Chapter 7

‘I Take You as my *Lawfully* Wedded Wife’

Comparison and observations with regard to the penalization of forced marriages

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1 Introduction

Immigration being inextricably linked with its history, Europe continuously faces the issue of how to deal with the import of new and formerly unknown cultural practices, e.g. forced marriages. Framing forced marriages as harmful cultural practices, implying serious human rights violation, penalisation appears to be the correct answer.[1] Europe being in support of penalisation, states have made arrangements to combat forced marriage, introducing or extending penal provisions. New incentives to penalise this practice have been laid down in the Council of Europe’s Convention on preventing and combating violence against women and domestic violence (hereafter: CAVHIO),[2] and the Directive on human trafficking of the European Union (hereafter: the Directive).[3] Both documents portray forced marriages as a realistic danger to women, and – to a lesser extent – to men. Nevertheless, arguments against penalisation are also heard in Europe. Opponents argue that criminalisation implies stigmatisation of migrants and reflects elements of racism. Minority groups being vulnerable and at risk of becoming a subject of xenophobia, penalisation is said to be used as a vehicle to frame diversity issues in terms of criminal law indicating a discriminatory application of human rights law and neglect of the complicated nature of forced marriages.[4] Moreover, due to the ‘private’ nature of forced marriage no effective enforcement is to be expected. Since the legislature is

1 The term ‘framing’ is used to refer to a process of building frames, meaning a rather consistent interpretive package surrounding a central idea directed at building social and political support to nominate social behaviour as a social problem, as displayed by a specific social actor. Note that this paper relates to marriage as in ‘legal marriage’.

2 Council of Europe, 2011. The CAHVIO is also referred to as the Treaty of Istanbul. For an overview of preceding EU initiatives: Robbers, 2008.

3 European Parliament and the Council of the European Union, *Directive on the prevention and combating of trafficking in human beings and protects its victims*, 2011/36, *Pb L 101/1*, 15 April 2011.

4 Razack, 2004, p. 145 and 154 Also: Bakker, 2012, p. 16; Smits van Waesberghe et al., 2014, p. 24-25.

well aware of the difficulties to maintain the penalisation intended, this begs the question: does the legislature value the argument that criminal law needs to be used as a last resort? This being a central focus in the Utrecht academic tradition, I will analyse whether the penalisation of forced marriage can be justified. Does the call for penalisation, or extending penalisation, merely reflect political rhetoric, or does it reflect a realistic policy to adequately combat a serious social problem?

Since forced marriages qualify as a cultural offence,[5] the debate on multiculturalism needs to be taken into account. There is, however, no unequivocal voice how to deal with cultural offences. Indeed, the ways in which societies deal with the consequences of globalisation and immigrations are inextricably bound with deeply rooted cultural beliefs and traditions.[6] This perspective represents a second aspect present in the work of the Utrecht academy.

Finally, a third aspect is added: the tradition to execute comparative legal research. Given the distinct profile of national policies, I have chosen to analyse two cases: the Netherlands and England and Wales (hereafter: England). Both governments have recently passed legislation penalising forced marriages. Indeed, the Dutch are about to accept a new revision pursuing the penalisation of the preparatory act of 'luring' someone into a forced marriage (Article 285c DCC).[7] At the same time, the English have recently introduced a specific penal provision (Article 121 Anti-social Behaviour, Crime and Policing Act 2014; hereafter ABCP Act 2014).[8] Penalisation having been strongly opposed previously by the authorities, the introduction of a specific penal provision signifies an important change in the English criminal policy with regard to the question how to combat forced marriage. Obviously, this change of politics shows the willingness of national authorities to frame foreign cultural practices as a crime in need of active prevention. But what are the arguments that underpin this criminal policy? And what is the image of forced marriage that underlies its framing as a cultural offence? Moreover, are there empirical findings that support the need to use criminal law? And if there are no such data, what are the political motives that have led the Dutch and English governments to pursue penalisation? In order to find answers to these questions I will analyse the Dutch and the English policy, analysing both the legal discourse and the legal practice (Sections 4 to 6). Forced marriage having been qualified as

5 Cornelissen et al., 2009; Janssen, 2013.

6 Note that Koopmans et al. argue that 'the nation-state is still the most relevant context for understanding the politics of migration and ethnic relations'; Koopmans et al., 2015, p. 76-77.

7 *Kamerstukken II* (*Dutch Parliamentary Papers*) 2014/15, 34 039, nrs. 2-3.

8 Anti-social Behaviour, Crime and Policing Act 2012, chapter 12, part 10, Article 121, www.legislation.gov.uk/ukpga/2014/12/contents/enacted. The Act received Royal Assent on 13 March 2014. Also: Home Office, Forced Marriage-A Consultation, June 2012, www.gov.uk/government/uploads/system/uploads/attachment_data/file/157829/forced-marriage-response.pdf.

gendered violence,[9] the standards set in the CAHVIO and – to a lesser extent – the Directive with regard to gendered and honour-related violence are also relevant (Section 3). First, however, a problem definition is presented (Section 2). Finally, a comparative assessment is provided (Section 7).

