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Abstract

Several international conventions, and domestic law in fifty-two countries, ban forced marriage, and Human Rights conventions insist that marriage should only be entered into with the “free and full consent” of both parties. Using rational choice theory, we show that a closer examination of this concept reveals the extremely “bounded” nature of consent to marriage, such that marriage may be a “choiceless choice”, even where such marriages would not – in law – be considered “forced”. We do not use this to argue that *all* marriages are forms of modern slavery, but to urge for caution, and further research into the ways in which the powers attaching to the rights of ownership are exercised by one person over another could be manifested in marriage (i.e. could be *de facto* slavery), and the extent to which forced marriage necessarily involves a loss of sexual autonomy and non-commercial labour extracted under menace of penalty “under the guise of marriage” (i.e. be a form of modern slavery as defined by the International Labour Organisation and Walk Free). We agree that this *might* be manifested in a lack of consent to the marriage in the initial ceremony. However, we argue that this focus misses a variety of other ways in which some marriages could rightly be considered forms of modern slavery either narrowly or broadly understood, or as forms of human trafficking.

1. Introduction

Forced marriage remains a significant problem around the world. The International Labour Organisation (ILO) and Walk Free (conservatively, as they admit) estimate that 15.4 million people globally were in a forced marriage on any given day in 2016.² Although this issue is often associated with countries in South Asia and Sub-Saharan Africa, the United Kingdom’s (UK’s) Forced Marriage Unit deals with, on average, 1,350 cases each year.³ In recognition of the scale and scope of this problem, the international community has committed itself to ending forced marriage by 2030 as target 5.3 of the Sustainable Development Goals.⁴

Article 16 of the Universal Declaration of Human Rights (UDHR) enshrines the right only to marry with one’s full and free consent.⁵ Thus, a forced marriage is generally defined as a marriage in which at least one spouse did not give their free and full consent to the union: in domestic law, often accompanied by the need to prove coercion, threat or abuse.⁶ The ILO and Walk Free note that this lack of consent, accompanied by coercion, leads to people being in situations where they have lost their sexual autonomy, and are forced to provide labour

¹ Helen McCabe and Hannah Baumeister’s time conducting research for, and writing, this article was funded as part of the AHRC Fellowship AH/S012788/1.

² International Labour Organization and Walk Free Foundation, “Global Estimates of Modern Slavery.”

³ Forced Marriage Unit, “Forced Marriage Unit Statistics.”

⁴ United Nations Department of Economic and Social Affairs, “THE 17 GOALS | Sustainable Development.”

⁵ See Article 16 in United Nations, Universal Declaration of Human Rights.

⁶ Foreign & Commonwealth Office and Foreign, Commonwealth & Development Office, “Forced Marriage.”

“under the guise of marriage”.⁷ That is, forced marriage is a form of forced labour occurring outside the commercial sector. There is a rather “thicker” definition of forced marriage than the “thin” one found in most domestic law, or usually extrapolated from the UDHR. However, it is related to the “thin” one: the ILO and Walk Free emphasise the exploitation which occurs *after* the initial ceremony in which at least one spouse was forced to consent to the marriage, but their definition relies on that same “thin” understanding of a forced marriage as non-consensual to explain how subsequent labour done within the marriage is “forced”.

In this article, we apply the idea of “choiceless choices”⁸ to show that many apparently “consensual” marriages may, in fact, fit under the “thin” definition of “forced marriage”, even where there is no overt coercion, because people (mainly women and girls⁹) are faced with a very limited option-set aside from marriage. However, instead of arguing that there are therefore many, many *more* than 40.3 million people living in modern slavery on any given day¹⁰, we argue that a more nuanced understanding of the lack of consent involved in “forced marriage” should lead us to be cautious regarding the link between forced marriage and modern slavery.

Rather than class *all* forced marriages as modern slavery, only those cases of forced marriage in which powers attaching to the right of ownership are being exercised in the initial marriage ceremony or in the conditions of the on-going married relationship should be classed as modern slavery, understood in a narrow sense as *de facto* slavery.¹¹ In other words, the category of ‘forced marriage’ does not always equate to modern slavery. More research is needed into understanding exactly how, when, and why, this would be so. Similarly, only those cases of forced marriage where someone *does* lose their sexual autonomy *and* is forced to provide non-commercial labour on menace of penalty “under the guise of” a marriage they cannot leave should be classed as modern slavery on the broader understanding of it as an “umbrella term” for egregious exploitation (as it is used by the ILO and Walk Free). More research is needed to determine how large a subset of all forced marriages this would be. Forced marriage remains a significant human rights violation which ought to be eradicated, but only *some* forms of forced marriage should be viewed as *also* being forms of modern slavery, either narrowly or broadly understood.

1. Legal Background: Forced Marriage and Consent.

The UDHR (1948) and the United Nations (UN) Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962) state that “marriage shall

⁷ International Labour Organization and Walk Free Foundation, “Global Estimates of Modern Slavery.”

⁸ Langer, “The Dilemma of Choice in the Death Camps.”

⁹ We recognise that men can be, and indeed are, subject to forced marriage. However, what data there is about this issue suggests it predominantly affects women. For instance, the ILO and Walk Free estimate that 84% of victims of forced marriage were female, and 16% male (International Labour Organization and Walk Free Foundation, “Global Estimates of Modern Slavery.” In the UK, the Forced Marriage Unit’s reported statistics show that 79.5% of victims in cases they handled between 2011 and 2019 were female, and 20.5% male (Forced Marriage Unit, “Forced Marriage Unit Statistics.” and McCabe et al., “Impact of Covid-19 on Calls to the Forced Marriage Unit: Analysis of 2020 Data.” For more on this topic, see for instance, Aijazi and Baines, “Relationality, Culpability and Consent in Wartime: Men’s Experiences of Forced Marriage”; Schulz, *Male Survivors of Wartime Sexual Violence*; Samad, “Forced Marriage among Men: An Unrecognized Problem.”

