

FORCED MARRIAGES

In a Human Rights and Women's Rights Perspective,
Exemplified through Norwegian and Pakistani Legislation

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1 Introduction

1.1 Subject Matter

This thesis deals with certain aspects concerning forced marriages in Norway, mostly from a legal point of view. In Norway today, forced marriages occur first and foremost among some groups of ethnic minorities in Norway. I have chosen to look at the Pakistani population in Norway, as they are the largest minority group, and they also have the highest percentage of persons seeking help against forced marriages.¹

Arriving at a clear definition of forced marriages is difficult. Not much attention has been paid to where exactly to draw the line between unlawful compulsion on the one hand, and pressure one is legally allowed to exercise on the other, neither in international human rights discourse nor in national theory. In my opinion, this is partly due to conflicting views on what constitutes compulsion with regard to marriage, and partly because the subjective element of the victim is central. In the following I will argue in favour of a flexible, differentiated concept of forced marriage as long as one upholds the starting point that compulsion is prohibited.

Although I have a legal focus in my thesis, I have had to look beyond laws and regulations. The debate on the universality of human rights and or the relativist conception combined with the quest for multiculturalism is important in order to place the practice of forced marriages in a context. Forced marriages are a cultural phenomenon and one need to have at least some knowledge of the cultural mechanisms involved in order to decide what measures to apply in the fight against it. It is furthermore my opinion that laws and regulations alone cannot end this practice as there are so many different mechanisms causing its survival.

¹ For statistical data, see point 1.1.3 below

My aim with this thesis is to provide a brief overview of international instruments concerning forced marriages, what substantial obligations one can deduct from the instruments and to show how these may provide certain guidelines in the struggle to combat forced marriages in Norway.

Forced marriage is a crime that takes place in the private sphere. Traditionally states have been unwilling to interfere in such matters. One has also seen that states have been restrictive when it comes to interfering where religion (or practices that appear to be religious) and culture come into play. I will describe the ongoing debate concerning multiculturalism and try to suggest a couple of possible the measures that may be taken. My starting point is that culture should not serve as an excuse for upholding clearly damaging practices, and furthermore, in the case of forced marriage, that there is no religious support for the practice either. An obligation for the state to interfere is also established.

I will then give an overview of legal provisions in Norway relevant to forced marriages, and try to establish at least to some extent the content of the term forced marriage in relation to legislation. Furthermore, I will look at opportunities to improve the legislation in order to make it more effective in the work against such marriages.

As many excuse forced marriages as a religious phenomenon, I will furthermore look at Islam in order to find out what the religion really says about forced marriages. I will argue that it is important to combine the application of legal measures directly forbidding forced marriages with the working from within the culture to change this practice.

1.1.1 Background

During the 1990's, there was a growing awareness in Norway of the problem of forced marriages in some minority cultures. In 1995, a plan of action aiming to improve the integration, equality and overall situation of children and youth with minority

background, addressed the issue of forced marriages.² The media has also contributed to the increased focus on the problem by communicating the heart-breaking stories of many a victim of forced marriages. The Norwegian Parliament requested in the autumn of 1997 a plan of action devoted solely to the issue of forced marriages, and the Norwegian Government adopted a three-year plan of action in December 1998³. Through this action plan, the government signalled that forced marriages are unacceptable in Norway.

1.1.2 Forced Marriages in Numbers

There are not any statistics available on how many forced marriages are conducted in Norway (or with people resident in Norway). According to the statistics Oslo Red Cross International Centre (ORKIS) has presented in its annual report on callers to its information-line on forced marriages in Norway, 193 contacted the centre in connection with real threats of forced marriage in 2001. In 2002, 323 contacted the centre. This equals an annual increase of about 60%. Statistics from the organisation Self-help for Immigrants and Refugees (SEIF) show that 373 contacted the centre in 2001 concerning arranged marriages with various degrees of compulsion. The corresponding number for 2002 is 468, which equals an increase of 25%.⁴ Whether this is just the ‘tip of the iceberg’ and that there really has been an acceleration in forced marriages, or that it is the increased focus on the problem that has made more people seek help, is difficult to say. Bredal points to the fact that it is impossible to establish the extent of the problem,

² Handlingsplan mot tvangsekteskap (‘Plan of Action against Forced Marriages’), foreword. Found at internet (14.06.03): <http://odin.dep.no/bfd/norsk/publ/handlingsplaner/004021-990047/index-dok000-b-n-a.html>

³ Handlingsplan mot tvangsekteskap (‘Plan of Action against Forced Marriages’).

⁴ Høringsnotat (green paper/discussion paper): ‘Forslag til endringer i utlendingsforskriften §§ 25 annet, tredje og fjerde ledd og 19 femte ledd’, April 2003, the Ministry of Local Government and Regional Development. Found at internet (14.06.03): <http://www.odin.dep.no/krd/norsk/aktuelt/p10000282/p10000283/016081-080016/index-dok000-b-n-a.html>

both because cases will not always be reported, but also because it is hard to define what constitutes a forced marriage.⁵

1.1.3 Forced Marriages among Norwegian-Pakistanis

The Pakistanis are the largest group of immigrants in Norway (19 400 in 1997, of whom 11800 are 1st generation and 7.600 2nd generation immigrants)⁶ and in addition to this, they seem to be in a majority in statistics on the number of persons seeking help against forced marriages.⁷ According to the statistics ORKIS made on callers to the information-line, 31,4% of the callers were Pakistani in 2000. This was with a wide margin the largest percentage for any immigrant group.⁸ Indications of a high percentage of forced marriages are also the fact that the average age of marriage for Pakistani women is low (21 years old) and that most of them marry persons who have grown up in Pakistan, although many young people state that they would prefer to marry another Norwegian-Pakistani instead.⁹

1.2 Demarcations and Starting Points of the Thesis

First of all I would like to point out a few basis premises regarding this thesis, as these conditions are essential for my line of argument. My ethical starting point is – as I mentioned above – that forced marriages are wrong. The very concept of forced marriages - that someone forces a person into a marriage against his or her own will - crashes violently with the notion that all individuals are born ‘free and equal in dignity and rights’ as stated in art.1 of the Universal Declaration of Human Rights, and can therefore never be accepted. This is hardly a controversial point of view, as no religion

⁵ Fangen, 2002, p.36

⁶ Vassenden, 1997, p.39

⁷ Report from a study trip made by Norwegian representatives from Oslo Red Cross International Centre, Oslo Police District, the Ministry of Children and Family Affairs and the Norwegian Directorate of Immigration from the 6th to the 19th of December, p.3

⁸ Fangen, 2002, p.38

⁹ Fangen, 2002, p. 39 with reference to Bredal (1998)

restricts choice.¹⁰ In fact, most of them prohibit forced marriages directly and I will later show that there exists a variety of protection clauses against forced marriages in international human rights law.

One has to distinguish between arranged and forced marriages. At this point in my thesis suffice to define arranged marriages as marriages where someone else (normally a family member) finds the intended groom or bride a spouse, but where the groom/bride has the possibility to refuse the suggested spouse. Exactly when an arranged marriage crosses the line and becomes force is difficult to say. A definition of what constitutes a forced marriages that is often referred to is the one from the Working Group on forced marriages established by the British Home Office (the Working Group): '[I]t is a marriage conducted without the valid consent of both parties, where duress is a factor.'¹¹

Both men and women are victims of forced marriages. In my thesis I have chosen to focus on the situation of women. One reason is that it is customary for the wife to move in with the husband's family, so that the consequences normally are greater for the woman than for the man. Expectations of behaviour due to the concept of honour are also bigger and more restraining to the every day life of women than to that of men. Furthermore the situation for the man and the woman will often be so different that it would extend the limits of my thesis to have a 'double focus'. Forced marriages have been described as a problem of violence against women. It also seems that mostly women are affected. (see point 2.1) However, the legal protection, and the other measures taken to prevent these marriages, are gender neutral, and will often give the same result for both male and female victims. My discussion will therefore mostly apply to victims of both sexes.

I have chosen not to treat child marriages in this thesis. Such marriages raise a whole set of other problems, in addition to the ones we see in connection with the forcing of an

¹⁰ Working Group, *in* Foreword

¹¹ Working Group, p.6

adult into marriage. Child marriages will almost always be forced, and it would be next to impossible to draw the line between the forced and the arranged marriages. Children would, even if they were to accept the marriage, not have the insight and knowledge to understand what they agreed to. The definition of a child in the Convention on the Rights of the Child (the CRC) is a ‘human being below the age of eighteen years’,¹², unless majority is attained earlier under the law that is applicable to the child. I chose to use the same definition, and do not look at forced marriages when one or both of the victims are under the age of majority.

I furthermore exclude from my discussion the trafficking with women. Although trafficking with women may also take form of forced marriage, the circumstances are often different. The typical forced marriage situation is more a question of controlling female sexuality while trafficking involves the sexual exploitation of women for commercial purposes.

1.3 Methodology and sources

As my thesis is situated somewhere in between legal science and sociology/anthropology I have used a number of sources in this thesis. I have used traditional legal texts and its sources, such as travaux préparatoires, case law and legal theory in order to establish the normative contents of the Norwegian laws and regulation. In describing international law, I have made use of treaties, soft law and international legal theory. The use of sources in connection with these two parts has been traditional legal interpretation. When it comes to the part on Pakistani legislation and Islamic law, I had to resort to using secondary sources for a large part. It took a lot of time and effort to understand the peculiarities of a religious law compared to the secular legislation I have been used to interpret. In order to understand the mechanisms working together and upholding a practice like forced marriages, and to get insight in the different opinions concerning practices as these, I had to read and learn how to make

¹² CRC article 1. THE CEDAW Committee recommends that this shall be the minimum age for marriage for the State Parties, se point 2.1.5

use of sociological and anthropological sources. The process of gaining perspective and trying to see the legislation in its context in society has been both informative and very interesting.

2 Forced and Arranged Marriages – a Brief Overview

A marriage can serve a multiple of purposes, ranging from forming a union between two people who love each other to being a practical arrangement in order to provide financial security or connections. In between we can find the wish to weld together two families or two branches of a family. Although forced marriages derives from and occurs in the cultures that practice arranged marriages, it is common to separate the two. The conception of arranged marriages has been a subject of controversy, as some think that all arranged marriages are de facto forced marriages (operating with the notion of “false consciousness”), whereas others distinguish sharply between the two forms of marriages. SEIF states in their emergency-guide that arranged marriages can be called a tradition of compulsion because saying no to a marriage can lead to pressure from the family and the surroundings.¹³ I support the view of amongst other the United Nations Special Rapporteur on Violence (the Spec. Rapp.), stating that forced marriages ‘must be distinguished from arranged marriages, which operate successfully within many communities.’¹⁴ Arranged marriages are common in large parts of the world, legal and not regarded to be in contravention with human rights.

How to draw the line between the two different types of marriage, however, is quite difficult. The ordinary definition of an arranged marriage, is that the bride/groom of full and free consent marries a person someone else (normally his/hers parents) have suggested. The element of choice – the person has a right to reject the parents’ suggestion(s) concerning a spouse at any time - is emphasised, and it is this element that

¹³ Storhaug, Hege: ’Tvangsekteskap-en kriseguide’. Found at internet (15.06.03): <http://www.seif.no/tvangsekteskap/kriseguide/index.html#01>

¹⁴ Spec. Rapp, point 57, p.19

separates arranged marriages from the forced ones. In a forced marriage, as previously mentioned, the element of choice and consent will lack, as the parents will not suggest a spouse for their daughter, but simply choose one, and force her to marry him.

The distinction can be hard to draw from case to case. What constitute a 100% free and full consent is hard to establish. How much the pressure from the parents influenced the woman's 'choice', the same. Questions can be raised as to whether the parents really used force in order to complete the marriage – or if the woman who felt compelled was just overly sensitive. Was the opportunity to say no actual, or was it just a theoretical opportunity?

Organisations seeking to help the victims of forced marriages/preventing them from happening, often say that the starting point has to be the subjective experience of the victim herself.¹⁵ If he/she felt forced at the time, the marriage was not constituted with full and free consent. This subjective approach is useful when it comes to dealing with the victims, but can prove to be less useful when it comes to operating within a legal framework. The principle of the foreseeability of legal provisions requires that it, at least in the field of criminal law, has to be established a lower boundary for what constitutes compulsion. The need for foreseeability is not as apparent in other areas, for instance when it comes to the annulment of a forced marriage. But still, a legal system cannot be based solely on subjective perceptions, one need to have at least some objective criteria. I will come back to this under the discussion of Norwegian legislation, point 6.1 below.

2.1 Violence against Women

Forced marriages are part of the larger problem of violence against women. The Working Group is of the opinion that, although men also are affected, forced marriage must be seen primarily as an issue of violence against women. Their consultations show that the percentage of women subjected to forced marriage is higher, and that it is

¹⁵ Working Group, p. 18

women who most often live in fear and suffer violence as a result of forced marriage.¹⁶ The British Embassy in Islamabad had 180 cases of forced marriage in 2001. 25% concerned boys.¹⁷ The effects are furthermore likely to be greater for girls. The Spec. Rapp supports the view that forced marriage primarily must be seen as an issue of violence against women.¹⁸

2.2 Reasons behind Forced Marriages

Islam regards marriage as a civil contract, and a marriage is looked upon as an agreement between two families rather than two individuals in love. Up until the last 100 years or so, this was the common view in most Western countries, as well.¹⁹ The family unit plays a larger role in Islamic societies (and in most other non-Western communities for that matter) –and as one is expected to provide for one’s family when necessary it is only natural that a number of different reasons come into consideration when choosing a spouse. The arrangement of marriages forms a complex web of economic, social and political factors and can also be a reflection of existing power relations. One of the arguments for arranged marriages is that since the spouse becomes an integrated part of an extended family it is important to consider how well the spouse will fit in. And who is better to evaluate this than the family, especially since there normally is very little contact between single people of opposite sexes. It is in these cases hard for the young person to form a qualified opinion on the suitability of a possible spouse on his or her own.

The segregation of the sexes is seen as desirable as Islam does not accept sexuality and impropriety outside of marriage. In the Saima Waheed case (which I will return to shortly) the dissenting judge argued that if a woman was to use her independent choice

¹⁶ Working Group, p.11

¹⁷ Report, Study Trip, p.10

¹⁸ Spec. Rapp, point 57, p.19

¹⁹ For a brief overview on the history of forced marriages practiced previously in Norway:Hennum/Paul, p. 22-23

of entering into a contract of marriage, the only way in which she could make such a choice was by ‘freely mixing with males and then selecting one of them as her future husband. This way of life is neither permitted nor encouraged by any *fiqh* or school of thought because it is against basic teachings of Islam that people from both sexes should have free access to each other’.²⁰

Women are forced into marriage for a number of reasons. Strengthening family links (often combined with pressure from the family or long-standing family commitments), protecting perceived cultural and religious ideals, preventing ‘unsuitable’ relationships (the girl gets a boyfriend the parents do not condone of) are –in addition to protection of family honour and controlling female behaviour and sexuality–some of the reasons why parents force their children into marriage.

Honour –and the importance of being honourable– also plays an important part in the identity building of families in minority cultures in industrialised countries. People who are deemed to have lost their honour, lose respect and prestige in the minority group.

2.2.1 The Concept of Honour

The concept of honour holds a strong position in many Muslim communities. Female members of the family are seen to embody the honour of male members, and the family status in these patriarchal societies depends on honour. The women must protect their virginity and chastity. The Spec. Rapp states that ‘what masquerades as “honour” is really men’s need to control women’s sexuality and their freedom’.²¹ As marriage also is a mean of controlling sexuality (marriage is regarded as an important safeguard of chastity²² in Islam), the link between them is evident. The concept of honour is a powerful tool that has brought about many forms of violence, including the compelling

²⁰ Abduhl Waheed v Asma Jahangir, PLD 1997 Lahore 331

²¹ Spec. Rapp., point 27, p.13

²² Espositon, John (1982), p.15

of women into marriage. The number of ‘honour killings’ is on the rise world wide, and one sees that the perception of what constitutes honour and what damages is widening.²³

For women wishing to protest against a forced marriage, or wishing to marry a spouse of their own free choice, the threat of honour killing will often linger in the background. Women who choose their own husbands are seen as transgressors of the boundaries of appropriate sexual behaviour. The Spec. Rapp states that forced marriages are ‘forms of direct abuse that regulate female sexuality’.²⁴

The element of free consent can easily be obscured when there are so many powerful factors at play. Economic reasons combined and interlinked with considerations of honour and family connections create an enormous pressure—both towards the intended spouse who has a duty to provide for its family and towards the branch of the family in the industrial country to show solidarity with their relatives in the home country—especially so when it is customary and desirable to arrange marriages between cousins. The family ties are obviously stronger then, and it will be harder to decline a suggested marriage candidate, as the consequences of such an insult will be bigger. It can also go the other way, in that the immigrated family wishes to find a good honourable spouse from the home country.

For a young person presented with all these arguments the possibility of declining a suggested marriage can appear to be less than none. The parents may loose face or be denied the possibility of a better life through their children and the youth may loose contact with his or her family if declining—or even worse. Where to draw the line between a forced marriage and a marriage entered into after reasonable consideration of the consequences of refusal is in these cases very hard. The youth may in either case look for a way out that does not compromise him/her and his/her family (see my discussion of the legislation in Norway chapter 6)

²³ Spec. Rapp., point 28, p.13 For more regarding honour and honour killings (the murder of a woman to restore the family’s honour), see the Spec. Rapp. p.11-15

²⁴ Spec. Rapp., point 103, p.29

2.3 Reasons in Relevance to the Pakistani Community in Norway

The majority of Pakistani immigrants in Norway come from a district in Punjab that is called 'Little Norway'. The villages in this district are very poor, and the illiteracy rate is higher here than in the rest of Pakistan (some statistics indicate that the numbers are up to 80%²⁵). The population here practice something they refer to as 'strict Islam' that in fact is a continuation of old traditions and customs, many of which is contrary to Islam.²⁶

In Norway, most of the marriages of the Pakistani population are between a Norwegian-Pakistani and a person from Pakistan. In the period 1987-1995, 69% of the men and 71% of the women found their spouses abroad.²⁷ Among Pakistanis in Norway 80% of the marriages are between cousins. This percentage is higher than the one in Pakistan.²⁸ Terje Bjøranger from the Norwegian Directorate of Immigration suspects that transnational forced marriages are increasingly economically motivated.²⁹ The difference between the families that have relatives in the West and those who do not, is enormous.³⁰ Since family ties are strong in Pakistan, and it is customary for cousins to marry each other, family pressure often constitutes a large part of the motivation.³¹

The practice not to marry another immigrant is a practice that ensures that the close ties between the immigrants and their country of origin, particularly with the relatives in said country, are upheld. It is also a means to increasing wealth in the country of origin. Most of the Pakistani population is very poor and –as families have a duty to look after its members- it is a huge advantage to have a relative in an industrial country such as Norway that can send back money. As it is customary for cousins to enter such an

²⁵ Report, study trip, p.6

²⁶ Report, study trip, p.18

²⁷ Bredal, (1998), p.5 with further references

²⁸ Report, study trip

²⁹ Conversation with Mr. Bjøranger 13.06.03

³⁰ See Report, study trip regarding the differences in 'Little Norway' in Punjab.

³¹ Working Group, p.14

alliance and the pressure from the part of the family still situated in Pakistan – and with an eligible cousin- is often very strong on the ‘Norwegian branch’ of the family, since the wealth of the family is at stake. The aspect of honour comes into consideration here –being used for all it is worth- and strong forces are at play, making it even harder for the youths to resist a ‘suitable’ marriage. Marriages across borders are valuable entrance passes to an industrialised country and thus ‘big business’.

3 Protection against Forced Marriages in International Law

There are several international instruments which are relevant to the discussion on forced marriages. As far as the position of women is concerned, the United Nations Convention on Elimination of All Forms of Discrimination against Women (the CEDAW) is of the utmost importance. The CEDAW Committee has been very active in its addressing of forced marriages and issues related to forced marriages, and this provides useful information when interpreting the rights deriving from the convention. But there are also other conventions regulating questions relating to forced marriages of both sexes. I will start by giving an overview of these (in that sense more general) conventions before concentrating on the rights embedded in the CEDAW. I will then look at other human rights embedded in various conventions that may be violated through a forced marriage.

It is important to have a human rights perspective when discussing the problem of forced marriages, as these human rights can create obligations for the states and through that ensure that individuals are protected against forced marriages on a national level. It is also possible that the states may be held responsible for failure to prevent international human rights, even if the violations are committed by private, non-state actors. I will address those questions after my overview of different human rights protecting individuals against forced marriages.

3.1 Interpretation of Treaties

International treaty language may be vague and general. This can give rise to problems when one is to establish the exact content of the treaties. The vagueness and generalness are often deliberate, as a result of compromise between diverging political and moral viewpoints and due to the fact that the states often do not wish to give up too much of their sovereignty by taking on obligations which are too precise. The tendency to establish rights for individuals through conventions that can be enforced by courts of law has increased, at least in the area of human rights, but it is still difficult to deduce specific rights and obligations from the treaties.

An interpretation of the treaty text is necessary in order to establish its content. This would be the situation with all legal texts, but the need is particularly urdent when the texts are as vague and general as they are in international treaties. The sources of law and rules for interpretation frequently differ from what one sees in the national jurisprudence. The states have agreed upon the rules for interpretation and the relevant sources of law. These principles are set forth in the Vienna Convention on the Law of Treaties articles 31-33.³² The principles concerning interpretation have been regarded by the International Court of Justice as a codification of customary international law³³, but the principles outlined in the treaty are not exhaustive.³⁴

It is the wording of the treaty that is the natural starting point when interpreting treaties, as it is the treaty text the parties have agreed upon, cf. article 31. The interpretation must be carried out in good faith, the wording must be seen in context, and the object and the purpose of the treaty may shed light on the interpretation. The preamble of the treaty provided guidance when it comes to establishing the object and purpose of the treaty.