2 Framing forced marriages as a social problem

2.1 Defining the problem

Forced marriage being an umbrella term, the term has no strict legal content. Indeed, the definitions used in the public debate differ.[10] In line with the 'romantic' Western concept of marriage underlying human rights law, marriage in general is interpreted as a bond of love, implying a voluntary, reciprocal commitment.[11] In line with this Haenen has defined forced marriage as 'a marriage (i.e. a marital or marital-like association), which at least one of the partners entered into against their will as a result of some form of coercion exerted by another party'.[12] Force, as related to 'forced marriage' is, however, a diffuse concept and needs to be related to the cultural context of the social life of ethnic minorities.[13] Indeed, since parental approval is a regular preference with regard to the 'mainstream marriage', the difference between a regular and a forced marriage lies in the presence of a clear subordination of the spouse's consent. Hence, apart from the clear cases (e.g. the use of physical violence or the taking away of personal documents) the assessment that a marriage was forced will have to depend on an evaluation of 'the case as a whole'.

Moreover, social regulations regarding cultural practices being tightened, solutions chosen are often of a legal nature. With regard to forced marriage the human rights argument lies at hand. Obviously, if force is applied, this implies a violation of the individual's integrity indicating a human rights violation. The use of the human right arguments, however, appears to have an inflationary effect, leading to the use of strong expressions referring to forced marriage

9 E.g. Preamble CAHVIO (Treaty of Istanbul); European Agency for Fundamental Rights 2014; Ageng'o, 2009.

10 Robbers, for instance, distinguishes a victim-orientation and a perpetrator-orientation. The former is of a broad nature, featuring a need for public assistance; the latter, being linked to legality, requires a strict definition (Robbers, 2008, p. 9).

11 E.g. Article 16 para. 2 Universal Declaration on Human Rights (1948).

12 Haenen, 2013, p. 31. Haenen explicitly presents this definition as a 'preliminary' definition'.

13 Rude-Antoine, 2005, p. 20; Haenen, 2013, para. 3.3.2.3. Some argue that marital force should be interpreted as a symptom of the struggle of non-Western immigrants to deal with the economic and social strain present in their daily lives; e.g. Razack, 2004, p. 43 and 160; Gill & Mitra-Kahn, 2012, p. 114-115. Moreover, referring to the prohibition of forced marriage by the Islam, several authors stress that social pressure must not be taken as a synonym for cultural tradition; e.g. Gangoli, 2006, p. 32.

as a form of enslavement.[14] On a lighter scale forced marriages are qualified as domestic violence, often referring to the continuous nature of the offence being related to as marital captivity, or relating to the consequences of a forced marriage to marital abandonment.[15] At the time of writing, one can observe that European and national authorities are becoming increasingly aware of the complex nature of 'forced marriage', adding marital captivity, abandonment and the potential risk of human trafficking to the political agenda.[16]

2.2 Defining the problem in terms of delinquency

Obviously, what is being addressed as forced marriage represents an ambiguous phenomenon, comprising both punishable and non-punishable types of force. Indeed, although figures show an apparently genuine cause for concern, this does not necessarily imply a need for penalisation. Penalisation being supported in Western Europe, this begs the question: what defines forced marriages as delinquency?

The Dutch provision, Article 285a DCC, prohibits the (threat to) use of force in a general wording. Indeed, the elements of the offence are quite open, referring to the (threat to) use (of) 'force' or 'any other relevant cause'. The (threat to) use of force is not related to a specific aim; there is no explicit reference to forced marriage. The English legislature opted for a different solution: although Article 121 ABCP Act 2014 mentions the use of force in a general wording (violence, threats and other form of coercion), the application of these elements are explicitly linked to the purpose of forcing someone into a marriage, or the reasonable belief that one might cause someone to do so without free and full consent. Thus, providing a finalised description of force, the English have opted to penalise forced marriage as a specific offence, in contrast to the general one stipulated by the Dutch legislature. This difference follows from the distinct legal systematics used in the distinct legal systems: in Dutch criminal law the use of general provisions is preferred, whereas in English law, which is historically based on case law, the introduction of statutory law is of recent date and relates to the 'topic of the day'. Such a system makes it relatively easily to penalise specific social practices that are felt to constitute violations of contemporary social beliefs.

Obviously, neither Dutch nor English law provides a clear definition of what constitutes forced marriage. Nevertheless, both legislatures vigorously defend the need to penalise forced marriage, using strong words to illustrate its reprehensible nature. Forced marriages are referred to as 'slavery' and 'harmful

14 E.g. Haenen, 2014, para. 3.3.2.3. Also: UN Entity for Gender Equality and the Empowerment of Women, *Defining other forms of human trafficking: forced marriages*, www.endvawnow.org/en/articles/618-defining-other-forms-of-forced-marriage-human-trafficking.html.

15 E.g. Chantler, 2009, p. 606; Khanum, 2008, p. 49.

16 E.g. Bakker, 2012, p. 5-6.

cultural practices', both being in violation with the 'beliefs of the common people'. This entails strong legal implications, however, since it implies that the punishable nature of forced marriage is universally foreseeable, thus setting aside the standard that penal provisions must be 'prescribed by the law',[17] and implying there is no need for a clear definition. Moreover, based on the argument of universal foreseeability, the authorities can claim universal, extra-territorial jurisdiction. Both the Dutch and the English authorities have made such a claim (Article 7 DCC, and Article 121, section 8 ABCP Act 2014, respectively).[18] In light of the absence of a clear definition of what constitutes the offence of forced marriage, one can wonder whether this is justified. Moreover, to legitimise penalisation we need to establish that the image of forced marriage underlying Article 284 DCC and Article 121 ABCP Act 2014 corresponds to those present in Dutch and English legal practice.