¹⁰ International Labour Organization and Walk Free Foundation, “Global Estimates of Modern Slavery.”

¹¹ That is, as slavery as defined in League of Nations, Slavery Convention; Research Network on the Legal Parameters of Slavery, “Bellagio-Harvard Guidelines On The Legal Parameters of Slavery.”

be entered into only with the free and full consent of the intending spouses”.¹² Relatedly, the UN Convention on the Elimination of All Forms of Discrimination against Women (1979) protects women’s “same right to freely choose a spouse and to enter into marriage only with their free and full consent” as men.¹³

So far, fifty-two countries have criminalised forced marriage.¹⁴ In several others, proving that a marriage was non-consensual for one or both spouses is grounds for an annulment.¹⁵ The ILO defines forced marriages as “situations in which persons, regardless of their age, have been forced to marry without their consent”, adding that this may be “through physical, emotional, or financial duress, deception by family members, the spouse, or others, or the use of force, threats, or severe pressure”.¹⁶ Several states take a similar view. For example, Article 26 of Afghanistan’s Law on Elimination of Violence Against Women defines forced marriage as a situation in which “a person gets a woman engaged or married who has reached the legal marriage age without her consent”. Article 293.1 of Canada’s Zero Tolerance for Barbaric Cultural Practices Act (2015) defines forced marriage as a situation in which a person “celebrates, aids or participates in a marriage rite or ceremony knowing that one of the persons being married is marrying against their will”. Article 270.7A of Australia’s Criminal Code Act defines forced marriage as a non-consensual conjugal association, and specifies that the lack of consent can be caused by coercion, threat or deception of the victim or a third party, or by incapacity for example due to the age of a spouse. The law in England and Wales highlights that violence, threat and coercion directed at the victim or another person invalidate consent to marriage.¹⁷ Article 58 of Belize’s Criminal Code (2000) also highlights that force or duress invalidates consent.

We are concerned that this view of “consent” to marriage is too narrow. Specifically, it fails to consider enough of the relevant background conditions. An autonomous, isolated, atomistic free agent is imagined entirely divorced from community, upbringing, or socio-economic realities. And their otherwise sovereign will is deemed to be over-ridden by another. In this article, we seek to critique this notion of who is being forced to consent to marriage, and the “consent” given to marriage, with implications for the link between forced marriage and modern slavery.

2. “Bounded Consent” and “Choiceless Choices”.

The idea that women – in particular – give their “free and full consent” to marriage has been criticised for at least two centuries, with feminists pointing out how little choice women actually have in the matter.¹⁸ We look to update this analysis through applying the insights of rational choice theory, which has interrogated a wide range of apparent “choices” to explore how people make decisions in extremely constrained circumstances, and to cast light on the bounded nature of many apparent acts of consent. Using these insights illuminates the

¹²Article 16 in United Nations, Universal Declaration of Human Rights; Articles 1 and 2 in United Nations, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.

¹³ Convention on the Elimination of All Forms of Discrimination against Women.

¹⁴ Walk Free Foundation, “Stacked Odds: How Lifelong Inequality Shapes Women and Girls’ Experience of Modern Slavery.”

¹⁵ See, for example, Article 26 Islamic Republic of Afghanistan Ministry of Justice, Law on the Elimination of Violence Against Women; Article 168 Family Code of Bolivia; Article 100 Ghana Criminal Code; Article 68 Malaysia Law reform (Marriage and Divorce) Act 1976; Article 12 UK Matrimonial Causes Act (as amended).

¹⁶ International Labour Organization and Walk Free Foundation, “Global Estimates of Modern Slavery.”

¹⁷ Article 121 UK Anti-social Behaviour, Crime and Policing Act 2014.

¹⁸ Mill, Jacobs, and Payne, *The Complete Works of Harriet Taylor Mill*.

“bounded” nature of consent to many marriages, and casts doubt on the question of how many could be said to have been entered into with the “full and free consent” of both parties.

2.1 Rational Choice Theory.

Firstly, then, a brief exposition of rational choice theory. In rational choice theory, “rational” thinking is taken to mean that people weigh the costs and benefits of their decisions, and act accordingly (choosing the least-costly and/or most-beneficial outcome). In this context “rational” is not a normative word – that is, it is not a value-judgement on these choices. It is merely a process for understanding how choices came to be made.

Rational choice theory can be applied to a plethora of decision-making processes. It is particularly of interest for helping explain apparently “irrational” or “bad” choices as being, in fact, entirely rational given the constrained circumstances in which actors found themselves. For instance, Cha et al (2016) show that overweight and obese young people “choose unhealthy behaviours due to inaccurate information and insufficient competence to practice healthy lifestyles rather than because of laziness or being irrational”.¹⁹

2.2 “Bounded Rationality”.

The concept of “bounded rationality” attempts to explain the constrained nature of the cost-benefit analysis. If someone perceives only limited options, their cost-benefit analysis is consequently limited to those options. When considering criminal decision-making, for instance, those who perceive themselves to have limited options may consider criminal behaviour as their best option to meet their goals.²⁰ For example, individuals who have a criminal record, cannot secure employment or access housing, and needs to support their family, may rationally make the choice to sell drugs. However, that decision is bounded based on the (limited) options those individuals have available to them. Similarly, individuals who choose to prostitute themselves may also perceive limited options in terms of employment and providing basic needs for themselves and family members.²¹ This point is reinforced in the Coalition Against Trafficking in Women (CATW) manifesto which states “Women in prostitution do not wake up one day and “choose” to be prostitutes. It is chosen for us by poverty, past sexual abuse, the pimps who take advantage of our vulnerabilities, and the men who buy us”.²²

2.3 “Choiceless Choices”.