³² For more information regarding treaty interpretation, see for instance: Ruud, Morten, Ulfstein (2002), p. 69-76

³³ Arbitral Award of 31 July 1989, ICJ Rep. 1991, p.53 on p. 70.

In the interpretation of human rights documents, a principle of efficiency has developed. This means that one is to choose the interpretation that best ensures an efficient implementation of the treaty. It is furthermore argued that public international law, especially in the area of human rights has to depend on a dynamic interpretation in order to keep up with developments in society.³⁵ The principle of efficiency combined with a dynamic interpretation can provide a useful tool when interpreting human rights treaties and establishing the obligations of the State Parties with regard to the treaties.

The issue of forced marriages and violence against women has also been dealt with in ‘soft law’-sources, i.e. documents that are not legally binding, such as the Declaration against Violence and the report of the Spec. Rapp. The CEDAW Committee has made general recommendations pursuant to article 21 of the CEDAW. Formally speaking, these interpretations of the conventions are not legally binding, but they are relevant to the understanding of the CEDAW. For Norwegian authorities, who have a responsibility to ‘respect and ensure human rights’ pursuant to the Constitution section 110 c³⁶ recommendations from human rights instruments will be of relevance, particularly in the cases where the CEDAW Committee establishes how the Convention is to be interpreted.

3.2 The Universal Declaration on Human Rights

It is natural to take the Universal Declaration on Human Rights as a starting point when one is to examine general human rights’ protection against forced marriages, as this is the first human rights instrument to be proclaimed by a global international organisation. (Buergenthal states that it ranks ‘as a milestone in mankind’s struggle for freedom and human dignity’³⁷).

³⁴ Ruud, Ulfstein, Fauchald (1997), p. 61

³⁵ Ruud, Ulfstein, Fauchald (1997), p.62

³⁶ Unofficial translation by the Ministry of Foreign Affairs, found on the internet (14.06.03): <http://odin.dep.no/odin/engelsk/norway/system/032005-990424/index-dok000-b-n-a.html>

³⁷ Buergenthal (2002)

The UN Charter (the Charter) itself states in article 1.3 that one of the purposes of the United Nations is to promote and encourage “respect for human rights”, but does not go any further in describing what those human rights actually consist of.

The Declaration was adopted by the UN General Assembly in 1948. Over the years, the Declaration won worldwide recognition, and now serves as a symbol of what the international community means by ‘human rights’. Although it is not a treaty and therefore is not legally binding as such, there is today widespread agreement concerning the fact that the Declaration is a normative instrument reflecting at least some legal obligations for the Member States of the UN, as it is seen as the interpretation of the human rights obligations contained in the Charter.³⁸ The UN Human Rights Conference in Teheran in 1968 issued a proclamation saying that the Declaration ‘constitutes an obligation for the members of the international community’³⁹, and this was repeated at a similar conference in Vienna in 1993. The International Court of Justice (ICJ) has also used the proclamation in its line of argument.⁴⁰

Article 16 in the Declaration proclaims the right to marriage and family. Subparagraph 2 states that marriage ‘shall only be entered into with the free and full consent of the intending spouses’, and thus rules out forced marriages, as such marriages will lack the free and full consent of at least one of the intending spouses.

3.3 The International Covenants on Human Rights

The International Covenant on Civil and Political Rights (ICCPR) and The International Covenant on Economic, Social and Cultural Rights (ICESC) constitute together with the

³⁸ Buergenthal (2002)

³⁹ ‘The Proclamation of Teheran’, 13th of May, 1968

⁴⁰ General Assembly Resolution 217 A (III)

Declaration what is normally referred to as the international Bill of Human Rights. The Covenants were based on the human rights catalogue set forth in the Declaration.

The covenants are treaties, and therefore create binding legal obligations for the State Parties. This carries the implication that issues relating to compliance with and the enjoyment of the rights guaranteed by the Covenants are matters of international concern, and not only exclusively within the domestic jurisdiction of the states.

3.3.1 The International Covenant on Civil and Political Rights

The ICCP uses almost the same wording as the Declaration in its discussion of marriage: ‘No marriage shall be entered into without the free and full consent of the intending spouses’, see art. 23(3). Again we find that a ‘free and full consent’ is an obligatory condition of a marriage which is consistent with international human rights.

3.3.2 The International Covenant on Economic, Social and Cultural Rights

In the ICESCR we find the protection against forced marriages in art. 10(1), linked to the State Parties’ recognition of the fact that ‘the widest possible protection and assistance should be accorded to the family, (...) particularly for its establishment’ (art. 10(1), first sentence). Even if the State Parties are responsible for protecting the establishment of families, it does not accept forced marriages, as ‘marriages must be entered into with the free consent of the intending spouses’ (art. 10(1) i.f.).

The condition stipulated for a marriage to be acceptable in human rights terms by the ICESCR, is simply a ‘free consent’, but this cannot be said to de facto constitute a difference from the ICCPR and the Declaration, as it is not likely that a consent which is not ‘full’ can be said to be ‘free’. Neither is it likely that it was intentional to establish two different contents of the right to freedom from force in relation to marriage with the two different wordings.

3.4 Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages

The Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages (The Marriage Convention) entered into force 9th of December 1964. The 49 State Parties to this convention includes Norway, but not Pakistan.

The preamble refers to art. 16 of the Declaration, and to General Assembly resolution 843(IX), in which ‘certain customs, ancient laws and practices relating to marriages (...) were inconsistent with the principles’ in the Charter and the Declaration. The preamble further states that the State Parties ‘should take all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring (...) complete freedom in the choice of a spouse’.

Article 1 in the Marriage Convention expands the notion of what constitutes ‘valid’ marriage in relation to the international bill of rights. Not only must the consent be full and free, the consent is also ‘to be expressed by (...) [the intending spouses] in person after due publicity and in the presence of the authority competent to solemnise the marriage and of witnesses’. For the cases of forced marriages, however, it is the free and full consent that is relevant.

3.5 The CEDAW

The Convention on Elimination of Discrimination against Women (CEDAW) was adopted on the 18th of December 1979 and entered into force on the 3rd of September 1981 after 20 countries had ratified it (pursuant to article 27(1) in the Convention). There are now 169 state parties to the Convention (spring 2002).

The CEDAW is an instrument addressing discrimination of women, and therefore will discrimination against a man falls outside the scope of the Convention (see art. 1). The CEDAW is quite extensive and progressive as human rights convention go. The

preamble is far-reaching in its referrals to “the new international economic order based on equity and justice”, and the convention breaks down the traditional dichotomy between the private and the public sphere. It has been a common notion in human rights law that the states are not to interfere with its citizens’ ways of organising their private life, but the CEDAW observes no such division. The preamble states that “a change in the traditional role of men as well as the role of women in society *and in the family* is needed to achieve full equality” (my stress), and article 16 goes a long way in ensuring equality ‘in all matters relating to marriage and family’.

The substantive rights of the convention consist of a combination of the so-called 1st, 2nd and 3rd generation rights, and thus provide a whole range of rights aimed at improving the position of women. It has been customary to divide the substantive human rights into three generations after when they first won recognition on an international level. The 1st generation, the civil and political rights, are rights protecting the individuals from infringements by the state. The 2nd generation rights are the social, economic and cultural right and these impose a duty on the state to take active action in order to ensure the rights. The 3rd generation of rights is a recent development and deals with collective right. The division into generations does not make a hierarchy of rights. The position of the UN has from the adoption of the Universal Declaration always been that the human rights are ‘universal and indivisible’ –although there is an ongoing discussion as to whether one can give many of the solidarity and collective rights belonging to the 3rd generation status of human rights (see the debate on multiculturalism in chapter 5 below).

The CEDAW protects civil and political rights (1st generation) for women such as the right to equality before the law (art. 15.1) and the right to vote (art. 7 litra a), and it protects economic, social and cultural rights (2nd generation), like the right to work (art. 11.1 litra a), the right to access to health care services (art. 12.1) and the right to participate in all aspects of cultural life (art. 13 litra c). The CEDAW also provides collective/solidarity rights (3rd generation), in its particular protection of rural women (art.14).

3.5.1 Equality in the Family –Article 16

Article 16 of the CEDAW gives –as mentioned above- the State Parties an obligation to eliminate discrimination against women in all matters relating to marriage and family relations. This article, combined with article 2 and article 5, obliges the State Parties to take all appropriate measures to modify social and cultural patterns of conduct so that equality will be ensured in all parts of society and life. Article 16 is controversial, and it is the article which holds the most reservations by State Parties to the Convention, as it goes straight to the core of the private life of individuals. The article is seen as a breakthrough in international law's recognition of women's individual rights in the private sphere.

Neither Norway nor Pakistan made any reservations to article 16, but Pakistan made a declaration when ratifying the CEDAW in 1996, that said that: 'The accession by the Government of the Islamic Republic of Pakistan to the said Convention is subject to the provision of the Constitution of Pakistan'. As I will come back to further down, the Pakistan Constitution lays down that Pakistan is a Muslim State. Although not specifically aimed at article 16, it is clear that a statement like this, giving Islamic law precedence over the CEDAW is particularly problematic when it comes to ensuring equality between man and women within the family. The Qur'an states for instance that the man shall be head of the family, and the Islamic tradition propounds the doctrine of equal worth and equal dignity rather than using the phrase 'equality for men and women'.

Article 16 refers to matters concerning the entering into marriage in several provisions. Article 16.1.a states that men and women shall have the 'same right to enter into marriage', and article 16.2.states that the 'betrothal and marriage of a child shall have no legal effect'. Paragraph 2 also instructs the State Parties to specify a minimum age for marriage. In General Recommendation 21 the CEDAW Committee recommends, with reference to the CRC, that the minimum age shall be set to 18 years of age.

Article 16.1.b stipulates that one shall have the right to 'freely (...) choose a spouse and to enter into marriage only with their free and full consent'. This implies two things:

Firstly, that man and woman shall be equal also when it comes to this matter, and secondly –which is the most relevant in this case – that the entering into a marriage always shall be free from coercion. According to Thorbjørnsrud,⁴¹ it is possible to separate between three levels of self-determination in relation to arranged marriages: 1) The daughter’s right to give or withhold her free consent, 2) her right to choose for herself someone their parents can accept, and 3) her right to choose a partner that the parents do not accept. A violation of number 1 will constitute forced marriage, and an infringement on the right to marry only after giving your free and full consent. Violations of number 2 and 3 will constitute an infringement on the right to freely choose a spouse and the right to marry.

3.5.2 Recommendations by the CEDAW Committee

The CEDAW Committee addresses in General Recommendation No. 21⁴² the right of women to choose a spouse and enter freely into marriage, and describes this as ‘central to her life and to her dignity and equality as a human being’. The Committee stresses that ‘a woman’s right to choose when, if and whom she will marry’ shall only be subject to reasonable restriction such as a minimum age requirement or a prohibition of marrying close relatives.

The CEDAW Committee points out that although most of the countries report that their national constitutions and laws comply with the Convention on this matter, custom, tradition and failure to enforce the laws given, in reality makes a contravention to the CEDAW. The statements made by the Committee take us to the core of the discussion about state responsibility, which I will come back to later in chapter 4.

General Recommendation No.19 concerning violence is also of relevance in forced marriage cases. The Committee states that ‘[g]ender-based violence is a form of

⁴¹ Fangen, p.35

⁴² General Recommendation No. 21 (13th session, 1994) made by the Committee on the Elimination of Discrimination against Women

discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.⁴³

3.6 Other human rights relevant to the protection against forced marriages

A victim of a forced marriage will not only find that the specific right to freely choose a spouse is violated, and the right to marry (also protected in the European Convention on Human Rights article 12), she will also experience an infringement of other human rights. Being forced into marriage may constitute a violation of the highest attainable standard of physical and mental health pursuant to ICESCR article 12. Her liberty of movement (ICCPR art. 12) may be restricted, so may her right to liberty and security and to freedom from arbitrary detention subsequent to ICCPR article 9 and the European Convention on Human Rights (ECHR) article 5. In gross cases, we can also talk about violation of right to prohibition against cruel, inhuman and degrading treatment (ICCPR art.7, ECHR art.3) and the right to life (ICCPR art.6, ECHR art.2). She should also be free from gender-based discrimination, cf. art 2 of ICCPR and ICESCR and ECHR art. 14. Female victims of violence such as forced marriages have the same right to enforcement and protection of the law as those belonging to other victims of violence. Hence, women's right to equal protection of the law is violated if the state concerned fails to ensure these rights to women subjected to or threatened by forced marriage on the same basis as other victims of violence. Also, as forced marriage constitutes a form of violence against women it results in a direct violation of human rights, cf. article 4 of the Declaration on the Elimination of Violence against Women.

The more extreme cases may also constitute acts of 'slavery-like practices' (cf. the Declaration art. 4, ICCPR art. 8 and ECHR art.4) which have been described as including practices whereby 'a woman without the right to refuse, is promised or given in marriage' (cf. art. 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery) –although this definition resembles the situation of trafficking more than the situation of forced marriages.

⁴³ General Recommendation No. 19 (11th session, 1992) made by the Committee on the Elimination of Discrimination against Women, point 1.

4 State Responsibility for Protection According to International Law

Once a state has ratified a convention, and thus become a State Party, the state will be legally bound to obey the convention, and follow through on the substantive obligations given in said convention. In traditional international law the states that are the legal subjects, and this is still the main rule. One has also opened for the possibility that individuals may be legal subjects, at least in the way that they may be the beneficiary of rights. When it comes to obligations, it is still –internationally- the states that are held responsible for international wrongful acts. Exceptions may be found when it comes to gross violation of human rights. The recent establishing of the International Criminal Court (the ICC) is a good example of this. The ICC prosecutes individuals accused of genocide, war crimes and crimes against humanity.

State responsibility is a fundamental principle of international law. It provides that a state is legally accountable for breaches of its obligations under customary international or treaty law that are attributable or imputable to the state. The principle also lays down the conditions for when a state shall be seen accountable for an international wrong. These rules of responsibility are largely based on customary international law as it has transpired from state and case practice. The International Law Commission (the ILC) of the UN has since 1994 worked with the codification and development of the rules of state responsibility, and has now come up with a set of draft articles on the responsibility of states for internationally wrongful acts that the General Assembly took note of in Resolution 56/83 of January 28th 2002. The draft articles are annexed to the Resolution.⁴⁴ These draft articles provide a general overview of the content of the customary international law of state responsibility, although they have not yet been formally adopted, and therefore are not legally binding as such.

The starting point is that a state is responsible for all actions and omissions by state organs, whether the organ exercises legislative, executive or judicial powers (cf. draft article 4) as long as the conduct is attributable to the state under international law and constitutes a breach of an international obligation of the state (cf. draft article 2).

⁴⁴ The Draft Articles, found at internet: <http://www.un.org/law/ilc/reports/2001/2001report.htm>

The international law of state responsibility for human rights violations has in recent times evolved from its traditional starting point. There are now numerous states that are members of multilateral human rights conventions, and this has enhanced the prospects of enforcing state responsibility. Forced marriages are often conducted by the family of the victim –or at least by individuals, and it is difficult to think of an example where the state will be the direct perpetrator. However, this does not mean that states have no responsibility when an individual has gotten her human right violated and a forced marriage has been conducted.

Acts on the part of private persons that violate an individual's right not to be forced into a marriage do not necessarily imply state responsibility, as the general rule of public international law is that private individuals, both natural and legal, are not directly bound by international law. Private individuals whose acts or omissions are incompatible with international human rights law bear no legal liability on that ground (but may of course very well be responsible under national legislation).

The state will, as mentioned above, bear responsibility for acts by its organs or by representatives of the state when serving as such a representative (even though the state official exceeds his/her limits of power). But the state will also be responsible for its failures to act appropriately to meet its international obligations, even when private persons conduct the substantive breach. A state cannot look the other way, and stay passive when private persons violate the human rights of others. Rebecca Cook states that the 'state will be responsible not directly for the private acts, but for its own lack of diligence to prevent, control, correct, or discipline such private acts through its own executive, legislative, or judicial organs'.⁴⁵ Governments will be required to take preventive steps to protect the exercise and enjoyment of human rights –in this case the right to be free from coercion when entering into wedlock. This will include having internal laws prohibiting the use of forced marriages. The state does also have a duty to investigate violations that are alleged and to punish violations that are proven. The state

⁴⁵ Cook, Rebecca J.,(1994), p.228-256

shall provide effective remedies, including compensation to the victims. In the case of forced marriages, the state may be obligated to provide shelters to help the victims as well, as this will form an important part of the protection against a possibly ‘vindictive’ family of the victim.

In determining what states can be held accountable for when it comes to private violations, one has to examine the nature of the right in question. A state can never be asked to guarantee 100% that no human right will be violated by a private person, but the state has to show due diligence in awareness of the risk of human rights violations.

These principles have been developed by international human rights tribunals to apply to international human rights conventions. In the Rodríguez decision did the Inter-American Court of Human Rights imposed liability on Honduras for lack of due diligence in preventing unexplained ‘disappearances’, since the state thereby had failed ‘to ensure’ respect for human rights. The state had not kept its responsibility to respond appropriately to potential or actual private conduct. Nor had the state fulfilled its responsibility to ‘organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are all capable of juridically ensuring the free and full enjoyment of human rights’.⁴⁶

It is the individuals that are the beneficiaries of the international human rights protection against forced marriages, and they are just as vulnerable to violations of their human rights performed by private persons as they are to violations conducted by officers of the state. It is therefore crucial for the maintenance of the human rights protection, that the responsibility of the states is understood to be more than just to passively not engage in violation of the rights themselves, but that they also have to meet international obligations to deter and condemn such violations conducted by private persons. Rebecca Cook has formulated the content of state responsibility like this:

⁴⁶ Velásquez Rodríguez Case of the Court of September 10, 1996 Inter-Am. Ct. H.R.

State responsibility includes taking appropriate action to prevent objectionable private action, to monitor private acts that constitute violations, for instance through human rights monitors and police monitors, and to sanction and remedy acts of violation that are identified.⁴⁷

The UN Declaration on the Elimination of Violence against Women states clearly that:

States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.

Article 4 (c) of the Declaration furthermore states that the States should 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those are perpetrated by the State or by private actors'

Some guidance on the specific action entailed by such obligations may be found in the Provisions of specific treaties or UN Resolutions, and findings and recommendations of international human rights courts and mechanisms provide more detailed knowledge on the specific content such obligations impose on the state. The CEDAW Committee listed in Gen. Rec no. 19 measures that the states should take in order to provide for the effective protection of women against gender-based violence. Such measures should inter alia include:

"(i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including, inter alia, violence and abuse in the family, sexual assault ...

(ii) Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of women and men...

(iii) Protective measures, including refuges, counselling, rehabilitation action and support services for women who are the victims of violence or who are at risk of violence."

⁴⁷ Cook, Rebecca J.,(1994), p.228-256

The Declaration on the Elimination of Violence against Women and the Beijing Platform for Action provide further guidance on what actions governments are to take to address violence against women. (Siter herfra)

INTERRIGHTS (referanse) deduces from the abovementioned material that it can be concluded that, in the context of forced marriage, states are obligated to:

‘provide effective penal sanctions, civil remedies and compensatory provisions;

provide that the legal requirement of marriage includes the free and full consent of both parties;

prescribe suitable minimum ages of marriage, prohibit child marriage, encourage the use of facilities whereby the consent of both parties may be freely expressed and marriages may be registered and generate social support for the enforcement of laws on the minimum age of marriage;

provide women with access to justice, including information about their rights, free legal and other assistance, and safe shelter to ensure they are able to have recourse to such remedies;

ensure that legal and judicial procedures be made victim-sensitive; exercise due diligence to prevent, investigate and punish acts of forced marriage;

ensure that women at risk of or subjected to forced marriage have specialised assistance, such as treatment, counselling, health and social services, facilities and support structures;

develop appropriate guidelines for the training of law enforcement officials, the judiciary, legal practitioners and for any government authorities who are responsible for ensuring effective protection against forced marriage; develop national plans of action to promote the protection of women against any form of violence, in particular, forced marriage;

facilitate the work of, and provide resources to, the women's movement and non-governmental organisations in addressing forced marriage;

ensure co-operation with NGOs by police and immigration officers, medical personnel and other law enforcement and judicial officials;

conclude appropriate national, subregional, regional and international agreements to prevent the abduction of, and the sale or traffic in, women or children for any purpose or in any form

and provide technical co-operation to developing countries and share experiences, best practices and lessons learned in order to combat trafficking for any purpose, including forced marriage.

Jeg tenkte jeg kunne bruke noe av dette flettet sammen med CEDAW artikkel 2 for så å beskrive de ulike tiltakene jeg har tenkt å gå inn på. Forbud i lov omhandlende ekteskap og straff finnes i både Pakistan og Norge, mens visum og asyl tenkte jeg bare å beskrive fra et norsk synspunkt.

5 The Debate on Colliding Human Rights, Women's Positions and Multiculturalism

Forced marriages constitute a breach of women's human rights and the states are after the doctrine of state responsibility (chapter 4) obliged to provide some sort of protection against it. As mentioned above, one must at the very least demand a prohibition of forced marriages in the law of the state. Arguments have furthermore been made that the states' obligation reaches further than that. The states must also prosecute violations of the law. Measures to prevent forced marriages from happening (a duty the states have after the CEDAW art. 2 and other human rights instruments) can take on different forms. There can be different opinions on what measures are efficient and correct to use in given situations. The views on what measures to appropriately apply may to a certain extent vary after which theoretical approach one has to human rights. In the general human rights discourse there is an on-going discussion as to whether multiculturalism is bad for women. I will give a summary of this debate and the different viewpoints, as this provides a useful background to the practice of forced marriages. In discussions concerning harmful practices such as forced marriages, one hears on one side the 'excuse of culture' (that this is a cultural, or religious, custom that it will be discriminatory to interfere with) and on the other side the categorical dismissal of

arranged marriages altogether. In my opinion, it is important to see the problem from different angles, avoiding the danger of becoming categorical and biased.