3 The European standard

In light of the mixed nature of Western societies the Member States are called on to provide clear, unequivocal standards.[19] Nevertheless, neither the CAVHIO nor Directive 2011 prescribe the introduction of a special provision.[20] Indeed, such an incentive would go beyond the competence of the European legislature. The CAVHIO provides a general message, instructing the Member States to 'take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence (...) perpetrated by non-State actors'.[21] Directive 2011 contains similar instructions, Article 3 referring to 'practices similar to slavery, servitude (...)'. Section 12 refers to forced marriage as 'human trafficking'. The recent case of M. and others against Bulgaria shows that the ECtHR is of the same opinion: forced marriage may qualify as human trafficking, representing a violation of Article 3 and/or 4 of the European Convention.[22] Such an evaluation, however,

17 See Article 7 section 2 ECHR.

18 See Article 7 ECHR.

19 CAVHIO, *Explanatory Notes*, under 89, addressing the Western-European context as one 'where distinct ethnic or religious communities live together and in which the prevailing attitudes to the acceptability of gender-based violence differ depending on the culture or religious background'.

20 Overall, there is no support in Europe to introduce a special offence; see the report on the EU Daphne-research 'Active against forced marriage'; www.hamburg.de/contentblob/1406660/data/dokumentation-eng.pdf, p. 9-10. But a number of states have specific legislation: Sweden, Norway, Belgium, Germany, Austria, Cyprus, Serbia and Albania.

21 CAHVIO, Article 5, section 2. In addition, Article 32 CAVHIO deals with the legal consequences of forced marriage, obliging the member states to provide for measures to ensure that marriages under force may be voidable, annulled or dissolved without undue financial or administrative burden being placed on the victim.

22 ECtHR 31 July 2012, M. and others v. Italy and Bulgaria, Appl. no. 40020/03, *European Human Right Cases* 2012/221, annotated by M. Boot-Matthijssen.

needs to be based upon a clear and unambiguous establishment of force being used against a vulnerable victim. Furthermore, the CAVHIO contains a clear position with regard to the use of a cultural defence: culture, custom, religion, tradition or so-called honour cannot be invoked to justify any act of (gendered) violence (Article 42 CAHVIO). Indeed, this restriction is presented as a 'key principle'.

In addition to the avenue of penalisation, prevention and treatment are explicitly mentioned. Indeed, following the 'three Ps' structure (prevention, protection and prosecution), the Council's policy is completed with a fourth aim: the pursuit of 'integrated policies' (the fourth 'P').[23] Overall, states are expected to offer a 'holistic response' to violence against women.[24] With regard to the prosecution of violence against women, one can hear the echo of the ECtHR's case law on the positive obligations in the instruction to carry out effective investigation without undue delay, respecting victims' rights, avoiding secondary victimisation.[25] Being in support of an evidence-based policy, the Council of Europe believes that registration and research should be furthered, arranging for adequate procedures on the national level.[26]

4 The Dutch legal discourse

The Dutch authorities having ignored the social repercussions of globalisation for a long time, forced marriage has only recently become an issue.[27] Until the 1990s, the Dutch assumed that the immigrants who were invited to come to work in the Netherlands would return to their country of origin, causing no need to develop a specific integration policy. This suits the 'politics of accommodation' that dominated Dutch society most of the twentieth century.[28] Although these policies have been in decline since the 1970s, they have had their impact on Dutch culture and have put their mark on the Dutch debate on immigration and integration. Indeed, according to Koopmans et al. pillarisation is a 'form of multiculturalism *avant la lettre*'.[29]

However, since the decline of the welfare state and the related rise of populism, the position of immigrants in Dutch society has become increasingly problematic.[30] Underlying is the essentialist assumption that immigrants are neither able nor willing to fully integrate. Obviously, the rise of the *PVV*, an

23 CAVHIO, *Explanatory Report*, under 63.
24 Ibid., under 64.
25 Ibid., Article 49 and 50. In similar terms: Directive 2011, under 20, stating victims should 'receive a treatment that is appropriate to their needs'.
26 CAVHIO, *Explanatory Report*, under 77.
27 Entzinger, 1984; Gorashi, 2010 and 2010a.
28 The term is taken from Lijphart, 1975.
29 Koopmans et al., 2005, p. 71.
30 Ghorasi, 2006, p. 12-13, 46-49. According to Ghorashi, today's 'harsh' approach is but a manifestation of the policy underlying the 'soft' approach in the 1980s.

extreme right-wing political party, is likely to have contributed to the rise of such an 'exclusive' discourse. Moreover, Dutch minority groups traditionally are not manifestly represented in politics, but join forces with traditional political parties.[31] This political invisibility encourages the majority's claim that Dutch immigrants are not willing to assimilate.

In this gradually changing social and political landscape, cultural offences have become an issue. Triggered by horrible international and national events that were assumed to be related to the 'hostile' nature of non-Western religions, the already weakened social support of multiculturalism in the Netherlands declined. Presenting ethnicity as a predictor of domestic violence, the policy with regard to honour-related crime became dominated by the general policy against domestic violence.[32] Dutch (feminist) NGOs furthered the political debate, claiming that there was a need to tighten (legal) regulations with regard to forced marriages. Indeed, in the summer of 2009 there was a panic, when NGOs reported that young girls from ethnic minority groups in the Netherlands were abducted during their summer holidays in order to be wedded in the country of the family's origin.[33] As a result an MP resolution was submitted in November, requesting the penalisation of forced marriage. The resolution received broad support, being signed by members of left-wing and right-wing political parties. Although no cases of forced marriage were reported this accelerated national politics, producing governmental documents.