In its most extreme form, bounded rationality can result in individuals making “choiceless choices”. The term “choiceless choices” has been used to describe the plight of Jews who were given privileges, in the form of material items and other benefits, in exchange for their services to the Nazis during World War II.²³ It has also been employed in regard to the decision-making of criminals (including human traffickers).²⁴

¹⁹ Cha et al., “Understanding How Overweight and Obese Emerging Adults Make Lifestyle Choices.”

²⁰ E.g., Felson, “Violence, Crime, and Violent Crime”; Jacobs and Wright, “Bounded Rationality, Retaliation, and the Spread of Urban Violence”; Newman, “Policy Thoughts on Bounded Rationality of Identity Thieves”; Taylor, “On the Edge of Reason? Armed Robbery, Affective Transgression, and Bounded Rationality.”

²¹ E.g., Capaul, “An Examination of Prostitution and Sex Trafficking Laws within the United States”; Kennedy et al., “Routes of Recruitment: Pimps’ Techniques and Other Circumstances That Lead to Street Prostitution.”

²² O’Connor and Healy, “The Links between Prostitution and Sex Trafficking: A Briefing Handbook.”

²³ Langer, “The Dilemma of Choice in the Death Camps.”

²⁴ For instance, Cornish and Clarke, “The Reasoning Criminal: Rational Choice Perspectives on Offending”; Giannini and Di Filippo, “The Trafficking In Human Beings Prevention: A Criminological Perspective: Part Two.”

There has been some controversy, however, over the term “choiceless choices”. The concept seems to inherently remove agency for the decision-maker. Expanding on the sex work example, sex worker advocates passionately argue that, even with limited options, to assume all sex work is forced takes away the agency of the sex worker.²⁵ Relatedly, Wertheimer argues that people facing undesirable alternatives are still capable of making a “rational choice”, with what he calls “constrained volition”.²⁶ In other words, even with bounded rationality, agency still exists. This said, identifying agency can be very difficult, and appearances of agency may be illusionary. This is well-illustrated by Batsyukova, who describes the inherently exploitive nature of prostitution. Although an individual engaging in prostitution may be able to leave their employment, they often have limited control over who they serve or the conditions of the service. Frequent violence against prostitutes is well-documented.²⁷ Therefore, even when there is an appearance of agency (real or illusionary), clear “constraints” on volition ought also to be seen as forms of coercion.²⁸

2.4. “Bounded Rationality” and “Choiceless Choices” in the Context of Marriage.

We agree that people exercise agency, even in cases of bounded rationality and “choiceless choices”. And, indeed, a strength of rational choice theory is that it explains how people were, in fact, making rational decisions based on cost-benefit analyses, even where their decisions can appear (to an outside observer, unaware of the constraints under which they were operating) sub-optimal, and even irrational. But we think this agency is increasingly constrained as the “bounds” of their option sets are drawn ever tighter, until they are faced with only “choiceless choices”. We also argue that this limiting of people’s option-sets is a form of coercion. In the context of marriage, this might be done through overt threat of violence, actual violence, abuse or deception, as noted in much domestic legislation on forced marriage. But it may also be done in other ways, not captured by legislation. Moreover, we argue, as so many people’s (mainly women’s and girls’) option-sets are severely constrained when it comes to marriage, understanding the notion of bounded rationality and choiceless choices undermines the notion that many people give their “free and full” consent to marriage. Although both parties may appear to consent, emotional and socio-cultural expectations often play a large role in the “decision” to marry, and are difficult to discern.²⁹ In this way, many marriages (even ones that would not count as “forced” as understood in domestic law or international conventions), though a rational choice, may be the outcome of severely bounded option-sets, and may even be “choiceless choices”. People (mainly women and girls) in these situations are still exercising agency, and are not merely passive “victims” of patriarchal social structures. But this does not, in itself, mean that their fundamental human rights are not being violated.

The idea of “choiceless choices” and bounded consent with regard to forced marriage has already been explored in the context of conflict-related forced marriages. Like women in war more generally, forced wives can be seen purely as passive “victims”.³⁰ However, as Chris Coulter and others have highlighted, women in and at war, including forced wives, use their

²⁵ Deady, “The Girl next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification within the Prostitution Industry.”

²⁶ Wertheimer, *Coercion*.

²⁷ Batsyukova, “Prostitution and Human Trafficking for Sexual Exploitation.”

²⁸ Anitha and Gill, “Coercion, Consent and the Forced Marriage Debate in the UK.”

²⁹ Sowe, “From an Emic Perspective: Exploring Consent in Forced Marriage Law”; Anitha and Gill, “Coercion, Consent and the Forced Marriage Debate in the UK.”

³⁰ Aoláin et al., *The Oxford Handbook of Gender and Conflict*; O’Reilly, *Gendered Agency in War and Peace: Gender Justice and Women’s Activism in Post-Conflict Bosnia-Herzegovina*.

agency to make choiceless decisions.³¹ For example, in Sierra Leone, some women chose to become combatants to end continuous sexual abuse and domestic slavery.³² This decision was bounded by circumstances. Most of these women had been forced to join fighting groups, often by kidnapping or as a result of their homes and districts being overrun, taken-over, and destroyed, by the fighting groups of which they were then “part”. Some women were taught to fight in order to protect themselves and the camp in case of an attack, or to help their forced husbands in combat. For some it was a rational route to accessing better food and loot (and greater chances of escape). Others were forced to use combat skills when sent to the front line as a form of punishment. Arguably, some forced wives see their participation in direct combat as a means of escaping their “victim” status and exercising agency – but this is a “choiceless choice”.³³ Relatedly, in Namibia’s struggle for independence, women are recorded as seeking to become pregnant in order to avoid service on the frontline.³⁴ More broadly, it has been argued that forced wives in Sierra Leone and Uganda reproduced their socially-constructed “female” roles as wives and mothers as a way of surviving.³⁵ Although we should avoid generalising experiences, the testimony of one ex-forced wife in Uganda shows how marriage was a rational choice for unmarried girls abducted by the Lord’s Resistance Army, as it made them less likely to be subjected to extramarital sexual violence (and related punishments for sex outside marriage), and gave increased access to resources.³⁶