5.1 Universalism

Universalism claims that international human rights, like for instance gender-equality, freedom and self-determination (and hence the liberty to choose one's spouse freely) are and shall be the same everywhere. The theory emphasizes the similarities between all human beings, groups and situations, and does not find the social and cultural context relevant when it comes to establishing rights for the individual. Universalism bases itself upon the idea that the norms and values embodied in the human rights doctrine are overriding and universal. If a conflict between norms is to occur, it is to be resolved by the establishment of a hierarchy of values and sources. The human rights are to be placed at the top of the 'pyramid of values'.⁴⁸

Since the human rights system consists of a plurality of norms embracing both individual and communal rights, there can also be found conflicting values within the human rights system. The tense relationship between the CEDAW's principle of equality within the family (art. 16) and the right to freedom of religion in for instance ICCP (art.18) can serve as an illustration of this. Universalism arranges the human rights in a hierarchy so that the individualistic values and principles always take precedence over communitarian values in order to solve such conflicts. Human rights theory determines self-determination and freedom and other, similar human rights principles in the light of uniformly held standards regardless of the existing cultural and legal differences. It has been stated that this should be the case for the non-discrimination principle as well.⁴⁹

⁴⁸ Hellum (1999), p.409 and following

⁴⁹ Hellum(1999), p.414

5.1.1 The Critique of Universalism

Universalism is closely linked to Western jurisprudence and its perception of human rights, and many scholars have thus raised the question: Is the idea of universal human rights yet another exercise of colonial power in the sense that objectives and concepts that originate in one culture are used to describe, assess and even change realities in another? Women advocating change in a culture on the basis of universally held human rights standards are often accused of being Westernized and alienated from their own culture.⁵⁰ It has been pointed out that the universality of standards, with the main focus on individualistic rights such as freedom and equal opportunities, seems to presuppose a society that is atomized and individualistic. These are characteristic features of Western societies, but are rarely found in other parts of the world, which may indicate that while universalism may be applicable in Western culture it does not necessarily function equally well in other parts of the world.⁵¹

Critics see universalism as being somewhat arrogant and paternalistic, diminishing the individual's opportunity to make certain choices on her own (living in a polygamous marriage, for instance). The notion is that by taking universally held standards of human rights, or cross-cultural norms, as a standard for all the diverse cultures and societies of the world one fails to pay respect to people's freedom to lead lives that differ from the standard. Telling individuals of such cultures and societies that their own choices are bad for them is patronizing and paternalistic. Instead, people should be viewed as their own best judges in determining what constitutes operative values for themselves. Such a position is implied in what Nussbaum refers to as the 'argument from the good of diversity' reminding us 'that our world is rich in part because we do not all agree on a single set of practices and norms' and that 'the world risks becoming impoverished as it becomes more homogeneous'.⁵²

⁵⁰ Nussbaum (1999)

⁵¹ Hellum (1999)

⁵² Nussbaum (1999), p.230

As a response to that objection, one can point out that universalism maintains that freedom and equality for each individual is the essential thing, and in order for all individuals to be capable of choosing which life to lead, one is in need of some universal standards to protect those rights. A further claim has been made, namely that many existing value systems already are highly paternalistic, especially with regard to women in the sense that they are so frequently discriminated against. In fact, invoking any norm of non-discrimination can be regarded as paternalistic and interfering on the part of the ones who discriminate, but that should still not be seen as a valid argument for abstaining from promoting non-discrimination. In the words of Nussbaum:

We dislike paternalism because there is something else that we like, namely liberty of choice in fundamental matters. It is fully consistent to reject some forms of paternalism while supporting others that underwrite these basic values.⁵³

5.2 Cultural Relativism

In the theory of cultural relativism one finds responses to the aforementioned objections against universalism. Cultural relativism denies that conflicts between values from different traditions and cultures can be settled in any reasonable way. Every society, law and culture is instead regarded as one-of-a-kind and incomparable to others, so that one has to understand each unit in its own right. This theory is in strict opposition to universalism as it looks at the uniqueness of all human beings, groups and situations, rather than the similarities between them. Human conduct is seen as the result of any given culture and society and cultural relativism therefore concludes that overriding and universal standards do not exist. One finds that normative categories and standards originating in one culture cannot be justified as appropriate for other cultures that traditionally have adopted different normative categories and standards. The theory aims at establishing greater equality and understanding of cultures and societies, and is critical of the Western world's tendency to measure a culture or society against the 'ideal' society, i.e. a society with a Western economic and legal system. As a

⁵³ Nussbaum (1999), p.231

consequence, focus has been directed at group's human rights, particularly the group's right to self-determination and cultural integrity.⁵⁴

5.2.1 Critique of Cultural Relativism

Although it is easy to agree with the notion that one shall respect different cultures, it is not unproblematic to focus on community rights exclusively. If such a line of reasoning is taken to the extreme, as done by some culture-relativists, one can find oneself coming up with, for instance, the notion that human rights are irrelevant in some non-Western societies, since members of such societies view themselves not as individuals, but as members of a group.⁵⁵ Even if one is to accept such an extreme position, one will still require reference to at least some universal rights in order to ensure the groups' right to choose freely how it wishes to function. Otherwise one is left with the possibility of anarchy, which again is in direct contradiction to the starting point of cultural relativism, namely that one shall protect the uniqueness of every society and culture. In my opinion, this goes to show that one is in need of at least some aspect of universalism in human rights discourse.

Opponents of the theory have furthermore stated that the notion cultural relativists have of traditional cultures is far too simplistic, as cultures are not immutable and static, but subject to change and transformation through political and cultural debate. Focusing only on group rights means that one has to assume that the group has common goals in order to protect their traditions and customs, since no one has an interest worthy of protection in upholding a practice in a group that is undesired by others in the group. Critics of the theory have pointed out that it is very often only the dominant voices of the culture that are heard when one establishes the notion of what the culture in question 'consists' of. It is contended that culture relativists fail to take into account that the advocacy for change and the introduction of universally held principles of individualistic freedom in a culture often comes from the 'weaker' voices within the

⁵⁴ Hellum (1999), p.418 and following

⁵⁵ Africa has been viewed this way. See Hellum (1999), p. 418 and following

culture. Frequently, the culture relativist takes an incorrectly founded assumption of a common goal for the group as a starting point, and in doing so fails to register the objections raised by the weaker party of the group with regard to goals and practices of the group as a whole. In many cultures one finds that the male voice has been pronouncing the goals of the group, and with a relativist view on human rights, one can easily overlook the women's points of view and thus also women's rights, since their voices 'drown' in the process of formulating the common goals of the group. Martha Nussbaum states that:

It would be implausible to suggest that the many groups working to improve the employment conditions of women in the informal sector, for example, are brainwashing women into striving for economic opportunities: clearly, they provide means to ends women already want, and a context of female solidarity within which to pursue those ends. Where they do alter existing preferences, they typically do so by giving women a richer sense of both their own possibilities and their equal worth, in a way that looks more like a self-realization (...) than like brainwashing. Indeed, what may possibly be 'Western' is the arrogant supposition that choice and economic agency are solely Western values!⁵⁶

It is also important to bear in mind that by accepting cultural practices unconditionally, one is also accepting undesirable practices. The practices of female circumcision and forced marriages are gross examples of the fact that cultural traditions indeed can be harmful.

5.3 In Between: Pluralism

The pluralist theory offers a compromise between relativism and universalism by taking into account the objections to the two theories listed above. Pluralism sees conflicts in their cultural context, but does also make room for dialogue and change. It recognizes that there are some overriding norms and primary values that need protection, and states that a conflict between these can be resolved by ranking the values in a way that is sensitive to the social and cultural context in which the individuals live and act. Pluralism is in my opinion thus more respectful of culture than universalism, and therefore less paternalistic. Still, it is not as accepting as the culture relativist theory as it

⁵⁶ Nussbaum (1999), p.229

states that we are in need of some universal norms to separate right from wrong -or in this case acceptable cultural practices (e.g. arranged marriages) from unacceptable ones (e.g. forced marriages). The pluralist theory is in that sense more protective of weak individuals and group members than relativism.

An example of how one can use this theory in practice is the measures used in the struggle to eradicate female circumcision. Female circumcision, or genital mutilation as it is also called, is a practice that is closely linked to culture in the way that it is supposed to represent cleansing from sin, which is necessary for the inclusion of the girls into society as full members in their own right. In Kenya, one has successfully introduced an alternative rite known as ‘Circumcision through words’ that supports the ritual coming of age without the practice of female genital mutilation.⁵⁷

As my examples are meant to illustrate I find it important to take into consideration the impact culture will have on the implementation of human rights (in my thesis the right to freedom from force in matters of matrimony), but it is also essential to have some overriding norms to ensure certain basic rights. Cruelty cannot be accepted in the name of culture.

5.4 Culture vs. Non-discrimination and the Debate on Multiculturalism

There has been a growing acknowledgement in Western countries that minority cultures no longer shall have to assimilate into the majority culture, as this would be oppressive. Instead, Western countries seek to adapt policies that that are more sensitive to the inherent cultural differences between the minority groups and the majority of citizens. The whole discussion on so-called multiculturalism is closely linked to the debate on universalism. The viewpoints of multiculturalism are rooted in the cultural relativist argument of the good of diversity, claiming that each culture is valuable in itself, and thus shall be protected.

⁵⁷Spec. Rapp. (2002), point 118, p.32

Cohen, Howard and Nussbaum define multiculturalism as the idea that

‘people in other cultures, foreign and domestic, are human beings too –moral equals, entitled to equal respect and concern, not to be discounted or treated as a subordinate caste. Thus understood, multiculturalism condemns intolerance of other ways of life, finds the human in what might seem Other, and encourages cultural diversity.’⁵⁸

Multiculturalism

‘represents the view that culture provides the necessary and inescapable context of human life, that all moral and political doctrines tend to reflect and universalise their cultural origins, that all cultures are partial and benefit from the insight of others, and that truly universal values can be arrived at only by means of an uncoerced and equal intercultural dialogue.’⁵⁹

Arguments for multiculturalism state that self-respect is of fundamental importance. To gain that, it is essential to belong to a culture. It is also important to have a cultural context in which to develop an ability to choose how to lead one’s life.

Multiculturalists point out that such groups have their own ‘societal cultures’ that permeate all aspects of the lives of their members, and -as the societal cultures are threatened by extinction- that there should be special rights to protect them. The debate centres on what one shall do when the cultural and religious groups that claim protection adhere to policies and viewpoints that treat the women of their groups unequally.

⁵⁸ Cohen, Howard, Nussbaum *in* Okin (1999), p.4

⁵⁹ Parekh, *in* Okin (1999), p.72

5.4.1 Objections towards Multiculturalism from a Perspective of Women's Human Rights

It is evident that there is tension between egalitarianism and multiculturalism, as some cultures do not commit to the principle that all people are entitled to equal respect and concern. Especially when it comes to views on the position of women, we find diverging opinions concerning what roles they are to perform in the group.

The problems of multiculturalism become particularly evident when one -in the keeping with the desire for cultural diversity- wishes to grant cultural and religious minorities certain group rights which will enable them to preserve their society and culture from undue pressure on their ways of life. For how is one to defend such a proposal if the societies and cultures in question treat their female members as subordinate and not of equal worth?

In the debate over whether multiculturalism is bad for women, a central question has been raised: 'How should we understand a commitment to equality in a world of multiple human differences, grim hierarchies of power, and cruel divisions of life circumstance?'⁶⁰

Feminism, defined by Okin as

'the belief that women should not be disadvantaged by their sex, that they should be recognized as having equal dignity to that of men, and that they should have the opportunity to live as fulfilling and as freely chosen lives as men can'⁶¹

may come into conflict with the aspect of multiculturalism that concerns -again in the words of Okin-

⁶⁰ Cohen, Howard, Nussbaum, p.5

⁶¹ Okin (1999) p.10

‘the claim, made in the context of basically liberal democracies, that minority cultures or ways of life are not sufficiently protected by the practice of ensuring the individual rights of their members, and as a consequence these should also be protected through special *group* rights or privileges’.⁶²

Others have supported her view by pointing out that nearly every culture and society in the world treats women unequally in one aspect or another. Pollit has put it like this:

In its demand for equality for women, feminism sets itself in opposition to virtually every culture on earth. You could say that multiculturalism demands respect for all cultural traditions, while feminism interrogates and challenges all cultural traditions.⁶³

It has been argued that group rights can be antifeminist if the practices and ideologies concerning gender in the group facilitate discrimination of women. Such group rights would then limit the opportunities for women in the group to live lives that truly have been chosen freely on an equal basis with men.

The adverse effects of group rights are frequently greater for women. There is a connection between culture and gender, as women are often regarded as the bearers of culture. Honour is a strong value, giving rise to the notion that women’s sexuality, as well as their general behaviour, need to be controlled. However, also personal law and other laws regulating the private sphere affect women to a greater degree. Besides, the one whose main role is to remain in the home will find it difficult to participate in and influence the public arenas of culture and politics, and it is those arenas that rules for the private sphere are decided upon. The women are regarded as bearer of the culture and the protectors of honour.

Okin points out, like Nussbaum among others, that too little attention is paid to the fact that there may be differences within the group. Furthermore, she objects to the way advocates for group rights disregard the private sphere. The group is often seen as a

⁶² Okin (1999) p.10

⁶³ Pollitt (1999) *in* Okin, p.27

unified agent. In order to realise the rights needed to preserve tradition and its interest, those traditions and interests need to be identified. Internal disagreement will obscure the identification, and will thus become a threat to the ability of the group to protect its rights. ‘Group leaders are therefore motivated to foster unanimity, or at least an appearance of unanimity, even at the cost of internal oppression.’⁶⁴

5.4.2 Can Multiculturalism and Feminism Co-Exist?

Feminism and multiculturalism have, in Kymlicka’s view, a common goal in the sense that they both point out that traditional liberal conceptions are inadequate, since insisting on equal individual formal rights is not enough to ensure equality. One needs both equality in terms of opportunity, there must also be de facto equality. The traditional assumption that equality requires identical treatment is challenged by both of the theories.⁶⁵

Multiculturalism may function harmonically in co-existence with feminism as long as it supports group members’ choice not only to choose tradition, but also to abandon it. If multiculturalism aims solely at defending endangered cultures it will most likely end up focusing on the group’s interests rather than those of the individual.

Will Kymlicka agrees with the liberal notion that it is as important with justice within ethnocultural groups as it is with justice between different groups. It is also important to have a cultural context in which to develop an ability to choose how to lead one’s life. This requires liberalism internally.(referral to Kymlica here) He divides the group rights into two categories, namely the ‘internal restrictions’ and the ‘external protections’. Internal restrictions are characterised by the groups’ wish to impose restrictions on the individual’s freedom of choice, whereas external protections are meant to promote justice between groups. Such protective measures may be a guaranteed right to political

⁶⁴ Tamir *in* Okin (1999), p.47

⁶⁵ Kymlicka, *in* Okin, p.33 and following

representations, compensation for historical injustices and of language rights, as long as they aim at ‘ensuring that members of the minority group have the same effective capacity to promote their interests as the majority’. He does not believe in granting the group the right to impose restrictions on the free choices of its members, but advocates that the latter form of group right shall be awarded minority cultures.⁶⁶

Raz points out that we cannot only accept group rights to cultures that are 100% just to women, as we then would demand more of these cultures than of our own. Western countries are still unjust to women in many aspects. He therefore agrees with Kymlicka that one should accept ‘general measures in a multiculturalist spirit’ and reject ‘measures that perpetrate oppression or violation of basic civil rights’. He welcomes measures aimed at

‘enhancing an understanding and acceptance of cultural diversity in the population at large, replacing the attitude of a majority that agrees to tolerate minorities with one of coexistence of various groups within the general framework of one civic and political culture’

and stresses that

‘[t]he point of the distinction is that the need to put an end to specific cultural practices, such as parents’ marrying off young teenage girls, should not be regarded as a reason to deny respect and general support to the group whose practices they are. We do not reject our own culture when we find that it replete with oppression and the violation of rights; we try to reform it.’⁶⁷

In order to achieve this, the state’s strategy has to maintain a double focus. The state should promote recognition and respect for all the cultures it contains, as well as protect individuals against unjust or discriminatory treatment, whether on the basis of gender or any other reason. Raw realises that such a focus will give raise to difficult problems where different, seemingly sound values will come into conflict, and where a solution

⁶⁶ Kymlicka *in* Okin(1999), p.31 and following

⁶⁷ Raz *in* Okin (1999) p.97

will demand the sacrifice of some of these values. But, as he points out, the ‘need for sensible multicultural measures arises out of dilemmas generated by imperfect reality. They represent the least worst policy, not a triumphal new discovery’.⁶⁸ In his view, it is not the task of multiculturalism to try to preserve the purity of different cultures. One should instead

‘enable them to adjust and change to a new form of existence within a larger community, while preserving their integrity, pride in their identity, and continuity with their past and with others of the same culture in different countries.’⁶⁹

The notion of *survival* is strong in these debates, Tamir points out. In the discussion of group rights any reform of tradition/culture is seen as an endangerment to the group, and must therefore be counteracted. This is a misrepresentation of reality and intentionally obscures the distinction between two kinds of destruction of a culture:

‘the first results from external pressures “exhorted” by nonmembers; the second, from the desire of members of the community. It is not just and fair to protect a culture against the wishes of its own members.’⁷⁰

Besides, as Tamir puts it:

‘A great deal of paternalism is embedded in the assumption that while “we” can survive change and innovation and endure the tensions created by modernity, “they” cannot; that “we” can repeatedly reinvent ourselves, our culture, our tradition, while “they” must adhere to known cultural patterns. These assumptions are particularly damaging for women who can improve their social status only by challenging traditional norms. If a society cannot undergo change while retaining its identity, then the aspiration of women to improve their social position necessarily comes into conflict with the rights of the group.

⁶⁸ Raz *in* Okin (1999) p.97

⁶⁹ Raz *in* Okin (1999) p.99

⁷⁰ Tamir, *in* Okin (1999) p. 49

If, however, culture and tradition are seen in a less static light, then reformers could be seen as contributing to the preservation of the communal identity no less than conservatives. The fate of a culture, a language, or a religion ought to be determined by its members. For that purpose one must grant cultural, religious, national rights to individuals rather than to the community as a whole.⁷¹

Sassen points out that it is important to bear in mind that minority cultures are not necessarily discriminatory against women. She has in her work come across examples where the minority culture is regarded as providing a safe haven and a feeling of solidarity vis-à-vis a discriminating host culture. She does not deny that many cultures have large intracultural gender inequalities, but stresses that one has to recognise the many sources of pain and rage that derive from the intercultural dynamics of domination/discrimination. And when doing so, one may well find that this is ‘strategic for eliminating or reducing the conditions that led to the demand for group rights in the first place’.⁷²

5.5 Obligation to Modify Harmful and Traditional Customs and Practices

It has sometimes been argued that a cautious approach is required in relation to state intervention in cases of forced marriage, as the practice is embedded in cultural traditions or religious beliefs, in particular those of ethnic or religious minorities, and may not therefore be treated as a violation of human rights. However, under international law, there is a duty to modify or abolish existing customs or practices which constitute discrimination against women, and insofar as forced marriages clearly discriminate against women, there is an obligation to end the practice.

5.5.1 Protection of religious freedom

⁷¹ Tamir *in* Okin (1999) p.51

⁷² Sassen *in* Okin (1999) p.77

Nussbaum objects to Okin's simplified view on religion. She states that Okin regards religion as oppressing to women, without offering anything else. If then to be held up against the Enlightenment's goal of full equal dignity to all, religion will have to yield every time. Such a view on religion does, however, fail to take into account the good things that derive from religion, such as 'its role in people's search for the ultimate meaning of life; in consoling people for the deaths of loved ones and in helping them face their own mortality; in transmitting moral values; in giving people a sense of community and civic dignity; in giving them imaginative and emotional fulfilment – and, not least, its role in many struggles for moral and political justice.'⁷³ Okin will also alienate possible allies in the fight for equality by being paternalistic through her indication that religion has no good to offer. It is important to have respect for religious people. Okin: 'Of course it is good that pro-religion feminists are seeking out and trying to foster the most woman-friendly strands within their own religions. But to do so does not entail denying or even downplaying the dominant patriarchal strands that have so long prevailed within them.'⁷⁴

5.5.2 Protection Against Discrimination on the Basis of Culture

Defences of culture used in criminal cases draw attention to the negative aspects of the culture, and is in that way counter-productive. If being heard with such a defence, the state will through its judicial system have failed to protect women against male violence, and a women's right to equal protection of the law is violated. Why should women belonging to a minority culture in a Western state be less protected against discrimination and male violence than a woman of the majority culture?

Pollitt raises objections to the use of culture as a defence from another angle. Is the excuse based on fact? Besides, claims of cultural defence cannot be made by

⁷³ Nussbaum *in* Okin (1999) p.106

⁷⁴ Okin (1999) p.123

representatives from just any culture. This, she claims, is in part because multiculturalism is connected to Third Worldism and ‘the appeals that Third Worldism makes to white liberal guilt’, and in part because the host countries see that cultures similar to their own are ‘dynamic societies in which change is constant and interests clash’. The excuse works best if the host country knows little about the culture the immigrant perpetrator belongs to. Then it is easier to depict the culture as stable and constant, and the perpetrator of the crime can more easily come across as a naïve product of his old-fashioned culture that could not be expected to have the capacity to understand and adapt to the laws of the mainstream society. Pollitt points out that such notions are not based in reality, as one can hardly find a culture that never changes in the world to day.⁷⁵

5.6 Through Cultures: Internal Discourse and Cross-Cultural Dialogue

The Muslim scholar An-Na’im has suggested a way of ending unwanted practices by using a pluralist approach in reference to the conflicts between the CEDAW and Islamic law, or between cultural practices and the CEDAW. Shari’a family law is fundamentally based on the notion of male guardianship over women, and contains many features of inequality between men and women. It is, for example, much easier for a man to get a divorce than for a woman, and this is in direct contradiction with CEDAW article 16(c) which states that the State Parties shall ensure: ‘The same rights and responsibilities during marriage and at its dissolution.’