Criminal legislation was amended in 2013, introducing a rise of the maximum penalty (two years of imprisonment) and an extension of the statute of limitation.[34] In addition, pre-trial custody is now possible in case of suspicion of a forced marriage. The apparently 'modest' nature of this amendment cannot, however, hide its ambition. By qualifying forced marriages as a violation of 'the belief of the common people', the Dutch authorities are now competent to prosecute individuals who are suspected to have committed, or acted as an accomplice to the conclusion of a forced marriage abroad with regard to a Dutch national.[35] Even perpetrators that at the time of the act did not have the Dutch nationality but only had a (temporary) residence permit can be prosecuted. Moreover, the requirement of double criminality was abolished,

31 At the time of writing the climate is changing since several MPs representing a minority group have decided to leave the mainstream political party and to start a party of their own. Similar initiatives have been taken on the local level for some time now.

32 In 2006 the programme *Eergerelateerd geweld* (Honour-related violence) was launched, coordinated by the Ministry of Public Health, Welfare and Sports. This programme came to an end in 2011.

33 SPIOR, 2008.

34 *Bulletin of Acts* 2013, 95. Recently an additional amendment was presented to Parliament, proposing new arrangements on the civil aspects of forced marriage. A specific point of interest these days in the Netherlands is the discouragement of marriage between closely related family members.

35 This also includes female genital mutilation committed on victims under the age of eighteen and polygamy.

creating extra-territorial jurisdiction with regard to forced marriage committed by a Dutch native, irrespective of the nationality of the victim.[36]

At the time, judicial authorities voiced doubts as to whether the extended jurisdiction would show to be fruitful. The Board of Prosecutors-General explicitly called on the legislature to provide for 'a realistic perspective of what can and might be expected of criminal law'.[37] Still, the Dutch government believed that the extension of jurisdiction was needed in order to prevent 'safe harbours'. Indeed, an explicit signal should be given, clearly indicating that Dutch nationals and inhabitants '(...) must respect such a, for the national legal order fundamental value [the right to be free whom to marry – RK], not just in their home country, but also abroad. Non-compliance shall not be without consequences.'[38]

Nevertheless, the circumvention of such a clear political conviction stands in sharp contrast with the diffuse nature of the open wording of the law. The elements of 'force' and '*andere feitelijkheid*' ('any other relevant cause') used in Article 284 DCC imply complex issues of interpretation. There needs to be proof that the victim did not consent, either as a consequence of physical or psychological force. Things become even more complicated when Article 285c DCC, containing the penalisation of preparatory acts related to forced marriage, comes into force.[39] The present regime already penalises complicity, but such criminal liability is of an accessory nature. According to the legislature, to further the prevention of forced marriages any preparatory activities undertaken by those involved in the planning of a forced marriage need to be penalised. These activities must be such as to persuade the victim to decide to travel abroad, which journey would not have been undertaken if s/he had been aware of the perpetrator's genuine intentions.

Obviously the Dutch authorities welcome the incentives that flow from the CAHVIO and are more than willing to apply the instruction to use criminal law. Yet, criminal law is only the final piece of a broader policy. Prevention being the main aim, the focus lies on setting up a social network to provide social support. However, implementation of such a policy is hindered by a major decentralization as a result of the *Wet Maatschappelijke Ondersteuning 2015* (WMO; the Social Support Act 2015).[40] Under the WMO, local authorities are responsible for the prevention of domestic violence, including forced marriages. Although the prosecution of this type of offences is left to the Public Prosecution Service, the overall instruction is that local authorities (municipalities) and

36 This is in line with Article 44 paragraph 3 CAVHIO. Also CAVHIO, *Explanatory Notes*, under 227-228.

37 *Kamerstukken II* 2010/11, 32 840, no. 3, Bijlage, p. 3.

38 Ibid., no. 3, p. 9.

39 This proposal flows from the draft proposal related to the implementation of Article 37 of the Treaty of Istanbul, *Trb*. 2012, 233. According to the Dutch government a similar regime must be applied to forced abortion and forced sterilization.

40 *Staatsblad* 2014, 281.

public prosecution authorities must cooperate. Such cooperation being complex, this needs to be developed in the coming years.

5 The English legal discourse

The English debate on forced marriage started in the 1990s. Until 2000 forced marriage was addressed as a civil law issue, regulated by the Marriage Act 1994 and the Matrimonial Causes Act 1973. In the wake of three high-profile cases, penalisation became an issue.[41] The initial plan to introduce a specific penal provision, however, was strongly criticised.[42] NGOs believed that such specific legislation would reinforce racist stereotypes, leading to fragmentation of the laws pertaining to violence against women. Indeed, such a prohibition would be ineffective since it would drive forced marriage underground. According to the opponents, forced marriage had to be qualified as domestic violence, to represent a widespread global practice instead of a cultural offence.