When understanding the experiences of forced wives and their role in conflict, it is important to note both their agency and that this was exercised in extremely limited and constrained circumstances. Though we should not see them as necessarily “passive”, the freedom of their choices must be questioned.³⁷

In at least some conflict situations, the life of forced wives mirrored the peace-time roles of wives: they withdrew from school, got married early, bore children, and performed domestic tasks. Indeed, defence counsel in some international criminal cases involving charges of forced marriage have argued (though unsuccessfully), that forced marriages in conflict situations were no different to “normal” marriages in the relevant communities (and thus not a crime).³⁸

We agree with the judges of the Special Court for Sierra Leone, that similarities between the experience of forced wives in conflict situations, and “unforced” wives in the same communities in peacetime, were no defence for forcing these women into marriage. That this defence was offered in the first place highlights the limited option set faced by many women when it comes to marriage, even in peacetime. We note that this is not unique to the specific

³¹ Coulter, *Bush Wives and Girl Soldiers*; Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*; Mazurana et al., “Girls in Fighting Forces and Groups: Their Recruitment, Participation, Demobilization, and Reintegration”; Utas, “West-African Warscapes: Victimcy, Girlfriending, Soldiering: Tactic Agency in a Young Woman’s Social Navigation of the Liberian War Zone.”

³² Coulter, *Bush Wives and Girl Soldiers*.

³³ Coulter.

³⁴ Shikola, “We Left Our Shoes Behind”; Turshen, “Women’s War Stories.”

³⁵ Annan et al., “Civil War, Reintegration, and Gender in Northern Uganda”; Baines and Stewart, “‘I Cannot Accept What I Have Not Done’: Storytelling, Gender and Transitional Justice”; Van Gog, *Coming Back from the Bush Gender, Youth and Reintegration in Northern Sierra Leone*.

³⁶ Baines and Stewart, “‘I Cannot Accept What I Have Not Done’: Storytelling, Gender and Transitional Justice.”

³⁷ Coulter, *Bush Wives and Girl Soldiers*.

³⁸ *Al Hassan; Case 002; AFRC Case*.

communities involved in this particular conflict. Indeed, we argue that it is true for people (mainly women and girls) across the world.

For instance, see this analysis by Anitha and Gill in the UK context. They argue that:

“consent and coercion in relation to marriage can be better understood as two ends of a continuum, between which lie degrees of socio-cultural expectation, control, persuasion, pressure, threat and force. Women who face these constraints exercise their agency in complex and contradictory ways that are not always recognised by the existing ... initiatives designed to tackle [forced marriage]”.³⁹

They continue: “little attention is given to the many ways in which all women located within a matrix of structural inequalities can face social expectations, pressure and constraint in matters of marriage”.⁴⁰

We emphasise this analysis of the UK context, because we think it is important to note that not only forced marriage, but significantly bounded option sets, affect women in the Global North as well as the Global South. Including its eradication in the Sustainable Development Goals may have given weight to a stereotypical view that forced marriage only happens in “un-developed” countries, but this is far from being the case. Instead, as Anitha and Gill rightly argue, women faced significantly bounded option sets around wherever there is a “matrix of structural inequalities” leading to them facing particular “social expectations” and experiencing “pressure and constraint” – which, we argue, is everywhere in the world.

Anitha and Gill note that, prior to forced marriage being criminalised in the UK, courts focussed on what was called the “choice-prong”.⁴¹ This is “a bi-conditional proposal whereby the coerced person is presented with two choices: an unwanted marriage or violence to her person”.⁴² “Theoretically”, they note, “the petitioner still has a choice, but the choice is between two unpalatable alternatives, and the petitioner has to give up one right – to a free choice in marriage – in order to protect another – her right to safety and/or liberty”.⁴³ On our account, these women were faced with “choiceless choices”.

Anitha and Gill are right to note that the emphasis on “explicit threats” means that some other “coercive forces often go undetected”. In particular, the courts’ idea of a “free” agent – being a “gender-less, race-less being”, “predicated on [many judges’ own] ... experiences of a white man” – means that many women’s real experiences of coercion are not understood or captured.⁴⁴ As they also rightly note “[f]eminists have long recognised the variety of pressures on women to marry, including poverty, pregnancy and social norms and expectations ... underpinned by ... patriarchal structures”.⁴⁵ (For instance, women grow up knowing that they will be sanctioned if they refuse to go along with a marriage organised, or sanctioned, by their parents or families, or they grow up internalising the idea that they will

³⁹ Anitha and Gill, “Coercion, Consent and the Forced Marriage Debate in the UK.”, 165.

⁴⁰ *Ibid.*

⁴¹ Wertheimer 1987, cited Anitha and Gill, “Coercion, Consent and the Forced Marriage Debate in the UK,” 165.

