly attention.

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