The legislature, in fear of being accused of racism, decided against penalisation.[43] A civil approach was preferred, leading to the introduction of the Forced Marriage (Civil) Protection Order Act 2007 (FMPO).[44] The initiative to apply for an FMPO order lies with the (potential) victim or a representative third, who can lodge a request with the civil court to take appropriate measures to prevent the intended marriage from taking place (e.g. contact restrictions or the confiscation of travelling documents).[45] Such FMPOs are applicable only if plausible evidence is provided that the victim or a third party was (threatened to be) assaulted. Meanwhile, perpetrators can be prosecuted for 'common' offences (e.g. conspiracy, the use of force, abduction etc.). The breach of an FMPO is a civil wrong, which constitutes the offence of contempt of court (Section 63o (Civil Protection) Forced Marriage Act 2007).[46] Since prosecution must stand the test of a 'realistic prospect of conviction' and may not cause

41 E.g. the case of Humayra Abedin, a doctor who was abducted by her family and forced to marry in Pakistan; *The Independent* 5 July 2009, 'Forced marriage: I can't forgive what they have done to me', www.independent.co.uk/news/uk/home-news/forced-marriage-i-cant-forgive-or-forget-what-they-did-to-me-1732170.html.

42 HMO/FCO, 2005; House of Commons, 2011.

43 Note the British – including the English – traditionally champion multiculturalism due their long history of colonialism; e.g. Runnymede Trust, 2000. This explains why minority groups are a significant political factor. Fortier, however, observes a decline in the support of multiculturalism; Fortier, 2000.

44 HL Bill 3 of 2006-07. This Private Member's Bill, lodged by Lord Lester of Herne Hill QC, reflected a victim-centred approach. Also: Gill & Anitha, 2009, p. 261.

45 However, the victim can put forward a request to annul the order initiated by the representative third, or put forward an amendment.

46 Note that the FMPO is similar to the Dutch *tijdelijk huisverbod* (domestic violence restraining order). However, other than in the English system, it is the mayor – and not the civil court – that issues such an order. The difference lies in the rationale served: the Dutch order focuses on the maintenance of the public order, the English on the private issue of the prevention of a forced marriage.

negative effects on the victim's physical or mental health, expectations were low. Social agencies and NGOs stated that to lodge a request in order to initiate civil proceedings (FMPO) would be beyond the victim's capacities.[47] Prosecution was expected in extreme cases only.[48]

Similar to the Dutch, the English opted for a broader policy, setting up a social network to further the prevention of forced marriages. The Forced Marriage Unit (FMU) was introduced, representing a co-operation between the judicial authorities, specialized police forces and the social services.[49] To support this cooperation Multi Agency Risk Assessment Conferences (MARACs) were set up. Research shows that success has been limited.[50]

A similar observation goes for the policy as a whole: the results reported have been disappointing from the start. Underperformance of the judicial authorities was observed and the police were criticised for showing reluctance to act due to a fear of being accused of racism.[51] A similar issue was reported regarding the civil authorities, which were criticised for leaving it to the voluntary agencies to take action. Indeed, in spite of a substantive number of cases having been reported, only a limited number of FMPOs was applied, none of them requested by a relevant third party.[52] Moreover, applications were not adequately communicated, nor registered.

This criticism, together with the drawing up of the CAHVIO fostered a change of policy.[53] On 8 June 2012, Prime Minister Cameron announced the government's intention to penalise forced marriage.[54] Describing forced marriage as 'little more than slavery', Cameron said that the authorities should not shy away from addressing the problem 'because of some cultural concerns'. According to Cameron, it was 'ridiculous that an order to stop a forced marriage isn't enforced with the full rigour of the criminal law', for 'forced marriage is wrong, illegal and will not be tolerated'. What's more, being 'the global leader on work to tackle forced marriage', the United Kingdom had to keep up appearances.[55] Thus, the plan to penalise forced marriage was justified.

In June 2012, the Anti-social Behaviour, Crime and Policing Act (ABCP Act 2014) received royal assent. The breach of an FMPO was qualified as a specific criminal offence with a maximum of seven years' imprisonment and/or a fine (Article 121 ABCP Act 2014). Similar to the Dutch regime, the English

47 E.g. Gill & Anitha, 2009, p. 116-117.
48 Ghaffney-Rhys, 2009, p. 249.
49 Note that the Dutch have recently decided to set up a national check-point, although of a more modest nature than the FMU.
50 Home Office, 2011, p. 96.
51 House of Commons, 2011, p. 20 & 33. By contrast, the stakeholders themselves presented a more positive evaluation: HMO & FCO, 2008.
52 HMO/FCO, 2008, p. 19.
53 Home Office, 2011; Home Office, 2012.
54 House of Commons, Library, *Forced Marriage*, 8 June 2012.
55 House of Commons, 2012, p. 9 and 11. Also: Number 10 Downing Street Press Release, *Forced Marriage to become a criminal offence*, 8 June 2012.

legislature opted for extra-territorial jurisdiction. Moreover, the English law referring to marriage as a civil or religious ceremony, Article 121 ABCP Act 2014 appears to cover a broader range of activities.[56] In addition, there is a clear focus on the victim's vulnerability. Indeed, Article 121 Section 2 ABCP Act 2014 explicitly states that in case the victim lacks capacity, any conduct carried out for the purpose of causing the victim to enter a marriage suffices.[57]