⁴² Anitha and Gill, “Coercion, Consent and the Forced Marriage Debate in the UK.”, 165.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* Some examples include Carole Pateman (1988), Susan Okin (1989), and early feminists including Harriet Taylor Mill (1998), and John Stuart Mill (1984).

bring “shame” on their families if they are pregnant before they are married.⁴⁶) Anitha and Gill also rightly note that “[w]omen’s class, education and employment status, along with generational differences in outlook, differences in migration routes ... the woman’s position within community networks ..., the perception and reality of racism, and access to appropriate support and services, all intersect to shape women’s agency in the face of these constraints”.⁴⁷ Relatedly, Crenshaw (1991) and Hill (2000) rightly speak of a “matrix of domination” faced by Black women and women of colour.⁴⁸

These constraints are faced by other minoritised communities, and – in several cases – also by majority-ethnic women in many countries around the world. That is, women, regardless of ethnic background (and to a great extent socio-economic background), may face pressure to marry if pregnant; from financial constraints arising from patriarchal tax and employment rules; from perceiving themselves to be a financial burden on their families; and from the general weight of social expectation. Feminist theorists have also written powerfully about how women internalise these expectations, and see their own worth as intrinsically linked to their marital status, which also puts constraints on the “free” nature of the choice to marry.⁴⁹ These factors are exacerbated where women have many fewer economically-viable options for survival except marrying, particularly where women are less likely (for a range of reasons) to be able to find work outside the home (and can only have their own “home” through marriage); where women’s right to own property is limited; and/or where their opportunities for education and employment are already limited, leaving marriage as their sole option.

Relatedly, many (again, especially and predominantly women and girls) know that marriage is their only route to social respect and the maintenance of physical safety outside the home (even if they are at risk of violence within the home). Having children may also be people’s most rational choice when considering their care in old(er) age: and for many, having children involves being married. There are also many other reasons for wanting children, and for many this desire can only be fulfilled through marriage (where unmarried parents, and/or single parenting is not socially acceptable; or where it is legally impossible to adopt without being married).

Similarly, children (and particularly girls) may be brought up to see themselves as having a duty to obey their parents, including regarding the choice of their spouse and the timing of their marriage. This is not to say that *all* arranged marriages are either “choiceless choices” or “forced”, but to highlight that consent is not always an individual issue, but something constructed and given by communities.

In many cases, then, even where overt force (of a physical, psychological, financial or emotional kind) is not in evidence, women may face severely bounded option-sets, and even a “choiceless choice”, when it comes to marriage. Rational choice theory can show why women still “choose” to marry in these situations (the alternative is much worse), but this does not mean their consent was “free”. These cases, too, should be seen as “forced” marriages, given the “thin” definition of forced marriages in international and Human Rights

⁴⁶ Bhopal, “South Asian Women and Arranged Marriages in East London”; also see Gangoli, Razak, and McCarry, *Forced Marriage and Domestic Violence among South Asian Communities in North East England*; Wilson, *Dreams, Questions, Struggles*. The examples are from British South Asian communities, but have a much broader application

⁴⁷ Anitha and Gill, “Coercion, Consent and the Forced Marriage Debate in the UK.” Their focus is on the UK context, but their arguments have wider applicability.

⁴⁸ Collins, *Black Feminist Thought*; Crenshaw, “Mapping the Margins.”

⁴⁹ Finlay and Clarke, “A Marriage of Inconvenience?” For an early example, see Mill.

conventions, which is *not* that “force” was used to gain (apparent) consent, but that at least one of the parties did not give their free consent.

Indeed, it also shows that most definitions in domestic law, which insist on proof of physical, psychological, emotional and/or financial, are too narrow to really capture the varied circumstances in which people (generally, but not exclusively women and girls) “consent” to a marriage without that consent being really “free”. Women and girls (in particular) face option-sets which are “bounded” by patriarchal social structures, male violence, and gendered social expectations (including those which women themselves internalise). An intersectional lens shows that this produces particularly limited option-sets when women are young; are from minoritised ethnic communities; are of low socio-economic status; have little physical or social capital; have insecure immigration status; are disabled; and/or identify as LGBTQI+.

Marriage, then, may be the most rational choice for many women. However, even where women do not experience overt physical, psychological, emotional or financial abuse to consent to a specific marriage, they operate within bounded option sets which may become so limited that marriage becomes the least-bad option, and it may even, in some cases, be a “choiceless choice”. Although the marriage is a rational choice, and an exercise of agency, recognition of the background limitations should make us challenge whether both spouses really gave their “full and free” consent to it.

This expansion of what constitutes a forced marriage has implications for the relationship between forced marriage and modern slavery, which we will turn to in the next section.

3. Legal Background: Forced Marriage and Modern Slavery

In 2012, the report of the United Nations Special Rapporteur on Contemporary forms of Slavery, including its Causes and Consequences included a section on forced marriage arguing that “[u]nder the [1956] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, all forms of forced marriage are defined as practices similar to slavery, which reduce a spouse to a person over whom any or all of the power attaching to the right of ownership are exercised”.⁵⁰ As already noted, the ILO and Walk Free included forced marriage in their global estimates of slavery in 2017.⁵¹ Four countries currently treat forced marriage as a form of modern slavery in their domestic legislation⁵², with some other states treating it as a form of exploitation for the purpose of which people can be trafficked⁵³.

Despite these connections being made by states and intergovernmental bodies (or their representatives), the link between forced marriage and modern slavery is not obvious. As noted above, the human rights-based “test” of a forced marriage is a lack of consent in the initial ceremony. The “test” of slavery (in line with the 1926 Slavery Convention and the

⁵⁰ Shahinian and Slavery, “Report of the Special Rapporteur on Contemporary Forms of Slavery, Including Its Causes and Consequences, Gulnara Shahinian.”

⁵¹ International Labour Organization and Walk Free Foundation, “Global Estimates of Modern Slavery.”

⁵² Article 167 The Criminal Code of the Republic of Moldova; Article 270.7AAustralia Criminal Code Act.; Article 98(1)(g)New Zealand, Crimes Act.; Article 257(1)(d)(i)-(ii)Nauru, Crimes Act..

⁵³ See for example Article 2-3Bahamas, Trafficking in Persons (Prevention and Suppression) Act.; Article 2-3, 6 Bangladesh, Human Trafficking Deterrence and Suppression Act.; Article 612, 615-618Micronesia, Revised Code.; Article 149Ukraine, Criminal Code.