An-Na’im states that there is a need for cross-cultural (or universal, if you like) norms, and takes as a starting point that it is the Shari’a that needs to be changed in order to be in accordance with the international human rights’ system, and not the other way around. He shows that one can interpret the Qur’an in ways that does not come in conflict with the CEDAW. Then he emphasizes that individuals from the Muslim society must make the implementation of this interpretation he calls an internal discourse. An-Na’im stresses that it is very important that the advocates for change are

⁷⁵ Pollitt *in* Okin (1999) p.28 and following

Muslim, since the Islamic world often feels that the West tries to impose its views and moral perceptions upon Muslims. If Muslims themselves work from within the culture, there is not the same risk that resentment, protests and feelings of alienation will arise from the Islamic world.⁷⁶

The challenge with such an approach is in my opinion to find the right speed to conduct the internal discourse. Going too slowly will send out signals that women's rights are not a priority and of little importance, and going too fast may increase the risk of pushing Muslims over to the fundamentalists, as they find the new developments to be out of tune with, and too revolutionary and progressive for their own religious perception of Islam.

Although forced marriages are a cultural practice, and not a religious one, the same procedure can be applicable. This is especially so, since the conductors of forced marriages often will perceive the practice as acceptable, and perhaps even encouraged, by Islam. The key word for the procedure of changing religion or culture from within is respect. In that way one will avoid being paternalistic.

In my opinion this example shows that it is important to remember to be careful and sensitive to the people whose practices one wishes to change. The risk is there, that attempts at change may be looked upon as arrogant and insulting of a culture. The risk is especially high when it comes to implementing article 16 of the CEDAW, since equality in the family is not a universal norm in itself. Very many cultures, both Islamic and others, including some Western countries base their conception of the family on the idea of complementarity and equal worth instead of equality. Some pluralists, like Sardar Ali, have suggested that one might not put so much emphasis on the equality-term, but instead concentrate on ensuring everyone equal access to different rights.

⁷⁶ An-Na'im, Abdullahi *in* Cook, Rebecca J. (1994) p.167-188

It is my opinion that such a procedure can be a useful approach to promote change in minority cultures in general. It has worked for the CRC, which is ratified by almost all the states in the world, and has a widespread support. In this connection it is interesting to note that the CRC-committee has been much better at implementing a gender-perspective in their examination of reports than the other human rights committees.⁷⁷

A variation over the same approach is presented by Ms. Ali who states that that one with reference to Muslim groups can play the 'Islamic Card' in order to promote change. Such a procedure is a kind of internal discourse where one is to look at the practice (like forced marriages) and holds it up to Islam in order to see if they are consistent. Put informal), the actor promoting the change thus says: 'Well, if you say you are Muslim, you have to obide Islam. This practice is unislamic, so you must stop adhering to it.'⁷⁸ She stresses the importance of working from within Islam: 'The secularisation of the women's rights movement would alienate and exclude many women. Furthermore, the abandonment of a struggle within Islam would leave the path clear for extremists and restrictive arguments, thus endangering the status of women even more'⁷⁹ as 'the struggle for equality in Muslim societies must come from within those societies if it is to be successful'⁸⁰.

If these procedures are to be implemented in the Norwegian work against forced marriages, one has to combine legal measures stating a universal, cross-cultural message that forced marriages are unacceptable with work conducted by members of the minority culture (internal discourse). I will return to this approach and the possibilities to use it on cases of forced marriages among minority cultures in Norway after I have gone through the Norwegian legislation, the possibilities if the forced marriage is conducted in Pakistan and the rules regarding consent in marriage in Islam.

⁷⁷ Ali, Shaheen Sardar, speech given at a seminar at Institute for Women's Law, University of Oslo, 8th November 2001: 'Conflicts of Values in Culture and Religion'

⁷⁸ Ali, Shaheen Sardar, speech, 8th November 2001

⁷⁹ Ali, Shaheen Sardar(2000) p.283

⁸⁰ Ali, Shaheen Sardar (2000) p.284.

5.6.1 Islam and the Charge from Cultures

Azizah Y. Al-Hibri points out that it is important to distinguish between religion and culture⁸¹. This can be seen as one way of conducting of internal discourse and promoting change from within. The Islamic society is based on a system based on the individual right to *ijtihad* (jurisprudential interpretation of a religious text). This means that there are no central authority has the task of interpreting the religion to its believers. Instead, both men and women engage in *ijtihad* to interpret the religion of their own. Islam guarantees every Muslim, both man and woman, freedom of conscience and since Islam was revealed as a world religion, it celebrates diversity, according to the Qur'an, 49:13. This goes to follow, she argues, that a Muslim country may retain all local customs not inconsistent with Islamic revelation. As a result, many countries have retained local custom found controversial by the outsiders, and by error, these have been perceived to be Islam-both by the West and sometimes within the culture. Islamic jurisprudence adopts the principle that many laws change with the change of time and place, yet many Muslims continue to follow the jurisprudence of past centuries and civilisations .

'A true feminist call to reform in Muslim countries or among Muslim immigrants must respect their religious and cultural sentiments, while recognizing the sanctity of the first and the flexibility of the second.' p.43. She states that the best approach for advocating change must be for Muslim feminists to re-examine Islamic jurisprudence critically in light of jurisprudential principles (and the mashala of the Muslims). She comes up with a tripartite strategy:

- 1) Clearly separate customary from religious practices (which will reduce Muslim resistance to change of the cultural kind.
- 2) Re-examine existing jurisprudence critically to reveal any inappropriate cultural elements in it.

⁸¹ Okin (1999) p.43

3) Provide modern contributions to Islamic jurisprudence, which take into account the time, place and mashala of women, half of whom are women.

6 Measures to Be Taken

As my review of the legal literature hopefully has shown it is not easy to establish one clear definition of the term forced marriage. The boundaries are not sharply delineated. According to international conventions, marriages should be of free consent. Forced marriages are thus a violation of human rights. As previously stated, the CEDAW has opened up for a pluralist approach to implementation in article 2, where the states are under obligation to implement the non-discrimination principle, but are allowed to use appropriate measures in doing so. This opens for the possibility of considering social, cultural and economic factors during implementation. See also point on measures in Norway.

In order to help possible victims of forced marriages, one needs both preventive measures to stop forced marriages from happening, as well as restorative measures to help those who have already been forced to enter marriage against their will. The two categories of measures will be quite different in form and content, as they will seek to help out young people at risk in two very different situations. There will also be a great span between the individual measures and the more all-over general preventive measures such as information campaigns and competence building.

As legal sociology has shown us, it is not always enough to pass a law in order to eradicate an unwanted phenomenon. Sociological jurisprudence has proved that it is not necessarily sufficient to pass a new law in order to change people's behaviour, and that the laws work best if people support the 'moral valuation' justifying the laws⁸⁶. It is not very likely that people whose view on parenting already diverges from the one of the legislative authorities will refrain from entering agreements like this, simply because they are prohibited by law. If there is a will, there will in most cases also be a way to find a loophole in the law. This is especially true when it comes to a phenomenon such as forced marriages as it will be almost impossible to stop all incidents just by passing a law. Marriages are in themselves more of a private rather than a public nature. The reasons why one enters marriage may vary and are not always visible. Thus the pressure/coercion from third parties in the case of forced marriage is often difficult to prove. This is obviously not the same as arguing that a ban on forced marriages is unnecessary. On the contrary, this must be the natural starting point in any campaign against forced marriages. And as I have shown above, there are numerous international treaties that establish that this is indeed the legal situation of today world wide. Thus we find the same rules in both Norwegian and Pakistani national legislation, as well. However, if one wishes to prevent all forced marriages from happening, one needs more than just a law. It is crucial to change the public opinion and values of those who practice such marriages, as that would lessen the incitement to search for ways of avoiding the law.

6.1 Legislation in Norway -a Brief Overview

The general starting point that marriages are to be entered into with consent of both parties is (as previously mentioned) set forth in international conventions that Norway have ratified (see section 2 of this thesis). According to these instruments and the rules

⁸⁶See for instance Mathiesen (2001), p.59 and following

concerning state responsibility is Norway obliged to ensure that the right to marriage and right to freedom from forced marriages are protected.

Protection against forced marriages is also found in Norwegian state law. The European Convention on Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights are made a part of Norwegian law directly with the Human Rights Act of 1999.⁸⁷ The treaties have a somewhat special status in Norwegian law. They are, subsequent to section 3 of the Human Rights Act, elevated to a level between the ordinary legislation and the Constitutional level as they are to take precedence over any other legislative provisions that conflict with them.

There are furthermore provisions in the Penal Code that makes it punishable to compel someone into an unwanted marriage, and there are provisions in the Marriage Act that render it possible to get a forced marriage declared null and void.

6.2 Criminal Law

6.2.1 The general clause against illegal use of force

As of today, Norway has no specific criminal provision concerning forced marriages, but such marriages are punishable under the general clause against illegal use of force which is to be found in the Norwegian Civil Penal Code section 222:

‘Any person who by unlawful conduct or by any threat thereof compels another person to do, submit to, or omit to do anything, or who is accessory thereto, shall be liable to fines or imprisonment for a term not exceeding three years. If there are specially aggravating circumstances, cf. section 232, third sentence, imprisonment for a term not exceeding six years may be imposed.

⁸⁷ For the normative content of the rights concerning marriage embedded in these treaties, please see section 2 on international law above

Any person who by threatening to make an accusation or report of a criminal act or to make a defamatory allegation unlawfully compels another person to do, submit to, or omit to do anything, or who is accessory thereto, shall be liable to fines or imprisonment for a term not exceeding one year.

If the felony has been committed against any of the offender's next of kin, a public prosecution will only be instituted when requested by the aggrieved person unless it is required in the public interest.⁸⁸

While the Penal Code has several provisions prohibiting use of force in order to attain a specific purpose, the general clause does not contain a specific purpose as a prerequisite for criminal responsibility. The right protected by law is the freedom of action and personal liberty in general.

The ordinary sentencing framework is fines or prison up to 3 years. If there are particularly aggravating circumstances, the maximum sentence is elevated up to 6 years.

6.2.1.1 'Unlawful conduct'

According to section 222, first subparagraph, 'unlawful conduct' or threat thereof that compels another 'to do, submit to, or omit to do anything' is subject to punishment. Accomplices are also criminally responsible. Unlawful conduct and threats of such conduct are equalized. In practice threats will be the most common.⁸⁹ The word 'unlawful' refers to other norms in the legal system. A punishable offence would naturally be regarded as 'unlawful conduct', but a breach of other legal norms will also be covered. An act or threat of act that results in a duty to pay damages without criminal liability may be comprised by the provision. However, in these cases not all kinds of coercion will be considered constituting 'unlawful conduct'. Whether the act is punishable or not will depend on what the victim is forced to do. It has been discussed whether certain acts that are not legally sanctioned can pass under section 222. Threats of suicide are presumed to fall under the scope of section 222, whereas one has

⁸⁸ Unofficial translation to English by the Norwegian Ministry of Justice, can be found on the internet: <http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.doc>

⁸⁹ Bratholm/Matningsdal (1995) p. 512

discussed if threats of divorce shall be included.⁹⁰ The ‘unlawful conduct’ can be directed at the forced one herself, or at relatives or close ones who have such a relation with the forced person that the threat will have an effect.

If one compels someone to enter into a marriage under threats of violence, custodial confinement, deprivation of possessions or property or other illegalities, it will be punishable subject to section 222, first paragraph. It is more problematic if one threatens with strictly social sanctions. Parents or siblings can for instance threaten to end all contact with the victim, or parents can threaten the victim with eviction from the family home. These acts are in principle completely legal. But such threats can be just as radical for the threatened as for instance acts of violence, and are therefore suitable to deprive the victim of the personal liberty section 222 is meant to protect.

As the phrase ‘unlawful conduct’ normally is understood to constitute a breach of a legal norm, civil or criminal,⁹¹ threats of strictly social consequences would therefore not be included according to the wording of the law. The legislative purpose, on the other hand, would be better fulfilled if threats of *other* sanctions than the ones that constitute breach of legal norms also are included, at least in the cases where the sanctions it is threatened with are very grave, and where the result of the use of force is such a gross violation of personal liberty as a forced marriage would be. Meanwhile, in Norwegian jurisprudence, it has always been the tradition to be restrictive when it comes to interpreting the wording of a penal provision extensively. That principle is also embedded in the Norwegian Constitution, section 96, which states that ‘no one may be convicted except according to law’.⁹² A Penal Code that is so wide and vague that the foreseeability disappears, will defeat the purpose of this principle. If grave threats of

⁹⁰ Bratholm/Matningsdal (1995) p. 513-514 with further references

⁹¹ Andenæs, Johs (1997) p.143. Andenæs refers to the recommendations of the Commission on the Penal Code (Straffelovskommisjonen), which states that punishment shall only be used in the cases where the act according to the remaining existing civil legislation is illegal. (S.K.M 1896 p.98).

⁹² Translation from Norwegian by the Ministry of Foreign Affairs, found 04.06.03 on the internet: <http://odin.dep.no/odin/engelsk/norway/system/032005-990424/index-dok000-b-n-a.html>

sanctions that do not constitute a breach of legal norms are *not* to be included in the prohibition of use of force, we will face a system that fails to give protection against forced marriages in cases where sanctions involved in the threat are of the ‘right’ kind.

There is no case law providing guidance when establishing the boundaries of what ‘unlawful conduct’ is in relation to section 222, and the conclusion is uncertain. The only case we have is on this matter⁹³ regarded a father who beat up his daughter, pulled her hair, kicked her and choked her until she threw up. These acts are clearly unlawful as they are punishable offences. The violence occurred a couple of weeks before the wedding and the court found proof for the fact that the violence was used in order to force her into the marriage (subjective guilt, see point 6.2.1.5 below) and that it was the compulsion that made the daughter enter into the marriage.

6.2.1.2 ‘To compel’

To compel is to prevent someone from acting according to her own free will. It must in this context be enough that the threats affected the victim to do, submit to, or omit to do something the said person otherwise would not have done or accepted. The boundary towards arranged marriages may here raise a problem, since a line has to be drawn towards the different kinds of pressure parents legally can practice. Parents can make use of a variety of measures in order to make their children do things they do not want to, like homework or housework. It is not unlawful for parents to try to influence their children in their election of spouses, either. The British Working Group on Forced Marriages uses the term ‘loving manipulation’ as something the parents freely can exercise.⁹⁴ A young woman who is urged every day by her parents to marry a man they have chosen, may very well experience such a pressure as insurmountable, but the parents are not committing a crime by doing so. Repeatedly informing the woman that she has to think about the honour of the family is not a crime either. It is the unlawful conduct that is punishable.

⁹³ Case no. 02-00292 M/01 from Indre Follo Municipal Court (tingrett) 04th of April 2002

⁹⁴ Working Group

The distinction can be hard to draw from case to case. Where the marriage is entered into after illegal acts or threats of such acts aimed directly at the victim, is this clearly a forced marriage. The problems arise in cases where fear of certain consequences influences the woman to enter into a marriage that the parents wish for. This will be the case where, for instance, an older sibling has been subject to force, or where the parents' attitudes or statements of a more general kind may be interpreted as implying that disobedience will lead to certain consequences (of the kind that constitutes 'criminal conduct' –see discussion above). In the cases where the parents (or others) have meant to influence the woman so that she enters into a marriage against her own will, or where they have regarded the possibility for such an influence as likely, and the victim too has seen it this way, this is to be regarded as a forced marriage. In a famous Norwegian case where the parents abducted a young woman from Norway to Morocco and kept her in confinement there for a long period of time, the court stated that a threat can vary in form and strength.⁹⁵

6.2.1.3 'To do, submit to, or omit to'

The result of the use of force is that the forced one must do, submit to, or omit to do something she otherwise would not have done. The wording is meant cover all hypothetical cases. The entering into a marriage is an active act that is covered by the alternative 'to do'. The alternative to 'submit to' covers cases where the forced one must remain passive, whereas cases when one is compelled not to marry a certain person are covered by the alternative 'omit to'.

6.2.1.4 Subjective guilt

Before criminal liability can exist, there must be not only an objective breach of the penal provision, but also subjective guilt on part of the actor. The guilt must exist at the

⁹⁵ Case no. 98-3021 M/77 from Oslo City Court (Oslo byrett) 10th of November 1998, p. 9. (The court did not, however, see that forced marriage was a central point in this particular case.)

moment when the act which creates liability is committed. Where a continuing activity is concerned one can be held criminally liable if one were to continue after becoming aware of the situation.

The general rule on the degree of guilt required for criminal liability is set out in the Penal Code, § 40, first paragraph: ‘The penal provisions of this Code are not applicable to any person who has acted unintentionally unless it is explicitly provided or unambiguously implied that a negligent act is also punishable.’⁹⁶ The offence must thus be intentional in order to be punishable after section 222.

In order for an offence to be intentional, the act itself must be intentional (consciously willed). Liability for an intentional offence requires that the intent encompass not only the act itself, but also the consequences and the circumstances that make it an offence.⁹⁷

The conductors of forced marriages will fall under this scope, as long as the use of force/coercion is illegal, which it must be in order for it to be punishable.

6.2.1.5 Attempted compulsion

The crime is executed when the victim has yielded to the compulsion. If the perpetrator fails to compel the victim, the person in question can be punished for attempted compulsion after section 49⁹⁸ in the Penal Code.

⁹⁶ Translation from Norwegian by the Ministry of Foreign Affairs, found 03.06.03 at the internet: <http://odin.dep.no/odin/engelsk/norway/system/032005-990424/index-dok000-b-n-a.html>

⁹⁷ Johannes Andenaes (1965), p. 192

⁹⁸ Section 49 states that ‘When a felony is not completed, but an act has been done whereby the commission of the felony is intended to begin, this constitutes a punishable attempt.’ Translated by the Ministry of Foreign Affairs.

6.2.1.6 Aiding and abetting⁹⁹

Aiding and abetting to compulsion can also be punishable pursuant to first paragraph of section 222 (which opens for the punishment of anyone who is an accessory¹⁰⁰ to the use of force). Aiding and abetting can take place beforehand or during the crime, and be of a physical or a psychological nature.

In order to establish whether someone can be convicted of being an accessory to the use of force, one has to look at the actions of the person in question to see if those can be characterised as aiding and abetting to the act that the relevant provision (here: use of force) describes. It will constitute physical aiding and abetting just to participate in one way or the other in the preparation or the carrying-out of the crime. A mother who finds a suitable husband, or prepares for the wedding, leaving the use of force or the threats thereof up to the father, is punishable for accessory to the use of force. There does not have to be a casual link between the aiding and abetting and the crime. If for instance a father would have forced his daughter into a marriage regardless of the wife's marriage preparations, she can still be punished as an accessory if she has contributed to such preparation. When it comes to psychological aiding and abetting, however, is it necessary that the support have an effect. Otherwise, it would only constitute attempted aiding and abetting.¹⁰¹ A man supporting his brother's intention to forcefully marry off his daughter can be punished for aiding and abetting if the brother would have refrained from forcing his daughter without the support. If it turns out that the brother would have forced his daughter into marriage regardless of what the man had said, the man can be punished for attempted aiding and abetting.

⁹⁹ I use Craig's translation of the noun 'medvirkning' with the term 'aiding and abetting'. See Craig: 'Stor norsk-engelsk juridisk ordbok' (1999) p. 151

¹⁰⁰ I use the term 'accessory' here since it is used in the translation of the Penal Code by the Ministry of Foreign Affairs. The Norwegian term 'medvirkning' has a slightly different meaning, as it does not include accessory *after* the fact, as the tradition has been in Anglo-American law. (For more on the translation of 'medvirkning', see: Craig, (1999) p. 151

¹⁰¹ Slettan/ Øie (1997) p. 122 and following.

A particular question that may be quite relevant in cases of forced marriage, is whether one can be punished for being an accessory if one knows that the crime is about to be committed, and one remains passive. A brother knows, for instance, that his sister is to be married off against her own will, and he does nothing to stop it. According to Norwegian legal tradition, one has to distinguish between knowledge of a crime and aiding and abetting.¹⁰² There is no general duty to prevent crime in Norway. In order for it to be punishable the passivity must be interpreted as encouraging for the perpetrator. This may easily move beyond a merely theoretical possibility in forced marriage cases in families with patriarchal family structures. If the mother is to forcefully marry her daughter away, and the father knows of her conduct and does nothing to stop it, this could be interpreted as an incitement from the man considered to be the head of the family.

One can be punished for aiding and abetting even if the main perpetrator cannot be punished and vice versa. The conditions governing criminal liability must be fulfilled for each perpetrator. Subjective guilt, legal age and sanity conditions have to be present in order for someone to be punished, and these conditions may be fulfilled for the accessory and not the main perpetrator (or the other way around). A woman eagerly supporting her husband in the marrying of their daughter against her will, can be punished even though the father cannot, for instance because he was insane at the time of the crime.¹⁰³ (If the accessory is forced into helping the main perpetrator, naturally she or he cannot be punished for aiding and abetting.¹⁰⁴)

¹⁰²Slettan/Øie(1997)p.126

¹⁰³ See chapter 3 in the Penal Code for the conditions governing criminal liability.