Although this change of policy was welcomed overall, it also raised criticism. Representatives from (feminist) minority groups scorned the use of the human rights argument used by the English authorities, stating that contemporary policy is at the crossroads of multiculturalism and ethno-centrism.[58] Objections rose against the 'implicit frame of reference for normality' present in the human rights argument, implying an image of minority women as victims of a non-genuine, backward culture.[59] Moreover, feminist authors stated that a 'hierarchical citizenship' was on the rise, indicating negligence of the gendered relations that triggers domestic violence against women.[60] Also, critics referred to the political fear of Muslim terrorism that appears to stir up racist tendencies, portraying assimilation and integration as social problems.[61]

6 The Dutch and English law in action

Having drawn up an overview of the Dutch and English debates, the question arises how this works out in practice? Since the starting point lies in the assumption that society should make relatively limited use of criminal law, penalisation should relate to the combat of a serious social problem. Are there empirical data in support? As will be shown, there is a strong discrepancy between the figures produced for the English case and the Dutch case. Thanks to the FMU, the English have been able to register reports with regard to

56 Under Dutch law a religious ceremony does not fall under the scope of Article 284 DCC but can be prosecuted as an offence against the administrative status (Article 449 DCC). In the Netherlands a religious marriage needs to be preceded by a civil ceremony. E.g. The Hague Court 14 November 2014, ECLI:NL:GHDHA:2014:3848 regarding the concluding of religious marriages by an imam.

57 Although the Dutch government also acknowledges the need to provide extra protection to victims that lack capacity, there is no explicit policy in place yet.

58 As mentioned the English case features a high level of political manifestation by minority groups, among them feminist NGOs. This explains why, other than in the majority of the European countries, some of these NGOs tend to oppose the penalisation of forced marriage. In contrast, feminist NGOs elsewhere have been the driving force behind such a penalisation. See for instance with regard to the Norwegian case: Lossius et al., 2011.

59 Gill & Anitha, 2009, p. 623; Dustin, 2010; Gill & Mitra-Kahn, 2012, p. 109-114.

60 Gill & Anitha, 2009, p. 119; Gill & Mitra-Kahn, 2012, p. 114. For a non-feminist critique: Fortier, 2005. Fortier qualifies the English policy as a 'pluralist model of managing cultural pluralism in a human rights framework'. Previously Young analysed the openly hostile attitude to immigrants present from the 1990s onwards as a drawback of traditional English conservatism; Young, 1999, p. 174.

61 Safia Mirza, 2012; Sales, 2012.

(potential) forced marriage since 2005, enabling the authorities to gather data for victim profiles.[62] Obviously, these figures only represent the tip of the iceberg. Indeed, a study by Khanum executed in 2008 based on self-reports produced a significantly higher prevalence of forced marriage than officially registered.[63] Other reports, however, presented lower estimates, e.g. the one by Gangoli who estimated about 30 cases annually.[64] Nevertheless, the FMU's registration provides some insight on the range of cases and victim profiles. Note that the data presented related both to performed and to potential forced marriages.

Table 1. Data with regard to England

Period	*2012*	*2013*	*2014*
Prevalence	1485	1302	1302
Sex	82% female 18% male	82% female 18% male	82% female 18% male
Age: under 15	13%	15%	15%
Disabled	114 individuals	97 individuals	unknown
LGTB*	22 individuals	12 individuals	unknown

* LGBT= lesbian, gay, bisexual or transsexual
Source: HMO/FCO, FMU statistics[65]

Since the Dutch do not systematically register reports of (potential) forced marriages, there are no reliable data. However, a recent report by Smits van Waesberghe ordered by the government provides an educated guess with regard to the prevalence of forced marriages in the Netherlands.[66] Data were collected from various registrations and subsequently extrapolated. Next, professionals were interviewed and a (modest) self-report was produced by victims. Based on the registration 499 cases were found, which contained 181 reports of forced marriage, 178 reports of marital abandonment and 140 cases of marital captivity. Based on these data a minimum prevalence of 674 to 1914 cases annually was reported. Experts interviewed, nevertheless, mentioned a lower prevalence (in the range of a few hundred cases annually).

Obviously, a comparison based on these data is not reliable. Since there are no reliable estimates on the prevalence of forced marriage, neither in the

62 The FMU is the result of a joint venture between the Home Office and the Foreign Commonwealth Organisation. Note that these data are based inter alia upon the amount of (civil) FMPOs registered.
63 Khanum reported 5000 to 8000 forced marriages annually in the region of Luton only; Khanum, 2008.
64 Gangoli, 2006, p. 9.
65 Taken from: www.gov.uk/forced-marriage#statistics-on-forced-marriage-collected-by-fmu.
66 Smits van Waesberghe, 2014.

Netherlands nor in England, the differences found provide no leads for valid conclusions. Still, there are some common features that might shed some light on the phenomenon of forced marriage. The majority of the victims being in the age group of 16 to 25, most victims are of a marriageable age. Next, female victims are obviously overrepresented, which might have to do with the focus of the social support. Men, however, are not totally absent. Indeed, a surprisingly high percentage of men (10 to 15%) report to have been the victim of a forced marriage. Assuming the threshold for male victims to come forward is high, one can assume that there is a dark number.