Bellagio-Harvard Guidelines on the Legal Parameters of Slavery) is the exercise of powers attaching to the rights of ownership by one person over another, which is quite different.⁵⁴

That forced marriage *did* involve the exercise of the powers attaching to property ownership in certain situations was determined in the first forced marriage case that came before the Special Court for Sierra Leone. The Court found that the act of calling someone a “wife” and “marrying” her could be taken as an indication of an act of enslavement, with her new “husband” claiming (and asserting against others) powers attaching to the rights of ownership over the woman in question.⁵⁵ In peacetime situations (in which the vast majority of forced marriages occur), we might arguably see something similar, with parents and guardians “giving” their offspring (both under and over the age of majority in their country) in marriage as if they were property. However, that the powers attaching to property-ownership were being exercised would have to be proved to show that the people being forced to marry *were* being treated as property.

The Bellagio-Harvard Guidelines also make this plain concerning the three types of marriage-related “institution or practice similar to slavery” detailed in the 1956 Supplementary Convention: to be actual slavery, and not “similar to slavery”, the exercise of powers attaching to property-ownership must be evident.⁵⁶ The three practices included in the 1956 Supplementary Convention are: the sale/purchase of women for the purpose of marriage “without the right to refuse”; the transfer of wives by their husband, his family or clan “for value received”; and the inheritance of widows.⁵⁷

But not all forced marriages fall into these categories. For instance, some men are forced to marry, and they are not covered by this Convention. Similarly, many forced marriages involving women and girls do not involve the bride’s family receiving anything of value from the groom or his family – and even where they *do*, it is not clear that this necessarily amounts to “payment” which would imply the bride is being treated as property. Moreover, we argue that the lack of consent is less important to these practices being “similar to slavery” than the fact that brides and/or wives are bought/sold, transferred and/or inherited: i.e. that something similar to treating them like property happens in each of these practices.

It is true that, in order to “bring ... to an end” these “institutions and practices”, Article 2 of the Supplementary Convention calls on states to “undertake to prescribe, where appropriate, suitable minimum ages of marriage, to encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages”.⁵⁸ In doing so, Article 2 certainly emphasises that consent to marriage is important. The idea behind minimum ages of marriage is that there is an age at which people become “competent” to consent to marriage. The Supplementary Convention clearly encourages the “consent of both parties” being “freely expressed”, and “the presence of a competent civil or religious authority” might be another way of ensuring that this *was* properly free and full consent, as ascertained by an impartial, and expert, witness. The same might be said about the registration of marriages, though this also protects the observance of minimum ages of marriage.

⁵⁴ See Research Network on the Legal Parameters of Slavery, “Bellagio-Harvard Guidelines On The Legal Parameters of Slavery.”

⁵⁵ *AFRC Case*.

⁵⁶ See Research Network on the Legal Parameters of Slavery, “Bellagio-Harvard Guidelines On The Legal Parameters of Slavery.”

⁵⁷ United Nations Economic and Social Council, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

⁵⁸ *Ibid*.

However, the Supplementary Convention is not saying that *all* forced (or non-consensual) marriages are institutions or practices similar slavery, or slavery itself. Instead, it is saying that in making it harder to marry people without their consent, states will be acting to “bring ... to an end” these three specific institutions and practices similar to slavery. That is, these institutions and practices are three sub-sets of *all* non-consensual marriages, specifically those in which a “price” is given, or “value” exchanged, by one party to another “for” a bride/wife, or where she is treated like property in that she can be “inherited”. *This* is the key link to slavery, and why the institution or practice is “similar to slavery”.

Indeed, that people are – generally – expected to give even coerced “consent” to a marriage, and that people go to great lengths to force people to “consent”, stands in some tension with the idea that those being forced are being treated “as property”. This is because one of the attributes of property is that “consent” is an entirely irrelevant notion. In buying/selling a piece of property, the consent of both purchaser and vendor are necessary, but not that of the thing being sold. Indeed, this is one of the elements of chattel slavery that people found (and still find) so inhuman: because enslaved people were (legally) property, they were sold with no reference to their own wishes or consent.⁵⁹ It may, therefore, be important that the Supplementary Convention uses the phrase “without a right to refuse” rather than talking about being forced to consent, and does not mention consent (or the lack of it) at all when considering the transfer of wives, or the inheritance of widows. Property also “has no right to refuse”, because such a “right” would not be appropriate: property cannot have rights.

The ILO and Walk Free use “modern slavery” as more of an “umbrella” term to cover a wide range of exploitative practices, and describe forced marriage as a form of forced non-commercial labour which is accompanied by a loss of sexual autonomy “under the guise of marriage”.⁶⁰ The lack of consent to the marriage (as already noted) is thereby necessarily connected to the “forced” nature of the labour, as forced labour is defined as “all work or service which is exacted from any person under the threat of penalty *and for which the person has not offered himself or herself voluntarily*” (our italics, for emphasis).⁶¹ However, there is *more* than just this lack of consent making forced marriage, on this account, a form of modern slavery – there is the loss of sexual autonomy, and the extraction of labour under menace of penalty, and it is *these*, arguably, which make forced marriage an egregious form of exploitation, on a par with forced labour, debt bondage, human trafficking and other “situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, deception, and/or abuse of power”.⁶²

Again, not all forced marriages necessarily involve this loss of sexual autonomy, or this extraction of forced labour under menace of penalty. For example, in the main, men are not expected to perform household labour as part of their role as “husbands”, and men who are forced to marry may be less likely to also experience forced labour.⁶³ In the UK, men with learning disabilities are sometimes forced to marry in order to secure them long-term care. In this case, they are not subject to forced labour. And “force” here refers to their inability to

⁵⁹ See, for instance, Crawford, “The Slave Family: A View from the Slave Narratives”; Williams, *Help Me to Find My People*.