¹⁰⁴ For more information, see: Slettan/ Øie (1997) p. 127

6.2.2 Rules of prosecution

If the felony is committed by the victim's next-of-kin¹⁰⁵, according to section 222, 3rd paragraph a public prosecution will only be instituted when requested by the aggrieved person unless it is required by public interest. In cases of forced marriages, it will often be the victim's next-of-kin that is the perpetrator. There is reason to believe that prosecution will be instituted regardless of the victim's request in most cases, since it would be of strong public interest that the grave kind of infringement on personal liberty which a forced marriage represents be prosecuted.¹⁰⁶ The rules of prosecution regarding section 228 of the Penal Code concerning violence or other bodily assaults was altered in 1988 so that prosecution always would be public when the felony was perpetrated by the victim's next-of-kin. This alteration reflects a stricter attitude towards violence within the family.¹⁰⁷ It is reasonable to believe that the same attitude would apply towards forced marriages. The Ministry of Justice and the Police seems to be of the same opinion as it presumes in the green paper suggesting changes to the Penal Code that it in to day's situation normally will be in the public interest to prosecute a mother or father compelling their child to get married.¹⁰⁸ The decision of which cases to prosecute is to be taken by the Public Prosecution Office.

¹⁰⁵ The term next-of-kin is defined in section 5 of the Penal Code: 'Wherever this code uses the term a person's next-of-kin, it thereby includes his spouse, ascendants and descendants, siblings and equally close relatives by marriage, foster-parents and foster-children, and his fiancée. If the marriage is dissolved, the said provisions shall continue to apply to events occurring before the dissolution. The spouse of a relative by marriage is also regarded as a relative by marriage.' Translation from Norwegian by the Ministry of Foreign Affairs, found 03.06.03 at the internet:

<http://odin.dep.no/odin/engelsk/norway/system/032005-990424/index-dok000-b-n-a.html>

¹⁰⁶ Hennum/ Paul opens for the possibility that there in some cases will not be in the public interest to prosecute, see Hennum/Paul (2000), p.44

¹⁰⁷ Andenæs/Bratholm, Anders(1996), p.52

¹⁰⁸ Ot.prp. nr. 51 (2002/2003) p.15

6.2.3 Deprivation of liberty

Victims can, in connection with forced marriages, find themselves deprived of their liberty. They can for instance be kept in unlawful custody by their family. Deprivation of liberty is prohibited in section 223¹⁰⁹ of the Penal Code.

Section 223 prohibits the unlawful deprivation of someone's liberty. The right protected by the law is the individual's right to freedom of movement and right to socialisation with others. The freedom of movement must be limited by physical obstruction. If no physical obstacles are present, the case may still be punishable subject to section 222.

The removal of objects necessary for the person to move around freely is also considered as a physical obstruction. Deprivation of liberty can exist even if the freedom of movement is quite big within a larger area. Confiscation of passport, money or other possessions must therefore fall under the limits of the provision, if such confiscation holds the effect that the victim is kept within an area against her free will. In the Nadia-case, the court found that although the girl, Nadia, was not constantly locked up or under strict supervision, there was still unlawful deprivation of liberty as she was without passport and money and had no way to escape on her own. Constant surveillance was thus not a necessary condition, since she in fact was deprived of her liberty. In addition to this, the parents knew her whereabouts at all times. The parents were convicted for unlawful deprivation of liberty.¹¹⁰

¹⁰⁹ Section 223 states that: 'Any person who unlawfully deprives another person of his liberty or is accessory to such deprivation of liberty shall be liable to imprisonment for a term not exceeding five years. If the deprivation of liberty has lasted for more than one month or has caused any person abnormal suffering or serious injury to body or health or has resulted in the death of any person, imprisonment for a term of not less than one year shall be imposed.' Translation from Norwegian by the Ministry of Foreign Affairs, found 03.06.03 at the internet: <http://odin.dep.no/odin/engelsk/norway/system/032005-990424/index-dok000-b-n-a.html>

¹¹⁰Case no. 98-3021 M/77 from Oslo City Court (Oslo byrett) 10th of November 1998, p. 7

To unlawfully deprive someone of their liberty does not necessarily mean that the deprivation must be absolute and insurmountable. It has been presumed in theory that it will constitute deprivation of liberty if the victim in order to regain her liberty must employ means that one within reason cannot expect her to make use of.¹¹¹ The Nadia-case can serve as an illustration of this. To flee from her family and a country may not be a 100 per cent impossible, but the court found that the situation she was put in never the less constituted deprivation of liberty.

Not just any form of short-term deprivation of liberty is punishable, but there is no minimum time-requirement. In Norwegian case law, there are several incidents where the deprivation has lasted shorter than one hour.¹¹² It will in my opinion be important to look at aspects like the way in which the deprivation was carried out, and how it made the victim feel. A deprivation that consists of confiscation of passport and money will probably be experienced by the victim (especially if the confiscation lasts only for a short period of time) as less infringing than for instance to be drugged or locked up in a basement. If the latter means are put to use, this will more easily constitute deprivation of liberty after only a short period of time than it would if the first means were used.

The deprivation of liberty has to be unlawful in order for the act to be punishable after section 223, i.e. it has to be contrary to a legal norm. The discussion will be the same with regards to this section as it was with regards to section 222 (See point 6.2.1.1 on ‘unlawful conduct’ above.) Parents’ freedom to decide on the upbringing of their children gives rise to questions with particular reference to deprivation of liberty.¹¹³ This does however fall outside the scope of this thesis, as I have excluded children’s marriages from my discussion.

¹¹¹ Bratholm /Matningsdal (1995) p. 521

¹¹² Bratholm / Matningsdal) (1995)p. 522-523

¹¹³ Parents are to a certain extent allowed to make use of ‘house arrest’, that is to tell their children that they are grounded, but there must be a certain proportionality between the means and ends. (See Bratholm/ Matningsdal) Deprivation of liberty past a normal, rational level as part of the raising of children is not allowed towards minors. Subsequently is deprivation of the liberty of as a part of a forced marriage not allowed neither towards adults nor minors.

6.2.4 Threats of Committing a Criminal Act

The Penal Code section 227 states that threats of committing a criminal act are punishable. The conditions are that the criminal act involved in the threat is subject to a more severe penalty than six months imprisonment. A father's threat to his daughter of an 'honour killing' if she does not marry according to his wishes, will for instance fall under the scope of this section. It is not a requirement that is threatened with a specific criminal act, cf. the case of Rt. 1996 p. 226.

The threat must be presented under such circumstances that the threat objectively is likely to cause serious fear. This is evaluated on the basis of the content of the threat seen in relation to the circumstances under which the threat has been presented.¹¹⁴ It is not considered vital that a braver person would not have been frightened.¹¹⁵ The fear does not necessarily have to be for the life or health of the victim.¹¹⁶

Both words and deeds, including signs¹¹⁷ can be regarded as threats in relation to section 227. It is not a prerequisite that the person presenting the threat has to execute the criminal act himself,¹¹⁸ and the threat does not have to be presented directly to the person who is supposed to be the victim of the criminal act, cf. Rt. 1984, p. 1197.

Unlike with section 222 it is not required that the aggravated party actually felt threatened. The father in the example above can still be punished, even if the daughter is not threatened by his statements. One can furthermore be punished if the threat is not

¹¹⁴ Norsk Lovkommentar, Matningsdal (2002) p. 106

¹¹⁵ See the travaux préparatoires, Innst. O. VI (1889) p. 23

¹¹⁶ Norsk Lovkommentar, Matningsdal (2002), p. 106

¹¹⁷ Norsk Lovkommentar, Matningsdal (2002) p. 105

¹¹⁸ Norsk Lovkommentar, Matningsdal (2002) p. 105

used as a means to an end. A threat of forcing someone into a marriage is thus punishable in itself.

Aiding and abetting is also punishable. The sentencing framework is fines or imprisonment for a term not exceeding three years. If there are especially aggravating circumstances, cf. section 232, third sentence, a term of imprisonment not exceeding six years may be imposed. The rules of prosecution is the same as with section 222, see section 227 second paragraph and the discussion under point 6.2.2.

6.2.5 Punishable Violation of the Formal Requirements of Marriage

Section 338¹¹⁹ of the Penal Code concerns persons who violate the formal requirements of marriage. In relation to forced marriages it is the violation of requirements for a valid marriage that is particularly relevant, as one of the requirements is that both persons shall enter into the marriage with consent. I will come back to this under the discussion of the marriage legislation below. Persons who violate the requirements are liable for fines. The degree of guilt is intent, cf. Penal Code section 40. A man who marries a woman forced into the matrimony, can thus only be punished if he is aware of the fact that she enters into the marriage without consent.

6.2.6 The jurisdiction of the Norwegian state

In cases of forced marriages it is not unthinkable that the marriage is entered into abroad, and that the perpetrators are foreigners. The penal code's territorial applicability is quite wide. Section 12 establishes how far the Norwegian penal law extends. The penal law has a wide scope of application. According to section 12 no.1 Norwegian penal law applied to acts that are committed in the realm. It makes no difference

¹¹⁹ Penal Code, s. 338: 'Any person who enters into a marriage or partnership pursuant to the Act relating to registered partnership without observing the provisions in force concerning the requirements for a valid marriage or the requirements for the registration of a partnership, dispensation or other statutory conditions, or who is accessory thereto, shall be liable to fines,.

whether the perpetrator is a Norwegian or an alien. Penal Code section 12 no. 3 applies to acts committed *abroad* by persons who are Norwegian citizens or are domiciled in Norway. Forced marriages conducted in Norway, by foreigners or Norwegian citizens, or forced marriages in other countries, for instance Pakistan, conducted by people who have their residence in Norway or who are Norwegian citizens are thus punishable after Norwegian law. Both cases are highly possible, but one may also think of other cases, where for instance that a Norwegian-Pakistani girl is sent abroad and her Pakistani grandfather (domiciled in Pakistan) forces her into a marriage. In those cases, the universality principle in Norwegian penal law applies. Section 12 no.4 states the principle that Norwegian penal law may also be applied to acts committed abroad by foreigners. The condition is that one of the serious offences listed in no. 4 (a) is involved. Sections 222, 223 and 227 are listed here, whereas section 338 is not. The Pakistani groom of such a marriage conducted in Pakistan can thus not be punished pursuant to Norwegian legislation even if he knows that his bride has been forced into the marriage.

6.3 Suggested Changes to the Criminal Law

Subsequent to the follow-up document 'Efforts against Forced Marriages Spring 2002',¹²⁰ the Government proposed amendments in laws and regulations regarding forced marriages. The Ministry of Justice and the Police have presented a green paper concerning amendments in the Penal Code.¹²¹ An important aim with the suggested amendments is that forced marriage cases shall be subject to higher priority from the police and the Public Prosecution Office.

¹²⁰ Follow-up document 'Efforts against forced marriages spring 2002' / oppfølgingsdokumentet "Innsats mot tvangsekteskap våren 2002" found 10.06.03 at the internet:

<http://odin.dep.no/bfd/norsk/publ/handlingsplaner/004021-990048/index-dok000-b-n-a.html>

¹²¹ Ot.prp. nr. 51 (2002/2003)

6.3.1 Forced Marriage as an Element in the Evaluation of ‘Specially Aggravating Circumstances’

A clear and effective set of rules is regarded as essential in order to intensify the fight against forced marriages. The Ministry wishes on this background to strengthen the legal status of those who are victims of forced marriages by making it clearer in the law that it is punishable to compel someone into marriage.¹²² This is suggested done by adding forced marriages to the list of what may constitute especially aggravating circumstances, cf. the Penal Code section 222, first paragraph and section 232. The maximum sentence is higher for felonies conducted under specially aggravating circumstances.

To compel someone into marriage may already constitute specially aggravating circumstances. In the case concerning forced marriages I referred to under point 6.2.1.1, the court stated that the father used force to influence one of the most important choices to be made in life. That combined with her weak position due to the violence he had subjected her for throughout her childhood, constituted specially aggravating circumstances. The legal situation will therefore not change.

But by mentioning forced marriages in connection to the legal provision, one is sending an important signal to the Public Prosecution Office and the Courts stressing the serious character of such acts. The hope is that this may contribute to an intensifying of the criminal prosecution and to stricter sentencing –not only with acts committed in the realm, but also when the compulsion is committed abroad.¹²³

6.3.2 Unconditional Public Prosecution in Forced Marriage Cases

As of today public prosecution of a forced marriage case (or a case of *threat* of forced marriage) will only be instituted when requested by the aggrieved person unless it is required in the public interest if the felony is committed by the victim’s next-of-kin. I stated in point 6.2.2 that it was likely that prosecution would be instituted regardless of the victim’s request, since the prosecution of a forced marriage would be of a strong

¹²² Ot.prp. nr. 51 (2002/2003), p.8

¹²³ Ot.prp. nr. 51 (2002/2003), p.8

public interest. The green paper suggests that public prosecution after section 222 and 227 of the Penal Code from now on shall be unconditional, i.e. the public shall prosecute regardless of whether the victim requests prosecution or not. The aim of the amendment of the rules regarding public prosecution is to signal that investigation of forced marriages shall get a higher priority than it has today.¹²⁴

The Ministry points to the fact that it more often than not will be unreasonable to expect young people to initiate proceedings after which their family members can be held criminally liable. This is in accordance with the suggestions put forward in the report of Henum/Paul, who emphasize that it will be positive to move the responsibility of initiating criminal proceedings from the children to the public.¹²⁵

An amendment of this kind will have a small effect if the Public Prosecution Office does not receive knowledge of the forced marriage. But, since the prosecuting authority in some cases will get information from other sources than the victims themselves, it may not be perceived by the perpetrators as automatically the victim's fault that prosecution is being initiated. This safeguard may also help victims to 'come forward' and ask for help, since they, once the punishable act has come to the attention of the Public Prosecution Office, cannot be pressured into withdrawing their request of prosecution.

Many of the bodies entitled to comment on the green paper have called attention to the fact that a rule of unconditional public prosecution will have a negative effect on young people that would not want prosecution initiated against their parents. They fear that a prosecution can ruin further contact between the parents and the daughter, and that fewer people will ask for help when they know that they risk that criminal proceedings will be initiated against the perpetrators.¹²⁶ As long as the cases already can be subject to prosecution regardless of what the victim requests, and since the rules regarding duty

¹²⁴ Ot.prp. nr. 51 (2002/2003), p 22

¹²⁵ Henum/Paul (2000), p.44

¹²⁶ Ot.prp. nr.51 (2002-2003) p. 18

and right to silence will remain the same as before, the Ministry does not recognize that such arguments should be attributed much weight.

6.4 The Marriage Act

As mentioned above, marriages are -according to Norwegian legislation and treaties Norway is bound by- to be entered into freely. The same starting point is set forth in the Marriage Act. It is stated in section 11, first paragraph, second sentence that the parties shall 'declare that they wish to contract a marriage with each other'. The Ministry of Justice and the Police states in the green paper suggesting changes of the Penal Code concerning forced marriages that 'forced marriages is a grave infringement of the individual's freedom and autonomy' and that the Marriage Act 'rests on the basic principle that a marriage is to be build on the free will of the parties' (my translation).¹²⁷ This implies that a marriage shall be of free consent. The declaration from the two parties is the only formal control of the consent that is carried out in connection with the matrimony.¹²⁸

There are several conditions that have to be present before two people can get married. The conditions are divided into material and formal criteria. When it comes to material conditions (age limits, prohibition to marry close relatives, prohibition for former married persons to remarry as long as the first marriage exists etc¹²⁹) a breach of these will be of no relevance to the validity of the marriage. The marriage must then be dissolved after the ordinary rules concerning divorce. If, on the other hand, the formal criteria (the declaration of consent, the presence of witnesses and both of the intending spouses etc.) are violated, the marriage will be regarded as null and void, cf. section 16.

¹²⁷ Ot.prp. nr.51 (2002-2003) p.8

¹²⁸ Hennem/Rachel (2000) p. 23

¹²⁹ See: Holmøy/LødrupPeter (2001) p. 39 and following

6.4.1 Nullity of Marriage as a Consequence of Compulsion

The Norwegian Marriage Act section 16, third paragraph provides the opportunity to have a marriage declared null and void if one or both of the spouses have been forced into the marriage by unlawful conduct. The provision was added in an amendment in 1994.¹³⁰ In the White Paper it is pointed out that forced marriages are frequent in many cultures and that it also happens to girls born and raised in Norway with parents from different cultures.¹³¹ The amendment came about because it was regarded desirable to spare someone who had been forced into a marriage (with all the unfortunate consequences this leads to) and who wanted to get out the strain a separation and a divorce would inflict on him or her. This would be especially so in the cultures where divorce, particularly for women, is regarded as shameful and stigmatizing.

6.4.1.1 Compulsion

The first condition that has to be fulfilled to get a marriage declared void is that compulsion has been used. Compulsion can be both physical and psychological and has the consequence that the compelled person is made unable to act according to her own free will. As with the general clause against illegal use of force, one has to draw a line between forced and arranged marriages. (See discussion above, point 6.2.4.2. 'To Compel')

6.4.1.2 Unlawful use of force

In addition to the fact that there must have been compulsion, the use of force must have been 'unlawful'. It must normally be a condition that the compulsion must have been able to cause grave fear.¹³² Holmøy/Lødrup state that in the evaluation of this, one needs to consider the cultural environment in which the victim has grown up. Hennem/Paul interpret this to mean that, in groups where family has a stronger control over the

¹³⁰ Endringslov av 24.juni 1994 nr.24

¹³¹ Ot.prp. nr. 44 (1993-94), p. 12

¹³² Holmøy/Lødrup (2001) p. 95

individuals, one will tolerate a somewhat stronger pressure than in groups where such control is weaker.¹³³

In my opinion one should not attach great importance to a cultural relativist argument like this one. The tradition for use of pressure within certain groups should not be of relevance when one is to decide what constitutes unlawful use of force according to Norwegian law. If the provision is practiced like that, it will create a situation where the law is interpreted differently depending on which cultural group the perpetrator belongs to. It is a basic principle that everyone is to be equal before the law. It is the determination of the word ‘unlawful’ that must be central here. The pressure is either unlawful subsequent to Norwegian law or it is not. The line can be hard to draw, and one may have to do so on a case-to-case basis. But the fact that some cultural groups pressure their children more than others cannot influence the content of the word ‘unlawful’ so that these parents get more leeway when it comes to using compulsion than other parents do.

The condition that the conduct has to be ‘unlawful’ is of highest relevance when it comes to psychological compulsion. It will normally be here that the borderline cases arise. The word ‘unlawful’ is a somewhat wider term in relation to section 16, paragraph 3 of the Marriage Act than it is in relation to section 222 of the Penal Code. It has been stated¹³⁴ that compulsion is unlawful when it is ‘manifestly unacceptable’¹³⁵. Threats of psychological and social sanctions will be relevant here, thus it is not necessarily a condition that acts that are sanctioned by civil or penal law constitute the threat. We see here that it takes less to get a marriage declared null and void than it does to get the perpetrators of the compulsion punished. The travaux préparatoires leave it up to the courts to draw the line between unlawful compulsion and lawful pressure. As the line between the forced marriages and the marriages where the pressure has not been big

¹³³ Holmøy/Lødrup(2001) p. 95, cf. Hennem/ Paul (2000), p. 27

¹³⁴ Holmøy/Lødrup(2001) p. 95

¹³⁵ ‘Manifestly unacceptable’ is my own translation of the term ‘klart utilbørlig’ which is used in the legal commentary to the law.

enough to ‘activate’ the law will be drawn differently depending on which law one wishes to apply, I will argue that this is a way of operating with a differentiated notion of forced marriages.

6.4.1.3 Procedural rules

According to section 16, paragraph 3 the marriage is not void until the courts have pronounced a declaratory judgment stating that the marriage is void. The legal proceedings must be instituted by one of the spouses. This has to be done within 6 months after the spouse is free from the compulsion, and at least within five years after the marriage was entered into, cf. section 16, paragraph 4. The absolute ‘deadline’ corresponds to the period of limitation for punishment after section 222. The reason for the relatively short period of limitation is consideration for the parties themselves, possible children and evidential difficulties. If there are no distinct indications that the compulsion has ceased to be found, is it the five year long period of limitation that must apply. In a case (RG 1999 p.449 -Fredrikstad) where a woman born in Somalia who had lived in Norway since the age of nine and was wed in Yemen against her will, the compulsion was perceived to have ceased when she returned to Norway. (See below on the possibility of extension of the period of limitation due to customary law.)

6.4.1.4 Territorial applicability

At least one of the spouses must have domicile or be a Norwegian citizen when the legal proceedings are instituted, cf. the Dispute Act section 419 litra a. If the marriage is entered into in the home country of the parents, but the compelled woman has domicile in Norway (and perhaps a Norwegian citizenship as well), it is the Norwegian legislation that determines the conditions of marriage.¹³⁶

If the victim has domicile outside the borders of Norway, and the wedding took place there, the situation is more uncertain. According to Norwegian international private law

¹³⁶ Holmøy/Lødrup (2001), p. 96 and Thue (2001) p. 294

the main rule is that questions concerning the validity of the marriage are decided according to the laws of the country where the wedding took place.¹³⁷ If a marriage is considered valid there, is it only in exceptional cases that it will be considered not valid in Norway. However, this is only the case as concerns of the validity of the marriage. Questions relating to separation and divorce are settled according to Norwegian rules for couples domiciled in Norway.