The major difference between the Dutch and the English practice regards the cultural background of the victims and their families. A possible explanation lies in the distinct composition of the immigrant population in both countries. In the English practice the majority of the victims has a South-Asian background (primarily Pakistani and Indian), whereas the Dutch victims mostly have a Mediterranean identity (Morocco and Turkey). This shows that forced marriages occur in different non-Western cultures. Moreover, there is a common motive that is reported to underlie the arrangement of a forced marriage: the family's belief that the wedding candidate chosen by the family is the best option. Nevertheless, figures show that marriage can also be forced on youngsters who are felt to cause problems for the family.

In order to try to obtain some additional information with regard to the number of cases prosecuted I performed a quick scan.[67] Results proved to be limited, but still some relevant quantitative and qualitative data were established. With regard to the Netherlands just one case was found in which someone was – successfully – prosecuted for facilitating a forced marriage.[68] The search for relevant English cases provided similar outcomes, only a limited number of cases of a breach of a forced marriage civil protection order were found, none of them leading to a criminal procedure.[69] Indeed, the number of FMPOs registered is relatively low.[70] An explanation might be that parties concerned prefer a non-legal solution, e.g. by turning for help to an IDVA, an Independent Domestic Violence Advocate. Although IDVAs are qualified as a relevant third party, having the right to apply for a FMPO, only a small number of requests was lodged.[71]

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67 With regard to the Dutch discourse I searched the official website of the judiciary (www.rechtspraak.nl). Since the English do not systematically publish case law, the quick scan was executed via a search on Google searching for relevant publications/case law.

68 District Court Arnhem 28 December 2012, ECLI:NL:RBARN:2012:BY7611, *inter alia* leading to a conviction based on Article 284 DCC.

69 Chatterjee, 2014; Ministry of Justice, 2010a, p. 20.

70 In the period 2008-2009 a limited number of FMPOs were registered: 94. Note an FMPO is not an offence, but a civil order.

71 Ministry of Justice 2010b, under 9 respectively 34-35. Interesting also is the scheme mentioned under 66, presenting an overview of the key respondents that have initiated forced marriage in the period 2009-2010.

In light of the recent date of the legal changes in both the Dutch and the English situation, one cannot expect a substantive number of criminal cases to have been registered. Indeed, the number of FMPOs registered being relatively low, the number of cases in which an FMPO has been breached will also be limited. Still, as the English authorities explicitly express their surprise regarding the fact that no breaches have been registered, expectations appear to be falsified.[72]

As mentioned, the figures presented do not provide a valid basis to draw conclusions with regard to the number or the nature of forced marriages concluded in the Netherlands and England. With regard to the nature of the forced marriage, it is especially the nature and amount of force reported in victims' self-reported stories that illustrate harmful and intrusive experiences, indicating that these forced marriages represent a serious violation of the right to physical and psychological integrity. However, there are different stories as well, referring to less intrusive types of force, indicating that the marriages involved refer to 'arranged marriages', rather than 'forced' ones.[73] Nevertheless, the line between these types of marriage is rather unclear. Indeed, an arranged marriage can also indicate the use of force, although of a less intrusive nature, at least apparently.[74]

Obviously, the question whether the legal practice is compatible with the assumptions underlying the national policy cannot be answered based on my limited search and the data found. Nonetheless, the lack of findings provides food for thought since it supports the initial observation that there is no solid empirical evidence (yet) to back up the strongly worded arguments underlying the penalisation of forced marriages as provided by the Dutch and English legislature. This begs the question: what are the 'real' motives underlying the pursuit of penalisation?

7 Some comparative observations

There is a link between the legislature's pursuit of penalisation of forced marriage (and extending this penalisation) and contemporary societies' struggle to deal with the consequences of globalisation and related immigration. Moreover, no rocket science is required to understand why both the Dutch and the English authorities use the human rights argument to justify the use of criminal law. Since human rights are highly valued in the Western discourse, references to the argument of the protection of the individual's integrity and the need to combat gender-related violence is as a rule above all suspicion. References to

72 Ministry of Justice, 2010a, p. 20.

73 E.g. for the Netherlands: Storms & Bartels, 2008; Cornelissen et al., 2009.

74 A forced marriage is qualified as a 'deviation' of an arranged marriage; the latter being based on consent (Ministry of Justice, 2010a, p. 4). Moreover, forced marriage is related to rape (Ministry of Justice, 2010a, p. 17. Also: Cornelissens et al., 2009 and Cinibulak, 2011.

'slavery' and 'human trafficking' used by the authorities and other proponents of penalisation of forced marriage appeal to a 'saviour's mentality' that appears to have taken hold of the public discourse with regard to gender-related violence that springs from imported cultural traditions.

Since cultural and gender-related violence represents a serious social problem it is absolutely not my intention to scorn this mentality. Nevertheless, precisely because of the 'unimpeachable' nature of the human rights argument and the inherent risk of abuse, we need to be critical about whether the human rights trump is played fairly. Indeed, the marrying off of young girls to adult men in different regions in Asia or Africa and the evil practices of abducting and 'marrying' so-called bush wives in the context of civil wars justify the application of such a label, but does it suit the type of forced marriages present in the West-European context?[75] Findings do not suggest that the practice of forced marriages as referred to above is widespread in the Netherlands or England. On the contrary, they suggest that the majority of the 'forced marriages' reported fall within the range of 'arranged marriages'. This may indeed represent a socially reprehensible practice, but the problems observed appear to be of a multiple nature, flowing from the struggle of cultural minorities to deal with the consequences of immigration and the related pressure to integrate.