⁶⁰ International Labour Organization and Walk Free Foundation, “Global Estimates of Modern Slavery.”, 9.

⁶¹ International Labour Organization, Forced Labour Convention. See also Article 1(3) International Labour Organization, Protocol of 2014 to the Forced Labour Convention.

⁶² International Labour Organization and Walk Free Foundation, “Global Estimates of Modern Slavery.”, 9.

⁶³ Though there are exceptions to this – for instance, accounts of men being trafficked to Hong Kong for the purpose of marriage where they were expected to perform all the household labour – Yu, “Hong Kong ‘Slave Husband’ from Pakistan Warns of Marriage Migration Dangers after Six Difficult Years in City.”

give consent, rather than that any particular coercion was used to make them agree. Similarly, there are examples of children being married and not expected to live together “as husband and wife”. In those situations, neither, therefore, experienced a loss of sexual autonomy of the kind being invoked by the ILO and Walk Free, nor forced labour “under the guise of marriage”. However, their future options regarding sexual partners had been closed off through the marriage.⁶⁴

Forced marriage as a form of human trafficking

Finally, as “modern slavery” can be understood as synonymous with “human trafficking”, the link between forced marriage and human trafficking is also of interest. The Palermo Protocol defines trafficking in persons as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”. It adds, “[t]he consent of a victim of trafficking in persons to the exploitation ... shall be irrelevant where any of the[se] means ... have been used”.⁶⁵ Forced marriage is not explicitly listed as one of the types of exploitation which “at a minimum” are included in Article 3 of the Protocol. These are: “the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.⁶⁶

However, even without forced marriage being explicitly included, we can see that at least some forced marriages might count as a form of exploitation for the purpose of which people can be trafficked. That is, people might be “transferred” (with or without “the giving or receiving of payments or benefits”) from one person who had “control” over them (e.g. a parent or guardian) to another (e.g. a husband) via their ostensible consent to a marriage. Here, consent was extracted “by means of the threat or use of force or other forms of coercion”. This includes “abduction”, “fraud”, “deception” and/or “the abuse of power or of a position of vulnerability”, “for the purpose of” marriage. Marriage here generally includes labour which may be forced; sexual exploitation; and potentially domestic servitude. Indeed, the Palermo Protocol also helps us understand as trafficking in persons situations in which one person (A) deceives another (B), when marrying them with the *intention* of exploiting them.

4. Implications.

We have argued that we should see as “forced” marriages all those to which at least one party cannot be said to have given their free and full consent. We have also argued that we should take a more nuanced approach to understanding what “full and free” consent would look like, recognising that a number of ostensibly “consensual” marriages may represent (in particular, but not solely) women and girls making a rational choice in extremely limited circumstances (indeed, perhaps even being a “choiceless choice”). Following this, if *all* forced marriages are treated as forms of modern slavery, there will be far more than the already admittedly-conservative estimate of 15.4 million people living in forced marriages in any given year.⁶⁷

⁶⁴ Antislavery Usable Past, “Narendra Chamar.”

⁶⁵ United Nations General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime.

⁶⁶ *Ibid.* One might think that forced marriage is included under “practices similar to slavery”, but we challenge the idea that *all* forced marriages are covered by that term in the 1956 Supplementary Convention.

⁶⁷ International Labour Organization and Walk Free Foundation, “Global Estimates of Modern Slavery”, 10.

Moreover, to end forced marriage, states would have to do much more than that which they are obliged to do by the 1956 Supplementary Convention (i.e. set a minimum age of marriage, register marriages, and ensure people could give their consent to marry in front of an official). That is, although a minimum age for marriage would help protect under-age people (primarily, though not solely, girls) from being forced to marry before they reached whatever was set as the age of majority in their country, it would not help them overcome, or escape (or, in itself, dismantle) coercive (generally patriarchal) structures which leave them with no other viable options but to marry on, or shortly after reaching their age of majority (whatever that might be).⁶⁸ On this point, states would also have to do more than ensure they meet Sustainable Development Target 5.3.1.⁶⁹

Similarly, states would need to do more than demand that marriages are registered (as coerced marriages can be registered) – and even the stipulation that states should “encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority”⁷⁰ would do little. This is for three reasons. Firstly, states are only asked to “encourage”, not “mandate”, this, so a number of marriages (including, potentially, forced marriages) may not happen “in the presence of a competent civil or religious authority”. Second, the judgement of such “competent civil or religious authorit[ies]” might also be shaped and constrained by the same structural forces which constrain women and render their option-set so limited. That is, they might not recognise the circumstances with which they are being faced as “coercive”. This is linked to Anitha and Gill’s argument about judges in the UK, but is also evident in decisions whereby judges, for instance, even when faced with the evident non-consent and distress of the woman involved, rule that women should marry their rapists.⁷¹ Much seems to hang on what is meant by “competent”. Thirdly, given the background of coercion, it is not clear that women (or men) would necessarily feel safe in revealing their lack of consent to a “competent civil or religious authority” (who is most likely a stranger). *Not* telling the “competent ... authority” might well be women’s most rational option in a very constrained set of circumstances – this does not guarantee that her consent is “freely given”.

However, the idea of “bounded consent”, and “choiceless choices”, and the illumination of the issue of forced marriage provided by rational choice theory serves to further cast doubt on the idea that *all* forced marriages ought to be considered forms of modern slavery. Women’s agency is often severely constrained by patriarchal social structures when it comes to the question of marriage, but this is not the same as treatment like property. In patriarchal societies,⁷² women use their agency to navigate a more-or-less limited set of options (depending on a range of other intersecting factors including race, age, disability, health, socio-economic status, levels of – and opportunities for – education, employment status, and immigration status among many others). Though in doing so they do exercise agency, and make rational choices, this does not make them “free” agents who are not being coerced,

⁶⁸ This is not to undermine the great gain it would, in fact, be if children could not marry, and the protection it would afford children who are pressured to marry. It is only to point out that this would not protect *all* women (or men) from forced marriages *and* that, in itself, it would do little to prevent women (and men) from being pressured to marry as soon as, or shortly after, achieving the age of majority.