In regards to Pakistan, the question on the validity of forced marriages according to national legislation does not hold much relevance, since a forced marriage is not to be regarded valid after Pakistani law, either. A Pakistani woman living in Pakistan when being forced into marriage will according to Shari'a be in a marriage that shall be regarded void (see chapter on Pakistan).And even if she fails to get recognition for the fact that her forced marriage is void in Pakistan, she can, if domiciled in Norway after the wedding, get the marriage declared null and void (provided that the prerequisites stated above are present). In the case printed in RG 1999 p.449 stated the court state that although there were doubts to whether the marriage is valid according to the law of Yemen or not, this was unnecessary to look into since the marriage would still be declared null and void after the Norwegian Marriage Act.¹³⁸ But, as I will come back to later, refusing to recognize a forced marriage from Pakistan on the grounds that it is not valid after Norwegian law, may be a measure to try out with regards to family reunification cases.

6.4.1.5 Exceptions after the ordre public-rule

The rules governing the use of the laws of other countries are not absolute. The Norwegian ordre public-rule will in some cases be applicable as an exception before the courts. This customary rule is based upon the idea that some actions are irreconcilable with the legal order and contrary to basic ethical or social values.¹³⁹ It has been

¹³⁷ See the decision in Rt. 1977 s. 715 at p. 722

¹³⁸ RG. 1999 p. 449 on p. 450.

¹³⁹ For further information on ordre public, see: Lundgaard(2000) p.99-199

emphasized that the ordre public-rule shall only be applied in exceptional cases where there are strong reasons¹⁴⁰ for it.

The ordre public-rule was applied in a case where a bigamist second marriage was set aside, even though it was valid after the laws in the home country of the parties (Bangladesh).¹⁴¹ It was argued in the judgment that a divorce would in any way be treated according to Norwegian law, and that an annulment of marriage bears a striking resemblance to a divorce. Conclusive for the outcome was the point that ‘a polygamous marriage that cannot be annulled could in no way fit in with the Norwegian legal order.

The Ministry of Children and Family Affairs assumed that the same could apply in cases where a forced marriage has taken place abroad, and where the parties moved to Norway within the period of limitation.¹⁴² The assumption has neither been confirmed nor rejected by the courts as there have been no cases concerning this tried before them, so the conclusion is therefore uncertain. Several remarks can be made. First of all, a void marriage does not have as many similarities with a divorce as an annulment of marriage. (The institution ‘annulment of marriage’ no longer exists in Norway). Secondly, it is not necessarily so that the upholding of a forced marriage is as inconsistent with the Norwegian legal order as the upholding of a polygamous marriage.

Nevertheless, as forced marriages infringe deeply on the right to freedom and personal liberty, it is in my opinion clear that such an institution must be contrary to the legal order and the general opinion of what the law is and ought to be. A forced marriage is by definition not voluntarily entered into, whereas the nature of a polygamous marriage does not automatically contain the same elements of compulsion.¹⁴³ At the very least must the marriage be void pursuant to ordre public-considerations when the use of force

¹⁴⁰ The Norwegian term that normally is used is ‘tungtveiende grunner’.

¹⁴¹ Rt. 1977 s. 715

¹⁴² Ot.prp. nr. 44 (1993-94) p. 13

¹⁴³ For polygynous procreative marriage arrangements, see Hellum (1999)

in question is punishable. One might think that the situation could be different in cases where section 16, third paragraph of the Marriage Act was violated, but where the compulsion is not punishable. It is however a strong argument for the courts to consider that the Ministry in its White Paper assumes that also these cases are to be void after the *ordre public*-rule. The travaux préparatoires are according to the Norwegian doctrine an important source of law.¹⁴⁴ The idea that marriages entered into abroad under unlawful compulsion would be inconsistent with the Norwegian *ordre public*-rule is also maintained in legal theory.¹⁴⁵ Such a rule would furthermore be easier to sustain. It can in my opinion subsequently be concluded with good reason that the *ordre public*-rule must apply to all forced marriages.

Thue maintains that the *ordre public*-rule may be applicable in the case of forced marriages also after the period of limitation is expired, even if the marriage otherwise does not fall under the scope of section 16, third paragraph.¹⁴⁶ This assumption is, however, uncertain. It may seem as though the Norwegian Parliament meant section 16, 3rd and 4th paragraph, to exhaustively govern the period of limitation (during which one must initiate a lawsuit) in cases of forced marriages.

6.4.1.6 Consequences of a nullity

The declaration of a marriage as null and void has implications for the future as well as retroactively. The marriage is not, and has never been, valid. The parties will thus be in a different position legally than after a divorce or after an annulment by the old rules. They will, after the judgment is final, be considered unmarried rather than divorced. The rules in chapter 16 of the Marriage Act concerning maintenance and spouse's pension after a divorce will not apply to void marriages. The parties will after the marriage is declared null and void by the court be able to demand that all assets are split according to the special regulation in section 57 *litra d* in the Marriage Act. A void marriage may

¹⁴⁴ For more information on the sources of law, see Eckhoff/Helgesen, (1997)

¹⁴⁵ Thue (2001), p.295 and Hennem/Paul(2000) p. 29

¹⁴⁶ Thue (2001), p.295

also have consequences in relation to any children of the marriage. Such questions are resolved after the paternity rules in the Children Act.

6.5 Suggested Amendments to the Marriage Act

The Government has subsequent to the follow-up document ‘Efforts against Forced Marriages Spring 2002’¹⁴⁷ suggested amendments in laws and regulations regarding forced marriages. Some of these amendments are to be incorporated into the Marriage Act.

6.5.1 Mandatory examination of conditions for marriage by public authorities

One suggestion is to introduce mandatory examination of the conditions for marriage executed by public authorities. Today, it is the persons with authorization to solemnize the marriage that conducts the control. The Ministry refers to Henum/Paul¹⁴⁸ who in their report (p.48-49) state that today’s control sometimes seem to be unsatisfactory – being solely in the hands of the individual officer authorized to solemnize the marriage.

If public authorities are to assume responsibility for the control, one avoids possible conflicts of interest on the part of the person conducting the ceremony, as he or she will not be torn between demands of the religious community and of the state in relation to the formal requisites for marriage. This can be of relevance in connection with forced marriages, as one may imagine that the person conducting the ceremony may become aware of the fact that the marriage is not of free and full consent, but will feel the pressure of the community present at the wedding not to protest. The Ministry states several reasons for the suggested amendment (see the green paper/discussion document

¹⁴⁷ Follow-up document ‘Efforts against forced marriages spring 2002’/ oppfølgingsdokumentet “Innsats mot tvangsekteskap våren 2002” found 10.06.03 at the internet:

<http://odin.dep.no/bfd/norsk/publ/handlingsplaner/004021-990048/index-dok000-b-n-a.html>

¹⁴⁸ Henum/ Paul(2000) p.48-49

section 3¹⁴⁹) including the hope that such an arrangement will decrease the number of forced marriages entered into in Norway.

In my opinion, there are not many negative aspects of an introduction of mandatory examination of the conditions for marriage executed by public authorities. The Ministry points to the fact that the arrangement is non-discriminatory in the sense that everyone who wishes to get married will have to abide by the same rules. Chances are that some forced marriage-situations will get intercepted if such control is to be conducted through interviews with (or at least through appearance before the control institution by) the intending spouses. However, it is my belief that the effects of such a change will not be revolutionary, as it is unlikely that a person who feels compelled into a marriage will tell this to a control institution. That would in most cases be the equivalent of saying no to the marriage –and that is exactly what she or he feels unable to do.

6.5.1.1 How to Conduct the Examination of the Conditions of Marriage

As with every other form of public control of the voluntariness of marriages -either the discussion of public prosecution (see discussion above), the discussion on the County Governor's standing to sue subsequent to section 16(3) of the Marriage Act (see point 6.5.2 below), or the interviews conducted in relation to family reunification applications (see point 6.6)- the main task must be to provide a safe haven where the possible victims feel safe enough to come forward and ask for help and protection. Since the perpetrators often are related to the victims, it will in many cases be hard for the victims to publicly protest against the marriage. One thing is to wish to prevent the forced marriage from happening, another altogether is to risk alienation from your parents and close relatives. In the Nadia-case, professor of social anthropology Unni Wikan testified that within Islam it is unheard of for a child to do anything that can harm the mother, almost no matter what the mother has done.¹⁵⁰

¹⁴⁹ Høringsnotat (green paper/discussion document): Forslag til endringer i ekteskapsloven om inngåelse og oppløsning av ekteskap (lov 4.juli 1991 nr. 47 om ekteskap), June 2002, by the Ministry of Children and Family Affairs, p.5 and following

¹⁵⁰ Case no. 98-3021 M/77 from Oslo City Court (Oslo byrett) 10th of November 1998, p.6

A possible procedure can be that the two intending spouses must appear in front of the controlling institution separately, and that the controlling institution is given the opportunity to investigate the case on its own. In such a procedure, if the controlling institution discovers any irregularities during an interview with an intending spouse, it has the opportunity to investigate further. In such a set up the implication is that it does not necessarily have to be one of the spouses that has informed the control institution and thus 'ratted on' her family. Even if the victim informs the controlling institution of the reality of the marriage, the controlling institution may investigate further and perhaps base its decision on other findings than the victim's testimony. This would give the decision an air of neutrality, separated from the testimony of the victim.

An arrangement where the institution is in a position where it can investigate does, however, raise some doubts. First of all is it not stated in the green paper/discussion document that the Ministry envisages such an increase in the thoroughness of the control.¹⁵¹ The control is suggested put with the national register, with the courts or with the two of them in combination.¹⁵² Neither the national register nor the courts are equipped for the investigation of these kinds of cases and it is also important to remember that the right to marriage, too, is a human right (see section 2 above). Thorough investigation may impede the fulfillment of the right to marry. An eager investigation may also risk being discriminatory in practice, if groups the controlling institution believes to be in particular danger of forced marriages are submitted to a scrutiny other groups avoid being subject to.

¹⁵¹ The Ministry of Children and Family Affairs informed upon request (10.06.03) over the phone that the final draft is expected to be presented in a green paper in the end of June 2003.

¹⁵² Høringsnotat (green paper/discussion document): Forslag til endringer i ekteskapsloven om inngåelse og oppløsning av ekteskap (lov 4.juli 1991 nr. 47 om ekteskap), June 2002, by the Ministry of Children and Family Affairs, p.16

On the other hand, a forced marriage constitutes a grave violation of human rights and this does of course have to be held up against the individual's right to non-discrimination. An investigation of this kind is in itself not a very intrusive procedure compared with the severe implications a forced marriage with all its violations of human rights will have for a victim. There are no statistics available on the subject, but research has shown that minority youth belonging to certain groups are at the risk of being forced into marriages. If such youths are to be subject to additional investigation when the controlling institution on the basis of the interviews deems it necessary, this will represent a degree of government interference that is defensible when the aim is to prevent forced marriages. The differential treatment would have a justifiable basis.

6.5.1.2 Information to the Parties if the Conditions Are Not Met

A denial of marriage based on the fact that the conditions for marriage are not met by the parties will influence greatly the right to marry. It is regarded as an important legal safeguard that individuals are to receive an account of the grounds on which decisions concerning the individual citizen are made. Mistakes can be made and a couple denied their right to marry must be allowed to know why. The problem with such a justification of the decision made by the controlling institution is that it faces the risk of singling out one of the spouses as the informant and cause for the denial. If it really is a case of forced marriage, and the victim has been subject to threats of unlawful conduct, the consequences can be severe.

The discussion will be the same as with the establishment of unconditional public prosecution in cases concerning the Penal Code section 222, or the right to be informed on the grounds for denial of application for family reunification. Even though the discussion contains the same elements and arguments, the weight of each argument may weigh differently from field to field. An infringement of the right to marry deserves a written justification. If the controlling institution is given the authority to investigate on its own, it is my opinion that the grounds for denial can be formulated without going into the testimony of the victim. If there is suspicion of such a serious crime as a forced marriage, a refusal may be justified simply by stating that there is a fear of a forced marriage and by pointing to indications that have come up during the investigation. If

both parties really wish to get married, they can have their case tried again –just like one, if denied marriage on the grounds that one is not properly divorced from the first spouse, can apply again when the divorce is final.

It is difficult to see that the risk of falsely perceiving a marriage as forced is very big. The Centre for Combating Ethnic Discrimination stresses that the institution that is given the authority to examine the conditions for marriage should have adequate competence on cultural and religious issues, so that it does not confuse for instance an arranged marriage with a forced marriage.¹⁵³ Weighed against the advantage it will be to prevent even just one forced marriage, it is clear to me that a mandatory examination of the conditions for marriage executed by public authorities is an unproblematic and desired measure in the struggle to end forced marriages

6.5.2 The County Governors' Standing to Sue Subsequent to Section 16(3)

As of today, it is only the spouses that can go to court in order to establish that the marriage as null or void, cf. Dispute Act section 417, first paragraph. The Ministry of Children and Family Affairs has sent a green paper on a hearing round¹⁵⁴ suggesting that the County Governors' right to institute legal proceedings with a view of getting a marriage declared null and void shall be reinstated. The County Governor previously had such standing subsequent to the then section 417 forth paragraph of the Dispute Act.

The suggested amendment is meant to serve a number of purposes¹⁵⁵ including the empowerment of the County Governor's jurisdiction in cases of forced marriages. One hopes that the County Governor's ability to institute legal proceedings on this matter may provide relief to victims of forced marriages that do not themselves feel strong

¹⁵³ The Centre for Combating Ethnic Discrimination, Comments to Green Paper. Can be found at internet (11.06.03): <http://www.smed.no/artikkelID.asp?artikkelID=202>

¹⁵⁴ Høringsnotat (green paper/discussion document)

¹⁵⁵ Høringsnotat (green paper/discussion document), p.17-19

enough to take the cases to court. The Ministry emphasises that in order for this to offer remedy to victims of forced marriages, it is essential that information about the fact that the County Governor has legal standing in these cases reaches the ones who are compelled into marriage.

6.5.2.1 Who Should Be Able to Provide The Governor With Information Concerning Forced Marriages?

The suggestion invites reflection regarding the question of whether it should be possible for others –and in that case, who- to provide the County Governor with information about the occurrence of forced marriages. The Ministry requested comments on this in the responses to the green paper/discussion document. In my opinion, it must at least be possible for private persons to supply the County Governors with information if they have friends or relatives being subjected to a forced marriage. The case may be different when other public institutions with a duty of confidentiality, for instance medical personnel, are involved. The reasons why such institutions (in most cases) cannot render information to the police regarding crime they receive knowledge of in connection with their work will apply in these cases as well. Reporting knowledge of forced marriages to the police will have different consequences from the reporting to a public office where only civil sanctions will come into play, but the two options have in common that they may entail extensive consequences for the involved parties. (Criminal charges may be pressed, or a marriage may be considered never entered into – see chapter 6 concerning the substantial content of different provisions concerning forced marriage) The justification for a similar rule for the duty of confidentiality when it comes to rendering information to the County Governors will have the best of grounds.

6.6 Family Reunification

Persons living in Norway or persons who intend to reside here permanently are in some cases allowed to have their family members come and live with them in Norway. The

rules regarding such family reunification are set forth in the Immigration Act¹⁵⁶ and the immigration regulations¹⁵⁷. According to section 9 of the Immigration Act, permission for family reunification is granted to close family members of the person resident in Norway, such as the spouse (cf. the immigrant regulations section 23). If the requirements stated in the law are fulfilled, the person thus has a right to family reunification. The persons who wish to come to Norway must apply for family reunification from their country of origin (or the country in which they have resided for the past six months) cf. the immigration regulations section 10, 1st paragraph, and the Immigration Act section 6, 4th paragraph. The applicants must themselves submit an application to the nearest Norwegian embassy or consulate.¹⁵⁸

6.6.1 The Prerequisite of Ensured Subsistence

As a general rule subsistence must be ensured before family reunification is granted, cf. the Immigration Act section 9. Further regulations are given in the immigration regulations which in section 25, 1st paragraph, state that a prerequisite of ensured subsistence has to be met in order for a family reunification to be granted. The subsistence is subsequent to section 25, 2nd paragraph, ‘deemed to be ensured when the applicant satisfies the conditions pursuant to § 19, when the principal person can maintain the applicant through the provisions of § 19 or through a combination’. In short, the evaluation of whether the prerequisite has been met is carried out by looking at the gross subsistence of both the applicant and the principal person. The minimum

¹⁵⁶ Unofficial translation in english by the Ministry of Local Government and Regional Development can be found at the internet (12.06.03): <http://www.ub.uio.no/ujur/ulovdata/lov-19880624-064-eng.doc>

¹⁵⁷ Unofficial translation in english by the Ministry of Local Government and Regional Development can be found at the internet (12.06.03): <http://www.ub.uio.no/ujur/ulovdata/for-19901221-1028-eng.doc>

¹⁵⁸ Fact sheet from the Norwegian Directorate of Immigration. found on the internet (12.06.03): <http://www.udi.no/dokumenter/pdf/Faktaark/VisumEngelsk%202.pdf>

total income is set to salary grade number one at the Government wage scale which in 2002 amounted to 161 000 NOK.¹⁵⁹

Section 19 establishes what constitutes subsistence. Income from employment, pensions and other periodical payments, own capital and for instance students loans –separately or in combination may found the basis for fulfilment of the prerequisite of subsistence. Subsistence may also in exceptional cases be ensured by a financial guarantee put up by a third party, cf. immigration regulations section 19, 5th paragraph.

It is possible to make exceptions to the prerequisite of subsistence when the applicant is the spouse of a Norwegian national resident in the realm, or where other particularly strong humanitarian considerations so indicate, cf. the immigration regulations section 25, 3rd paragraph. The use of the ‘exception clause’ is at present practiced quite liberally, so that the main rule for the spouse of a Norwegian national living in Norway is that no prerequisite concerning subsistence needs to be met.¹⁶⁰

6.7 Amendments Concerning the Prerequisite of Ensured Subsistence

A measure which has been suggested in Norway is to change the provisions in the Immigration Act concerning the prerequisite of subsistence when applying for family reunification on the grounds of marriage. This measure is meant both to minimize the occurrence of forced marriages, as well as making it easier on those who actually become victims.

¹⁵⁹ Høringsnotat (green paper/discussion document): ‘Forslag til endringer i utlendingsforskriften §§ 25 annet, tredje og fjerde ledd og 19 femte ledd’, April 2003, by the Ministry of Local Government and Regional Development , p. 3

¹⁶⁰ Høringsnotat (green paper/discussion document): ‘Forslag til endringer i utlendingsforskriften §§ 25 annet, tredje og fjerde ledd og 19 femte ledd’, April 2003, by the Ministry of Local Government and Regional Development , p. 2

It is at present possible to obtain dispensation from the prerequisite of ensured subsistence also when the applicant is under 23 years of age and has Norwegian citizenship, and the Government is proposing that that practice be changed.¹⁶¹ The green paper proposes that as a main rule subsistence is to be required when one of the spouses is under the age of 23, that the duty of subsistence should be with the Norwegian resident alone, and that financial guarantees put up by a third party is not to be regarded as subsistence.

As a high number of the forced marriages in Norway are between one spouse living in Norway and another from the Norwegian victim's country of origin¹⁶², one sees that a marriage often serves as an 'entrance ticket' into Norway for the spouse from the developing country. Unni Wikan points out how a Norwegian-Pakistani girl can secure her future husband from Pakistan residence- and work permit in Norway, and that through that, the marriage becomes a migration strategy.¹⁶³ It is hoped that the prerequisite of being able to give maintenance to the spouse, i.e. having a steady income over a decided minimum limit, would prevent young people from being forced into marriage, as there would be little or no point in a marriage if the two spouses could not reunite in the developing country. One imagines that this would give the young people chance to finish school, and maybe even get additional education, before being married off, since they would need a job and an income in order to qualify for family reunification on the grounds of marriage.

There is no doubt that brides and grooms in a developing country would appear to be a lot less attractive if they could not get his or her spouse into the country. Most of the forced marriages involving Norwegians are entered into abroad, in the victims' country

¹⁶¹ Høringsnotat (green paper/discussion document): 'Forslag til endringer i utlendingsforskriften §§ 25 annet, tredje og fjerde ledd og 19 femte ledd', April 2003, by the Ministry of Local Government and Regional Development , p. 2

¹⁶² Høringsnotat (green paper/discussion document), p.1

¹⁶³ Wikan(1995) p.117

of origin¹⁶⁴, and with a regulation like this, it is reasonable to expect that the Norwegian spouses will avoid being held in their country of origin until the family reunification permission is granted. This is something that often happens in these cases with the regulations we have to day, especially if the Norwegian is a girl/woman, since in the cultures that practice forced marriages normally it is expected that the bride shall move to her family-in-law's home.

If the prevention of forced marriages has failed, it is at least a considerable advantage for Norwegian authorities wishing to help the victim out of the distressed situation, that the victim is situated in Norway. One will then have qualified help at hand, one is in a position to provide alternative housing facilities in the form of shelters or similar facilities and most importantly –there will be no problems concerning jurisdiction.

Underlying the suggested amendment is the assumption that the younger the parties are, the harder it is for them to resist pressure from their families. An arranged marriage between young people may thus easily become a forced marriage in reality. The Ministry hopes to reduce the pressure on young people with regard to marriage.¹⁶⁵ It is also possible that there will be fewer forced marriages if one manages to raise the marriage age, as older girls are more likely not only to be able to protest, but to get heard than the younger ones are. If the worst comes to the worst, they may also have a stronger network of contacts, and may therefore more easily be in a position to handle a break with their families. Asma Jahangir¹⁶⁶, the lawyer who defended Saima Waheed,

¹⁶⁴ Høringsnotat (green paper/discussion document): 'Forslag til endringer i utlendingsforskriften §§ 25 annet, tredje og fjerde ledd og 19 femte ledd', April 2003, by the Ministry of Local Government and Regional Development , p. 1

¹⁶⁵ Høringsnotat (green paper/discussion document), p. 2

¹⁶⁶ Ms. Jahangir is a leading human rights lawyer and activist both in her home country and internationally, and recipient of inter alia The University of Oslo's Human Rights Award, The Lisl and Leo Eitinger Prize 2002.

points out that although a break with the family may be painful, the pain of being forced into marriage may well be bigger.¹⁶⁷

Regardless of the many possible positive aspects of this suggestion, it does, however, fail to take into account that a prerequisite of income may have as a result that children are taken out of high school or other studies earlier in order to get a job and reach the minimum income limit as soon as possible. Bredal's findings seem to indicate that the girls interviewed are of the opinion that they would have to do everything in the beginning, to give up education, start working as well as doing all the housework.¹⁶⁸

Due to the low average marriage age of Pakistani women in Norway, most of them must have been unable to finish higher education before the marriage. In the International Covenant on Economic, Social and Cultural Rights (the ICESCR), the right to education is embedded in article 13. This does not grant the right to a high school, as it only stipulates that primary education shall be 'available (...) to all' (litra a), but the article does also in its litra c state that '(h)igher education shall be made equally accessible to all (...), by every appropriate means'. Such a law will, if the potential consequences outlined above should come into effect, lead to a practice where higher education will be harder to achieve for children with parents that believe in early marriages.

Being taken out of school will marginalize the victim's position in a number of ways; the social network will come to consist almost solely of family members, it may lead to her standing on the side of the Norwegian society, and it will certainly diminish the victim's career opportunities. All of the above may again lead to a lower level of integration and participation in the Norwegian society. It will also make her more exposed to forced marriages, and less capable of protesting against an unwanted marriage. When contact with others is limited to contact with the family members that are exercising the pressure/coercion, it will seem hard or even impossible to find a way out, as one will have no one to go to but to strangers representing a majority society

¹⁶⁷ Stated in a speech at a lunch seminar at the Institute of Women's Law, University of Oslo, the 30th of October 2002

¹⁶⁸ Bredal (1998), p.31

culture oneself is not an integrated part of. If taken out of school too early, one may not even know of the alternatives that actually exist. When a victim is in such a marginalized position, the threshold for what constitutes a forced marriage may be lower than in other situations. The possible wrath of the family towards a person that objects to his or her imminent marriage will have greater consequences for a young person in this situation than for a well-integrated youth with a strong social network.

It is also quite reasonable to predict that this will affect girls to a larger degree than boys. In the traditional cultures that practice forced marriages, the man is looked upon as the main provider of the family, whereas the woman is supposed to take care of the home and family –often being subordinated to the man, given the view that he is the head of the family. In the family reunification cases where the husband is brought to Norway from another country, it will still be his duty to provide for the family, so ‘all’ that the girl has to do is to work until she fulfils the prerequisite of maintenance. After the husband is settled and has got a job, he will then be able to take over the responsibility of providing for the family.

It will in these cases be logical to prioritise the boys’ education over that of the girls’, since the girls will end up as housewives anyway. According to this line of reasoning, it will be preferable to get the husband over to Norway as soon as possible –and the way to achieve this is by taking the girl out of school and letting her start working. In the reversed situation, where the boy is in Norway and the bride is brought in from another country, it will appear more reasonable to see to it that the boy gets a ‘proper’ education, as that will enable him to earn more money, which is important for someone with a responsibility to provide for a whole family.

According to article 5a of the CEDAW, Norway is obligated to ‘modify the social and cultural patterns of conduct of men and women’ in order to eliminate practices based on ‘stereotyped roles for men and women’. Norway furthermore has a duty to ‘take all measures (...) to modify or abolish (...) regulations (...) and practices which constitute discrimination against women’ after article 2f of the CEDAW. Given the results stipulated above, such a rule may be hard to justify according to the CEDAW. But on

the other hand, the Government has a margin of appreciation when it comes to deciding what measures it chooses to apply. It is furthermore of the utmost importance to combat forced marriages, as these too are based on stereotyped versions of man and woman. Forced marriages are a huge encroachment on the freedom of the victims and have vast consequences for their whole lives. One has to make an overall evaluation and measure the positive impact such a law may have against the negative impact it may have on others. Given the fact that forced marriages are so cruel to the victims, and while the possible negative impact is as uncertain as it is, it is justifiable to try and see whether such a proposal can contribute to saving some from this plight. It is also important to keep in mind that if girls are taken out of school and set to work too early, both the girls themselves and the schools may react and make use of some of the relief measures that exists. Still, it is important that the Government recognises that a law like this may have unforeseeable consequences for the involved parties, and that even though it may help some, it may marginalize others, and increase the risk of forced marriages for them –and at an earlier age than before, with them being more isolated and alone, and thus more vulnerable and unable to get out of the situation, than they otherwise would have been. Measures to remedy the situation for these victims must also be at hand.

The Ministry recognises the risk associated with the suggested amendment, but points out that it will be possible to study and still fulfil the prerequisite of subsistence, since a student loan can form a part of the subsistence. The risk that young people are taken out of school is not regarded as big enough to justify the departure from a proposal that has so many positive aspects, as a student on a student loan and with an after-school part-time job will have the opportunity to fulfil the prerequisite of subsistence.

The Ministry still wants to keep the general exemption for cases where particularly strong humanitarian considerations indicate that permission for family reunification is to be given even if the subsistence prerequisite is not met. It is however emphasised that

the wording must be interpreted strictly, reserving the exception clause for truly extraordinary cases.¹⁶⁹

6.7.1 The Application Process

If the marriage that constitutes the basis of the application for family reunification is forced, the Norwegian Directorate of Immigration states that the marriage will be regarded null and void after the ordre public rules.¹⁷⁰ As the Immigration Act is a rights-based law providing the right to family reunification, the grounds for the denial of the application must be stated. That presupposes that the reasons for denial are secret. If not, the victim will easily be identified as the saboteur/informer to the Government.

On the other hand, such a suggestion calls for some legal doubt. Without an open bureaucracy in these cases it will be hard to uphold an impression of the decision making as unbiased and fair. Openness in the decision making process is an important legal safeguard to prevent arbitrariness. Furthermore the consequences of a wrongful refusal of granting family reunification will largely affect the family concerned, and come into conflict with the right to family life that we find in all major international human rights treaties. The assessment will be the same as after the chapter on mandatory examinations of the conditions for marriage. But whereas a wrongful decision in that context would amount to a delay before the marriage could be entered into, a wrongful decision in family reunification cases will result in the married couple having to stay in different countries until a possible new family reunification application is accepted. Mr. Bjøranger at the UDI is of the opinion that the applicants and their family in case of a denial would point the finger at the victim of the forced marriages regardless of whether the grounds for refusal were confidential.¹⁷¹ When the effect of such a measure is so unlikely to be efficient, the consideration of the proportionality

¹⁶⁹ Høringsnotat (green paper/discussion document): 'Forslag til endringer i utlendingsforskriften §§ 25 annet, tredje og fjerde ledd og 19 femte ledd', April 2003, by the Ministry of Local Government and Regional Development , p. 3

¹⁷⁰ Conversation over the phone 12.06.03 with Terje Bjøranger from the Norwegian Directorate of Immigration.

¹⁷¹ Conversation with Mr. Bjøranger 13.06.03

principle leads to the conclusion that refusal to give grounds for denial is too far-reaching and can thus not be accepted.

6.8 Visa while Waiting for the Family Reunification Application to Be Processed

Due to the unreasonable long period of time involved in dealing with family reunification cases, a visa (visa type: D) was introduced, granting the applicant permission to stay in Norway with his or her family while the application is processed. Pursuant to Section 106 second paragraph of the Immigration Regulations, the Norwegian Directorate of Immigration determines whether a foreign national who falls under Section 23 (a) of the Immigration Regulations and requests family reunification with his or her spouse may be granted a long-term national visa (visa type: D).

Such a visa enables its holder to travel to Norway, provided that when the spouse is a Norwegian national or a foreign national residing in Norway with a settlement permit, or any permit that may constitute a basis for a settlement permit or an individual permit. It is a condition according to circular UDI 01-16 JURA Case No.: 96/389 that both parties must be over the age of 18 unless the marriage was entered into in Norway. It is a condition that the spouses shall live together. If the conditions are met, Visa type D shall be granted if there is no specific information which indicates that there is a need to verify the documents in connection with the processing of the application for a work or residence permit, cf. the circular p.2.

The Norwegian Embassy in Islamabad often experiences that young women come to the Embassy together with her family applying for a visa to Norway on the grounds of family reunification, seemingly eager to get the application granted –only to contact the Embassy later without the presence of their family and begging them not to grant the visa, as they have been married off against their will and do not want a family reunification with the spouse. Similarly, the Embassy gets frequent phone calls from Norwegian citizens that urge them not to grant this or that Pakistani citizen a visa as the

application for family reunification is based on a forced marriage between the Pakistani and the Norwegian citizen.¹⁷²

6.8.1 Possible Amendments

A forced marriage is grounds enough not to grant a visa, and could have been a good way to provide remedy in numerous forced marriages. The only problem is that –since the Norwegian visa-regulations leave no room for discretion, and you are entitled to a visa if you fulfil the prerequisites stipulated in the regulations- anyone who gets his or her visa-application denied is entitled to a written explanation of the grounds for the denial. The young people that contact the Embassy may have different citizenships, but they all have one thing in common: They do not want their requests for a visa-denial to be made public, as this will be the same as openly resisting the marriage-with the grave consequences this may have for them personally.

The Embassy –and the youths at risk- e then left only with the hope that there is something else wrong with the application. In some cases one is ‘lucky’ and finds errors in some of the formal prerequisites that need to be met. This may delay the process, enable the Norwegian citizen to return to Norway and leave room for him or her to find alternatives and possibly get help. But the Embassy’s experience is that most of the applicants know far too well how to draw up the application without flaws. The population of ‘Little Norway’ districts of Pakistan have very close ties to the Pakistani population in Norway and are set on keeping it that way.¹⁷³

A denial to a visa application could provide a way out of the forced marriage for the victim. Coming to Norway alone gives the victim some time to consider, and make use of the available means (family-mediation, shelters, NGOs, police etc) in order to ‘break free’ of the marriage. In Pakistan, the women will have no means of getting out of her

¹⁷² Conversation with Mr. Bjøranger from the Norwegian Directorate of Immigration 13.06.03

¹⁷³ Conversation with Mr. Bjøranger from the Norwegian Directorate of Immigration 13.06.03

plight, as she would have practically no where to go. But in Norway, where the system of support is better she may find a way out of the difficult situation. Still, chances are that even though the reasons for denial are not stated it will be possible to point out the victim as the one who has ‘ratted’ to the Government. Norwegian Embassies have experienced just this.¹⁷⁴ Another measure would be to stop the use of Visas type D. They were introduced due to long waiting periods for the assessment of family reunification application. The waiting period is now a lot shorter¹⁷⁵ and the raison d’être for this kind of visa is no longer present.

6.9 Conclusive Remarks

I have in my discussion of the different provisions above argued that the requirement ‘unlawful’ is a somewhat wider term in relation to the Marriage Act than it is in relation to the Penal Code. It is my opinion that the differentiated term ‘unlawful’ shows a way of operating with a differentiated concept of forced marriages. As I stated in point 1.1, such a flexible, differentiated concept of forced marriage can prove useful as long as one upholds the starting point that compulsion is prohibited. It is difficult to agree upon an exact content of a definition of a forced marriage, the subjective element will vary from victim to victim, and it may also be required that the definition has a different concept in different situations. One must be stricter when applying provisions in the Penal Code than one has to be when declaring a marriage null and void. In regard to family reunification, it is possible that the increased stress the young women are subjected to simply by being in a country such as Pakistan may justify that the threshold of what constitutes a forced marriage must be even lower in these cases. What is evident is that the definition of forced marriages is at its widest when it comes to making use of non-legislative measures, cf. the definition of a forced marriage laid down by the working group.

¹⁷⁴ Ot.prp. nr. 51 (2002/2003) [p.20]

¹⁷⁵ Conversation with Mr. Bjøranger from the Norwegian Directorate of Immigration 13.06.03

6.10 Others

Changing public opinions is a preventive measure that can be carried out through information campaigns that tells parents belonging to minority cultures about the laws and regulations of the countries, and that seeks to alter the parents' opinion of how much influence their children shall have on their choice of spouse. In Norway one has distributed information to the minority cultures that one finds is practicing forced marriages by presenting information to participants in Norwegian language classes for adults, by talking to and cooperating with religious leaders, and by supporting voluntary organisations that work with minority groups and against forced marriages. Such measures have very few harmful effects. If the information is spread to the whole population and is very massive and evident in its form, one can risk stereotyping groups with minority backgrounds and giving rise to prejudice against such cultures for being inhuman in its practices for instance. Such stigmatisation could come in conflict with the International Convention on the Elimination of All Forms of Racial Discrimination (the CERD), after which the State Parties are obligated to work against racial discrimination. According to article 7 of the CERD, the State Parties have to adopt measures in 'the fields of teaching, education, culture and information' in order to amongst other promote 'understanding, tolerance and friendship among (...) racial or ethnical groups'. A broad national campaign against forced marriages can have the exact opposite effect if it labels whole minority groups as perpetrators of such crimes. But if the minority groups are identified and targeted directly, this can be done without attracting too much information from the mainstream society. It can also be perceived as positive that the minority cultures themselves (e.g represented by religious leaders and minority organisation) are working actively to extradite the phenomenon. The stigmatisation of minority groups at large will not so easily occur when mainstream society picks up that the minority groups themselves also are against this violation of fundamental human rights and freedoms. Numerous scholars have pointed out that this line of action also is the most efficient way of dealing with unwanted practices in different cultures. Abdullahi Ahmed An-Na'im stresses that internal discourse, i.e. working from within the culture, is essential when one wishes to obtain a goal that

descends from a cross cultural norm (in this case the norm that each individual shall have freedom, also in choosing a marriage)¹⁷⁶.

It is furthermore important to keep in mind that information campaigns like these have less harmful consequences towards an individual as a member of a group than a forced marriage will have on the victims. In such cases, when it has been documented that youths belonging to certain minority groups are at risk of being victims of forced marriages, the consideration of the victim must take precedence over the group's possible interest in avoiding negative mentioning in the public. Besides, if this concerns a minority culture that more often than not practices forced marriages, it is not evident that this group has a deserving interest to be spared from negative publicity in the media and public.

When it comes to more individually shaped preventive measures, it is important to have a good helping apparatus that youth in danger can turn to. Mediation services aimed at mediating in a conflict with parents and child can prove effective if both parties are willing to attend, and can be a good alternative before the conflict goes too far. As it is most practical to envision these services as voluntary, they will not be very intrusive and can therefore be a very good measure in the right cases.

In other cases, where the will to reconcile is lacking, or the children do not dare to contact a mediator for help, there is a need for social services and child care services that can interact with schools and others in order to pick up on youths that possibly are in danger. In Norway, one has found that most forced marriages are entered into in the family's country of origin. An important aim for the Government must then be to prevent the youths from being taken abroad as it is, jurisdiction-wise, much more difficult to prevent a marriage from happening abroad. In order to achieve this, it is important that schools are aware, as that may be the only tangent to mainstream society the youth at risk has, so that the schools can notify the appropriate social services. This presupposes that the schools have trained personnel that can identify a possible conflict

¹⁷⁶ An-Naim, Ahmed Abdullahi: Ch.7 in Cook (1994)

and try to ‘nip it in the bud’. If not executed properly and with a necessary amount of sensitivity, such a procedure can easily be an extra burden to youths from minority cultures in the way that they feel questioned and interviewed and that their families wrongfully are being suspected of being potential criminals. It can also add fuel to the fire if there really is an emerging conflict between the child and its parents.

It is very important when evaluating possible measures to keep in mind that it varies from family to family also within the minority cultures how one practices marriage. Arranged marriages are widespread in large parts of the world and this is a custom that many families in minority cultures practice without practicing forced marriages. As I have mentioned before, it is first when the marriage is involuntarily that it is illegal after international, as well as national, law. One must be careful so that one does not press all the norms of the majority culture down the heads of the members of minority cultures in a country. That will not only be undemocratic, but will also be in contradiction with the CERD.

7 Pakistani Legislation/ Islamic Law

Pakistan is an Islamic republic. This is embedded in the Constitution, which states that the spirit of the Constitution must be read in the light of Islam and that all laws are to be brought into consonance with the Qur’an and the Sunna.¹⁷⁷ The Constitution contains a so-called ‘repugnancy clause’ stating that no laws ‘repugnant’ to the injunctions of Islam are to be enacted, cf. part IX of the Constitution.

¹⁷⁷ Cf. article 2a which makes the preamble of the Constitution a part of its substantive provisions.

Pakistan inherited from British India a unified legal system and a complete hierarchy of courts when the country attained independence in 1947.¹⁷⁸ The founder of Pakistan (Muhammad Ali Jinnah) did not envisage a theocracy, however religious and conservative forces demanded a clear expression and manifestation of the Islamic identity of the State of Pakistan.¹⁷⁹ The two diverging opinions are mirrored in the Constitution, which opens for parallel judicial systems in the sense that it recognises religious law, (secular) colonial law and customary law, and the Shariat Court system that can determine whether a law is in conformity with the injunctions of Islam or not.¹⁸⁰

The parallel systems of law, and the focus on religious law can clearly be used to disadvantage of women, especially if a traditionalist version of Islam is allowed to influence the implementation of the law. In the Saima Waheed case, we find an example of how custom and a personal, traditionalist interpretation of religion almost prevailed over the laws (including the Shari'a) of Pakistan.

When the Indian sub-continent was colonised by the British in the 19th century, the British modernised the legal system after a Western model in order to keep up with the changes brought about by political and economic developments. A new court system was also established. Family law was, however, left alone. It was not important to the colonisers how the population arranged their families, and at the same time it was extremely important to the Muslim point of view to uphold the Shari'a in this area. As the colonisation stopped at the threshold of the Muslim family, the women –who normally operated mostly within the sphere of the family, became important as the bearers of culture. Since a woman's status is closely linked to her marriage, and to her behaviour as honourable, we see that it may be more important to influence or control who a woman marries, than a man. Combined with the duty of marriage, and the duty to help arranging marriages, these are mechanisms that may pull in the same direction, and constitute a pressure for the woman to enter into an unwanted marriage.

¹⁷⁸ Ali/ Arif(1998) p.31

¹⁷⁹ Ali (2000), p.266

¹⁸⁰ For more on the parallel judicial systems in Pakistan, see: Ali/Arif (1998)

There is no explicit protection of the right to marry in the Pakistani legislation, but such a right has been recognised by the courts (I will come back to two landmark cases further down). Furthermore, there are some provisions that provide protection against certain aspects of the practice of forced marriages.

7.1 Rights Embedded in the Constitution

The constitution of Pakistan guarantees many of the same rights that international human rights law ensure, and the reasons why these may be seen as offering safeguards against forced marriages are the same in both cases. In section 9 of the constitution it is stated that no person shall be deprived of the right to life and liberty, unless it is in accordance with law. Section 11 forbids slavery, forced labour and the like, its subparagraph 2 states that '[a]ll forms of forced labour and traffic in human beings are prohibited'. Section 14 sets forth the inviolability of dignity of man whereas section 15 protects the freedom of movement. All of these provisions may easily be violated in the grossest cases of forced marriages, where a young woman for instance is taken against her will and held in detention somewhere until the wedding. If the purpose of the marriage is to collect dower or to gain from it other benefits such as connections, it may also constitute trafficking in women. A life with a man the woman did not want to marry and the fact that she cannot get out of such a marriage, will easily amount to forced labour and slavery-like practice. If held against her will, either in the marriage or beforehand, the woman's right to freedom of movement is violated.

Section 25 ensures equality before the law, and gives equal protection by the law for all citizens, and section 25(2) states that there 'shall be no discrimination on the basis of sex alone'.

7.1.1 Writ Petitions for the Protection of Fundamental Rights

The constitution of Pakistan gives in section 199(1)(a) and (c) the High Courts authority to issue writs¹⁸¹. This means that the court can order officials¹⁸² of the state to refrain from doing anything they are not permitted to do or to do anything they are required by law to do. The court can furthermore declare that certain acts done and procedures taken have been done or taken without lawful authority and are of no lawful effect. The court also has the authority to order officials and government authorities to enforce any of the fundamental rights protected by the Constitution.

Any aggrieved person can file writ petitions such as these. The court recognises the principles of public interest litigation, so that persons or organisations not directly affected by an alleged violation of fundamental rights also have standing to file a writ petition.¹⁸³ It is an advantage for the female victim of a forced marriage that others, for instance NGO's¹⁸⁴, can act on her behalf in such stressful situations, where she may find herself to be in danger of being further victimised through 'honour' killing or other crimes. Still, INTERRIGHTS (The London-based International Centre for the Legal Protection of Human Rights) find that even though 'such applications may provide a useful avenue to challenge the failure of state authorities to take necessary action to address aspects of forced marriage', the resort to other remedies has in practice been more frequent.¹⁸⁵

7.1.2 Habeas Corpus Petitions

¹⁸¹ A writ is defined as 'a legal order issued by the authority [a court]and in the name of the state to do something therein mentioned -according to the Barron's dictionary of legal terms, 1998, New York

¹⁸² With official, I here mean a person that is performing functions in connection with the affairs of the republic

¹⁸³ Hossain/Turner p. 3.

¹⁸⁴ The abbreviation NGO stands for Non-Governmental Organisation

¹⁸⁵ Hossain/ Turner: p.3

A frequently used legal strategy in forced marriage cases in Pakistan where the woman is kept against her will in wait for the marriage or after the matrimony is the habeas corpus petition¹⁸⁶. Such petitions can be brought before the High Courts. This can be done as a writ petition filed under section 199(1)(b) of the Constitution. This provision provides for the court to issue directions that ‘a person in custody [is to] be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner’. The petition can also be filed as a criminal miscellaneous petition under section 491 of the Code of Criminal Procedure 1898, which states that the court may issue directions that any person ‘illegally or improperly detained in public or private custody be set at liberty’. This is, of course, provided that the custody is within the court’s jurisdiction.