⁶⁹ United Nations, “Sustainable Development Goals 5 Gender Equality.” The SDG target indicator measures the “proportion of women aged 20-24 years who were married or in a union before age 15 and before 18”.

⁷⁰ *Ibid.*

⁷¹ E.g. the recent case in India: France-Press, “India’s Top Judge Tells Accused Rapist to Marry Victim to Avoid Jail.”

⁷² By which we mean basically all societies.

particularly in cases where their option-sets are *so* limited, we should class them as facing “choiceless choices”, because the limitation of option-sets is itself a form of coercion.

In itself, however, a lack of choices is not the same as slavery, which should be identified by one person exercising the powers attaching to the right of property over another person.⁷³ It is true that when one person *is* enslaved by another, their option sets are very limited, but this is not the defining feature of slavery. As also noted, aside from when we consider enslavement (and, indeed, one of the moral arguments against enslaving *people*), it is something of a category error to even speak of property and agency, or property and “choices”. That enslaved people *do* have, and exercise, agency (within limited option-sets), and have done so throughout history, is a sign that they ought not to be being treated as property, *not* a sign that property *can* (rightly) have agency.

There are certainly cases where “marrying” someone constitutes an act of enslaving them, as noted by the Special Court for Sierra Leone and the International Criminal Court.⁷⁴ This might happen in peacetime as well as in conflict situations. There may also be cases which fit the descriptions in the 1956 Supplementary Convention – i.e. where women, without their consent, are given in marriage on receipt of some form of payment; where women are transferred once married for “value received”; and/or where widows are “inherited” (like property) on the death of their husbands.⁷⁵ As noted, the key here is that payment, transfer, and/or “inheritance” occur – i.e. that women are being treated *as property* in the context of marriage. A lack of consent is deliberately mentioned in the first case, but not the other two. This adds to our contention that it is not so much a lack of consent which is important when determining whether marriages are forms of slavery, but whether or not women are being treated as property. And we do not think that *just by virtue* of their consent being coerced, this can be said to count as treatment as property.

Similarly, when it comes to the definition of forced marriage offered by the ILO and Walk Free, a lack of consent to the labour being enforced under menace of penalty “under the guise of marriage” is evidently key to recognising that labour as “forced”, and thus of seeing forced marriages as a form of modern slavery broadly conceived. However, as noted, not all forced marriages result in a loss of sexual autonomy and non-commercial labour being extracted under menace of penalty. Moreover, some marriages which were initially consensual may also end up involving a loss of sexual autonomy and labour being extracted under menace of penalty, if one party decides they no longer wish to be married, but have no means of leaving. Yet these marriages do not count under the human-rights based, “thin”, definition of a “forced marriage”.

5. Conclusion

We should (continue to) recognise forced marriage as a serious human rights violation, crime and inhumane act, both in conflict situations and in times of peace, and work as a global community to end this practice by 2030. We should further recognise that many women and girls (and some men and boys) face extremely limited option-sets such that their choice to marry, though explainable by rational choice theory, is “bounded” and may even be a “choiceless choice”; that they are therefore coerced even if there is no evident use of

⁷³ See Research Network on the Legal Parameters of Slavery, “Bellagio-Harvard Guidelines On The Legal Parameters of Slavery.”

⁷⁴ *AFRC Case*; Prosecutor v Dominic Ongwen (Decision on the Confirmation of Charges Against Dominic Ongwen); Prosecutor v. Charles Ghankay Taylor (Judgement Summary).

⁷⁵ United Nations Economic and Social Council, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

physical, psychological, emotional and/or financial abuse; and that, their consent is not “free”. Thus, these, too, are “forced marriages”.

We argue, however, that we should not see *all* forced marriages as forms of modern slavery. (In some countries, of course, this is how they are seen in law, in which cases, in those jurisdictions, forced marriages simply are forms of modern slavery and/or human trafficking.) We suggest that marriages which are rightly to be considered forms of *de facto* slavery are those in which the powers attaching to the right of property are exercised by one person over another. We also recognise that marriages which involve a loss of sexual autonomy and the extraction of non-consensual labour under menace of penalty ought to be considered forms of modern slavery, where that term is used more broadly as an “umbrella” for various egregious practices, as by the ILO and Walk Free.

Importantly, these might be marriages into which people were forced by use of physical, psychological, emotional and/or financial means of coercion. We also argue that they might be marriages which presented themselves as the “best” (and perhaps only) option in a very limited option-set, marriages which ought *also* to be seen as “forced”. But they might not be. Marriages which were entered into consensually may turn out to involve forced labour, domestic servitude, a loss of sexual autonomy, and other institutions and practices similar to slavery. That the spouse consented to the initial ceremony would not diminish the exploitation they were subjected to (as with trafficking in persons).

That is, the way the “thin”, human-rights based definition of forced marriage is interpreted in domestic law misses the ways in which social structures limit people’s (mainly women’s and girls’) option-sets and coerce them into ostensibly consenting to marriage. Both in its non-expanded, and certainly in its expanded, form however, this “thin” definition is too wide for the argument that all forced marriages are forms of modern slavery (even when understood as broadly as possible, as by the ILO and Walk Free). Instead, further research should carefully delineate the typologies of forced marriage which might plausibly be considered *de facto* slavery, a form of modern slavery on the ILO and Walk Free’s definition, and a form of human trafficking.

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