If such a petition is filed, the court may issue orders upon the respondents of the petition (that would usually be the woman’s parents or other family members) to bring her before the court so that the judges may examine whether she is held in unlawful custody. This gives the court the opportunity to question the woman, in open court or in chambers, to make sure that she is not involuntarily kept in custody.¹⁸⁷

The petition may be initiated by the victim, but it may also be filed by any other person, such as a friend, a relative, or a person or organisation acting in the public interest. The governments of other nations also have the opportunity to engage Pakistani lawyers to act on their behalf. The British Government uses to a certain extent the Pakistani legal system to solve cases where the English citizen is detained by her family somewhere in Pakistan. So far lawyers from Pakistani NGO’s representing the British High Commission in Islamabad have pleaded 7 cases before the High Court.¹⁸⁸ This may provide a helpful measure for the Norwegian Government as well. See point 5.6 on family reunification.

¹⁸⁶ Habeas corpus is ‘a procedure for obtaining a judicial determination of the legality of an individual’s custody’ -according to the Barron’s dictionary of legal terms, 1998, New York

¹⁸⁷ Hossain/Turner p.6

¹⁸⁸ Report, study trip

It is a considerable advantage that anyone may file a petition, since the victim herself may not always be in position to file such a complaint. Victims held in unlawful detention in connection with forced marriages may find themselves constantly watched, without money, passport or access to a phone. The victims may also in the most extreme cases face the threats of ‘honour’ killing.¹⁸⁹ And, as it is mostly family members that would be detaining her, it may be emotionally difficult for the woman to bring the case before the court. A habeas corpus petition is not punitive in character, and will thus have less severe consequences for the perpetrators and through that also for the victim than if the family was to be prosecuted for the crime. Hossain and Turner state that

‘[g]iven the difficulties of obtaining evidence from the woman, due to a combination of family pressure, fear of reprisals from the family or repercussions upon them, a non-punitive approach is often found to be the most effective means of ensuring her recovery and release.’¹⁹⁰

A habeas corpus petition is ideal in this context as it aims simply at bringing the woman concerned before the court, and at getting her released from possible detention.

In some cases the filing of habeas corpus petitions has constituted a clear breach of the intentions behind the law. This was the case in the Saima Waheed case, where the parents of the Saima Waheed filed a petition against her lawyer, Asma Jahangir, on the grounds that she was responsible for detaining their daughter in a shelter home.¹⁹¹ However, the petition was struck by the courts, which stated that Ms. Jahangir did not detain her.

7.2 Criminal Law

The Zina (Enforcement of Hudood) Ordinance of 1979 section 11 criminalises the abduction for the purpose of forced marriage. Offences committed in connection with

¹⁸⁹ Hossain/Turner, p. 1

¹⁹⁰ Hossain/Turner, p. 3

¹⁹¹ *Abduhl Waheed v Asma Jahangir*, PLD 1997 Lahore 331

forced marriages may also -in extreme cases- lead to prosecution. This is the case of offences like murder and rape. Slavery is prohibited subsequent to sections 370-371 of the Penal Code of 1860. The Penal Code of 1860 also prohibits wrongful confinement. Sections 365 prohibits the kidnapping or abduction with intent to secretly or wrongfully confine a person, whereas Penal Code provision 368 concerns the wrongful concealing or keeping in confinement of a kidnapped or abducted person.

According to the Code of Criminal Procedure of 1898 section 100 a magistrate who ‘has reason to believe that any person is confined under such circumstance that the confinement amounts to an offence (...) [can] issue a search warrant’ to locate the ‘missing’ person. The individual the search warrant is directed to may then search for the confined person according to the provisions set forth in the said warrant. If the confined person is found, she ‘shall immediately be taken before a Magistrate, who shall make such order as in the circumstances of the case seem proper’. The courts furthermore have the authority to direct that certain categories of individuals shall be held in ‘protective custody’. Witnesses and victims of crimes of sexual violence are included in these categories.¹⁹² This measure may thus provide remedy for victims (or witnesses, for that matter) of forced marriages in grave cases.

Although the intent of criminal provisions is to provide effective redress to women who are victims of forced marriages, there appear to have been few or no instances of persons being prosecuted in relation to forced or threatened forced marriages.¹⁹³ INTERRIGHTS states that the laws meant to protect the women have instead been used against them. Reported cases indicate that families of women who have succeeded in evading forced marriages and contracting marriages contrary to the family’s wishes, have resorted to filing false charges of bigamy or zina(adultery¹⁹⁴) against the women

¹⁹² Hossain/Turner, p.4

¹⁹³ Hossain/Turner, p.4

¹⁹⁴ According to islam, zina or adultery is defined as any sexual contact outside a marriage.

and charges of kidnapping, abduction and rape against their husbands.¹⁹⁵ This happened for instance in the Humaira-case that I am discussing below.¹⁹⁶

7.3 Islamic Law

The family law is governed by the religious laws of Islam. In order to understand the judicial system of Pakistan it is thus important to have some knowledge of on Islam and Islamic law.

7.3.1 The Religion of Islam

Islam is a religion that permeates every aspect of the lives of those who profess to it. It combines religion, law and morality, and provides guidance and regulates a wide range of matters concerning a Muslim's life, in public as well as private matters (Islam does not initially recognise any boundary between the private and public sphere, or between society and religion. Everything is regarded a whole.¹⁹⁷). It does not only prescribe moral values and religious rites, but regulates quite specifically what a Muslim shall and shall not do down to the very details of good manners and hygiene¹⁹⁸. Islam consequentially comes with its own legal system.

The sacred law of Islam is called Shari'a –which means 'the right path' in Arabic, referring to the path man must choose to find Allah (God). Shari'a is one of the oldest legal systems we know, and it is still active and in use, regulating and affecting the lives of between 600-800 million people.¹⁹⁹ Shari'a is universal, in the sense that it is supposed to apply to all Muslims, regardless of where they live, and uniform, since there is only one will –the will of Allah- that is expressed in the law.²⁰⁰ The universality

¹⁹⁵ Hossain/Turner, p.4

¹⁹⁶ Humaira Mahmood v Malik Moazzam Ghayas Khokar, PLD 1999 Lahore 273

¹⁹⁷ Dahl (1997) p. 6

¹⁹⁸ An-Naim (1990) p. 11

¹⁹⁹ Warberg (1993)p. 262

²⁰⁰ Dahl (1997) p.12.

of Islam and Shari'a is important to take into account in the engineering of measures against forced marriages occurring amongst some Muslim immigrants in Western countries. A Muslim will, of course, have to be bound by the laws of the country he/she lives in, but will at the same time feel bound by Islam, and in that sense have a double set of norms regulating his/her behaviour. I will argue that in order to achieve an effective result, the measures cannot be of a sort that will force the Muslim to abandon his/her Muslim identity. I will come back to this later, in the discussion of measures in Norway.

7.3.2 The Sources of Law of the Shari'a

The religious, legal and moral code of the Shari'a has appeared through divine revelations and has been interpreted through the traditionally recognised sources of law, namely the Qur'an and the Sunna. The Qur'an is regarded as the revelation of Allah and is seen as a sacred text. The Sunna contains the statements, sayings and deeds of the Prophet Muhammad. A single statement/decision deriving from Muhammad is called a hadith. It is the hadiths that together with other stories of the prophet's life which constitute the Sunna. The number of hadiths is very high, and there are several collections of hadiths. The two hadith-collections regarded as particularly authorised are the collections of al-Bukhari and al-Muslim.

The interpretation of the aforementioned sources of law has taken place by using the legal techniques of *quias* and *ijma*. *Quias* is analogical reasoning, and is most often regarded as a restricted form of *ijtihad*. *Ijtihad* means 'self-exertion' and describes a procedure of personal reasoning or interpretation of the Shari'a. The practice of *ijtihad* has not been in use for several centuries²⁰¹, but Muslim scholars advocating reform of the Shari'a have opened for a renewed use of the procedure. *Ijma* is 'the unanimous agreement between jurists of a particular age on a specific issue'²⁰², i.e. established

²⁰¹ For further reading on 'the closing of the gate of *ijtihad*', see for instance: Esposito(1982) p.11 or Warberg(1993), p.267 and following.

²⁰² Esposito(1982) p. 7

consensus upon the issue. It is common to refer to both *quias* and *ijma* as sources of law in addition to the two textual sources²⁰³ .²⁰⁴

Shari'a is, as mentioned earlier, a uniform system of law. Still, there are ambiguities to be found in the sources of the Shari'a, and the content of the law has been established on the basis of interpretation. This has led to disagreements concerning principles of interpretation, which again has given rise to the forming of different schools of thought within Islam. The Sunni Muslims are divided into four schools of law, namely Hanafi, Shafei, Mailiki and Hanbali, whereas the Shias have the three subdivisions of Ismalia, Athna-Asharia and Zaidya. The vast majority of Pakistani Muslims are Sunni, belonging to the Hanafi school of law.²⁰⁵ I will therefore focus mainly on what this school of thought is saying.²⁰⁶

7.4 Islamic Family Law in Pakistan

Family law is one of the main areas in the Shari'a. The notion of family has a special place in the Islamic religion (it was, for example, the family that was the instrument when the first Muslim community was founded in Medina²⁰⁷ -as Mohammad's wife became the first Muslim), and the institution of marriage is thus extremely important. It is considered a duty for every Muslim man and woman to marry, unless they are physically or financially unable to enter marriage.²⁰⁸ In accordance with this duty, it is also a norm that one has to help arranging a marriage for close members of the family and friends.²⁰⁹ Marriage is seen as an important safeguard of chastity, and central to the

²⁰³ See for instance: Esposito (1982) p.3 and following.

²⁰⁴ For more information on the sources of law, see for instance: Dahl(1997) chapter 2

²⁰⁵ Ali, Shaheen Sardar (1996) p. 164

²⁰⁶ For more information on the Sunni schools of law, see for instance: Dahl (1997) p. 11 and following.

²⁰⁷ Dahl (1997) p. 49

²⁰⁸ The Qur'an 24.32, Esposito(1982) p. 15

²⁰⁹ Dahl(1997) p. 50

growth and stability of the basic unit of society, the Muslim family, through which the Muslim community is upheld and spread.²¹⁰

7.5 Marriage

Marriage (nikah) is regarded as a religious sacred covenant in the sense that it is the way of realising the essence of Islam. There is widespread agreement among all major writers on Islamic law upon the fact that marriage in Islam is a civil contract, and therefore all requisites of a valid contract must be fulfilled.²¹¹ In order for the marriage to be valid, the two parties to the contract must have capacity. Every adult Muslim of sound mind has such legal capacity to contract a valid marriage for him or herself, and a marriage cannot be brought about without the consent of both parties to the matrimony.²¹²

According to the Hanafi school of law, a woman can quite autonomously decide whether she will marry. It seems to be disputed how the other Sunni schools regard this question. Tove Stang Dahl claims, with reference to Coulson, that all of the major Sunni schools of law agree that a woman cannot be married off against her own will, but that the three other schools demand cooperation from her guardian in signing the contract,²¹³ whereas Sardar Ali claims with reference to Hamilton that the other schools 'assert that a woman can not contract herself in marriage to a man, either with or without the consent of her guardians'.²¹⁴

²¹⁰ Esposito(1982) p. 15

²¹¹ Ali, Shaheen Sardar(1996)p.157

²¹² Esposito (1982) p. 16

For hadiths supporting this view, see Bjøranger Terje (2000), p.105-106 and the internet site found (14.06.03): <http://www.sacred-texts.com/isl/hadith/had23.htm>

²¹³ Dahl (1997) p. 67

²¹⁴ Ali(1996) p. 166

A separation is thus being made between the girl's right to choose her spouse freely and the right she has to refuse a marriage arranged by her parents. There seems to be more of a consensus concerning the latter point –freedom from direct force- than as regards the former case. It is only if the latter right is denied that we may talk about a forced marriage. In the first case, it will be the woman's right to marry whoever she pleases that is violated. The two rights are of course entwined, both being part of the right to self-determination and liberty, as well as ensuring two different aspects of the right to marry. As it will extend the scope of this thesis to look at all the different interpretations of the different schools of thought, I will not go into the matter in any further detail, but concentrate on the school of law relevant to Pakistan, namely the Hanafi school of law.

7.5.1 Consent

The majority of people in Pakistan are, as previously mentioned, Hanafi Muslims, and the rule of full consent therefore applies.²¹⁵ The judiciary in Pakistan has in two different cases upheld that a woman's consent is a requisite for marriage.

In the Saima Waheed case²¹⁶, were the woman had married someone against the will of her parents, the father reopened a debate one had thought was settled for centuries among Hanafi Sunni Muslims, when he claimed that the approval of the guardian (*wali*) was a main condition of a valid marriage. The father of Saima Waheed accused her husband of kidnapping and adultery (*zina*). The court rejected this notion (though dissentingly) and upheld that a marriage without the consent of the *wali* was still valid. The dissenting judge (Ihsan-l-haq Chaudray) did, however, raise some concern among women advocates in Pakistan. Making no use of the sources of law available to him (such as the Constitution etc. as mentioned above) he stated that although the full and free consent of a woman forms an essential element of a valid marriage, a marriage must also have the consent of the *wali* in order for it to be valid. The case has been appealed to the Supreme Court. The married couple are now living in hiding in

²¹⁵ Bjøranger(2002) p. 71

²¹⁶ Abduhl Waheed v Asma Jahangir, PLD 1997 Lahore 331

Norway.²¹⁷ Shaheen Sardar Ali has in her article on the case argued that ‘the concept of a *wali* (male guardian) being required to be present at the contracting of marriage is a result of the socially constructed gender roles existing since times immemorial’.²¹⁸

The judgement in the next landmark case on forced marriages in Pakistan seems to support Ms. Ali’s standing. In the Humaira-case, a 30-year-old woman refused to marry the man of her father’s choice, and married someone else instead. The woman was then taken by her father and forced to participate in a mock wedding, which was videotaped to serve as proof. The fake husband reported that she was abducted by her real husband, and both the woman and her real husband were charged with the crime of adultery (*zina*). The High Court of Lahore exposed the videotaped wedding as mock, and held that:

‘In matters of marriage a woman was given equal right [by Islam] to choose her life partner (...). Unfortunately, in our practical lives, we are influenced by a host of other prejudices bequeathed by history, tradition and feudalism (...). It is that culture that needs to be tamed by law and an objective understanding and the Islamic values (...). Male chauvinism, feudal bias and compulsions of a conceited ego should not be confused with Islamic values. An enlightened approach is called for.’²¹⁹

7.5.2 Nullity of the Marriage as a Consequence of the Lack of Consent from Both Parties

Consent is therefore a condition for a valid marriage according to Islam, and thus also according to the law of Pakistan. The consent may be explicitly given, but it is considered sufficient that the woman does not protest. Without the consent of both parties, the marriage will be void (*batil*).²²⁰ This means that the marriage will have no legal effect after the law; it will be regarded as if it had never been entered into. It will

²¹⁷ Aftenposten 05.02.02, p. 6

²¹⁸ Ali, Shaheen Sardar, p. 174

²¹⁹ Humaira Mahmood v Malik Moazzam Ghayas Khokar, PLD 1999 Lahore 273

²²⁰ Ali(1996) p. 158

establish no civil rights or obligations between the parties and children of the marriage will be regarded illegitimate.²²¹

7.6 Concluding Remarks

Pakistan cannot be said to fulfil its obligation after the CEDAW to abolish customs and practices which constitute discrimination against women (cf. article 2 litra f), to take all appropriate measures to end practices based on the idea of the inferiority to women or on 'stereotyped roles for men and women' (cf. article 5 litra a) and ensuring the same right to freely choose a spouse. The Saima Waheed case serves as an example of this: Although the High Court eventually established that a grown Muslim woman is *sui juris* in relation to marriage, Saima and her husband were not granted sufficient protection by the Government and had to move from Pakistan in fear of their lives.

However, being as it may that Pakistan cannot protect women against forced marriages *de facto*, the laws are there granting (at least some of aspects of forced marriages) protection *de jure*. It would be possible to make use of habeas corpus or writ petitions, as the British High Commission has done in some cases, to get the victims back to Norway, where the legal system is better equipped to deal with the consequences of forced marriages. Effective remedy and help can also be provided, and if worst comes to worst, the woman will have a support apparatus at hand if she has to break contact with her family.

It is furthermore clear that Islam does not allow marriages without the consent of both the indenting spouses. The practice of forced marriages is thus rooted in culture and a traditionalist viewpoint that has nothing to do with real Islam. Communication of the fact that Islamic law, Pakistani legislation, Norwegian legislation and international human rights all pull in the same direction forming a universal, cross-cultural norm is thus essential in combating the practice of forced marriages.

²²¹ Ali(1996) p. 160

7.7 Cross-Cultural Norms/Internal Discourse in Forced Marriage Cases

Hennum /Paul state in their report on the legislation against forced marriages and bigamy (to the Ministry of Local Government and Regional Development) that the problem is not primarily that there is a lack of provisions regulating forced marriages, but that it can be a problem that the content of these provisions are not known to the public.²²² When it comes to the minority population from Pakistan, it is also very important to keep in mind that they, as Muslims, have to apply the law of Shari'a as well.

The internal discourse might take the form of information campaigns showing how forced marriages are contrary to their own religion. In order to prevent forced marriages from happening, it is my belief that the Norwegian authorities must address the parents who uphold such practices. They come from an extremely conservative part of the country and many are illiterate and frequently get more conservative in meeting with the liberal West, in fear of losing their own culture and control over their children. The 'Islamic card' must be played out. Just informing them of Norwegian legislation is not enough, one has to work with their identities as Muslims, and show that forced marriages are contrary to their religion. This has to be done in a culture sensitive way by members of their own group, so as not to alienate them. This can be done through NGOs in the minority groups, for instance. An important measure will be education, where exchange of knowledge showing them less alarming sides of the Norwegian society is a good means to enhance understanding. Legal provisions in Norway can be an effective remedy to oppose pressure from the family in Pakistan. The legislation will work together with Islam and international law, all pulling in the same direction especially if one succeeds in establishing an internal discourse on the cross-cultural norm of freedom to choose in relation to marriage.

²²² Hennum/Paul (2000), p. 41

8 Conclusion

In this thesis I set out to look at aspects of forced marriages from a human rights and women's rights perspective, trying to show how the practice is particularly harmful to women, and that states are under an obligation to work to prevent forced marriages in a number of ways. It is my opinion that working to prevent forced marriages best can be done through a combination of informing the perpetrators of Norwegian legislation and taking into account their Muslim identities and –in culture sensitive way- showing them that forced marriages are contrary to their religion. The Islamic argument should be used more actively when working to change attitudes in the Pakistani population.

Furthermore, I have further attempted to show that it can be useful to operate with a differentiated content of the term forced marriages, as the needs of the victims may vary from situation to situation. When it comes to applying the term forced marriages in relation to the Penal code, considerations of foreseeability and legal safeguards must be more in the foreground than when it comes to annulling a forced marriage or denying family reunification on the basis of forced marriages. Such a differentiated notion may be difficult to relate to, but as long as the assessment of what constitutes a forced marriage always will contain subjective elements relating to the victim, it may be an advantage that the notion is flexible (note, however: never in a culture relativistic manner-the cross-cultural norm that forced marriages are illegal must form the basis of the term at all times) and can be adjusted to the victims needs.

It has been important for me to point out that religion and culture should not serve as an excuse for upholding clearly damaging practices, and I have shown that in the case of forced marriages and the Pakistani population in Norway, there is no religious support for the practice either.

One of the problems in addressing new measures in regards to forced marriages is the lack of statistics. There may be a need for differential treatment, but as long as no statistics show the scope of the problem, it will be difficult to evaluate whether the differential measures taken are proportionate with what one hopes to accomplish. Can one, for instance, introduce a minimum age limit of 25 for family reunification between

spouses as Hege Storhaug has suggested?²²³ If this were to be introduced for the whole population, there would be no proportionality between the measure taken and what one wishes to accomplish, since there are so few forced marriages in the Norwegian population as a whole. But the case may be different if one through statistics finds evidence that an overwhelmingly large percentage of one minority group practices transnational forced marriages. Differential treatment always has to be justifiable, and as mentioned before, there has to be proportionality between the means and the ends. I am not saying that an age limit targeted at special groups would be unproblematic. Muslims are for instance urged by their religion to marry young, and such a measure may be too invasive in their religious faith. But if statistics are provided, it would be easier to raise a discussion over what measures to take. The CEDAW Committee requested Norway to conduct research into the stereotypical cultural attitudes prevailing in Norway and urged the Government to take effective measures to eliminate discrimination against minority women and to intensify its efforts to address the issue of violence against women in their consideration of Norway's 5th and 6th periodic report.

It might also be interesting to see how Norway defines forced marriage in relation to asylum seekers. I have no access to current practice on this area, but statements in the Basrat verdict²²⁴ may indicate a difference in practice that may be found in such cases. The court agreed with the State that one should be careful in letting such a widespread cultural phenomenon as forced marriages give status as a refugee and a right to asylum. If this is the prevailing Government view, there may be reason to investigate whether such a view will affect women to a larger degree than men, as women subjected to violence is a world wide problem. Forced marriages infringe deeply on the right to liberty and many other human rights (see chapter 3). Can it really be a valid argument in consistency with the CEDAW that female victims of forced marriages or other kinds of violence cannot be given status as refugees because there are so many of them in the same situation? It is beyond the scope of the present study to investigate the matter but it seems that this is an area that needs looking into by immigration and legal authorities.

²²³ Aftenposten, 15th December 1998

²²⁴ Case no. 00-03920 A/86 from Oslo City Court (byrett) of 06th of October 2000

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