This sheds new light on the argument of 'the clash of cultures' prominently present in the English and Dutch political debate. The analysis of the legislative debate in both the Netherlands and England shows that the human rights argument is used for political convenience. Comments stating that the authorities should not shy away from addressing the problem because of its cultural background, or that forced marriages are by definition in violation with the beliefs of the common people, produced by the English and the Dutch legislature respectively indicate an inflationary use of the human rights argument.[76] Moreover, such statements reverberate an appeal on the superiority of Western cultures.[77] Imported cultural practices being denominated as atavistic, an inherent inequality is assumed, downgrading the (political) claims for cultural identity. In the English political landscape, featuring political manifestation by minority groups, this provokes resistance, leading (feminist) NGOs to urge the authorities to opt for other, less discriminatory solutions.[78] In contrast, the Dutch discourse, featuring absence of minority groups in politics

75 See United Nations, 2007; Haenen, 2013.

76 Ertürk uses the term 'the practice of the othering'; Ertürk, 2007, p. 52. In similar terms: Brems, 1997; Razack, 2004, p. 157; Ghorashi, 2006 and 2010b; Gill and Mitra-Kahn, 2012, p. 115.

77 Feteke refers to a 'thick' European identity, pursuing the disciplining of ethnic minorities in order to articulate European superiority; Feteke, 2006, p. 10.

78 E.g. Feteke, 2006, p. 13; Feteke uses the term 'culturocide' referring to the consequences of Western policy for ethnic women.

and dominant presence of a right-wing party like the PVV, holds no barriers for the use of strong, almost xenophobic, populist rhetoric.[79]

Given these differences, I cannot agree with Koopmans et al., who believe that the Dutch and the British perspective on how to deal with multiculturalism show major resemblances, both reflecting a rather positive image.[80] This difference of opinion might be due to the fact that Koopmans et al. refer to administrative law primarily, whereas my focus lies on the normative perspective of criminal law. Indeed, according to the authorities the 'defence' of the nation's identity is at stake, which justifies strong means of 'protection' . This primarily applies to the Dutch context, which features the remains of 'a politics of accommodation' implying the presence of an unambiguous, consensual 'Dutch' identity.[81] In comparison, the English discourse traditionally features as the 'cradle of immigration', presenting room for cultural autonomy and political voice for cultural minorities.[82] Mirza qualifies this policy as a 'faith based approach': as a result of a bad conscience regarding England's wrongful colonial past, the English feel 'obliged' to champion multiculturalism.[83] Moreover, the English political system, traditionally based on the presence of only a small number of political parties, makes it hard for the political equivalent of the Dutch PVV to emerge. Nevertheless, since both governments champion the individual autonomy and the related rights of individual integrity, the need for state intervention appears justifiable in both discourses, if not inevitable.

8 Conclusion

Domestic violence represents a complex social problem, requiring custom-made policy. Since forced marriages have a cultural dimension, this adds an extra complication to the need to find a suitable solution. Although penalisation can contribute to the combat of forced marriages, we must not have high expectations of its practical value. Indeed, the maxim that criminal law must serve as a last resort obliges us to critically reflect on the penalisation of forced marriage, especially in light of an absence of an evidence-based policy and the underlying rather hostile atmosphere. Although both the Dutch and the English

79 The Rutte II administration is formed by the leading liberal party (VVD) and the socialist party (PvdA). The PVV, however, is runner up with regard to the number of seats in Parliament and thus of prominent political importance.

80 Koopmans et al., 2015, p. 71 and 90. Note Koopmans et al. refer to the British discourse which is not synonymous to the English one (Fortier, 2000 and 2005). Nevertheless, I take the liberty to relate their observation to the English discourse.

81 Lijphart, 1975; WRR, 2007; Bakker et al., 2012. Note that the Dutch are known for their ethnic profiling, referring to immigrants as 'allochthons', contrasting them with to 'authochtons'; Bovenkerk, 2014.

82 According to Koopmans et al. the share of English minority groups in the public sphere is twice the size of their Dutch counterparts: 18 versus 9% (Koopmans et al., 2005, p. 77-78).

83 Mirza, 2012, p. 121-123. Similar observations can be found e.g. in Poulter, 1986 and Fortier, 2005.

legislature show awareness of the need to lower their expectations,[84] they like to use strong arguments to justify the use of criminal law. Both legislatures show a 'saviour's mentality', using the human rights argument as a trump to justify penalisation of forced marriages. Still, in light of the complex problem addressed and the limitations inherent to criminal law, what we can expect is purely symbolic legislation.

Obviously, the increasingly complex nature of Western-European societies does not sit easily with the traditional standard to hold on to clear and enforceable penal provisions. One might agree with those who believe that symbolic penal legislation is a legitimate instrument to make the community aware of public standards. I myself do not principally oppose such use of criminal law, but I believe this should be done in a restricted way since criminal law, as must human rights law, must ultimately provide for 'real and practical rights'.[85] Since the efforts taken to actively enforce the penalisation of forced marriages have been of a limited nature, one may doubt the 'practical' significance of these provisions.[86] At the same time, this need not be evaluated negatively since forced marriages are closely related to the private sphere making a restricted use of criminal law preferable. Moreover, voices from ethnic minorities and empirical findings show that the victims involved do not wholeheartedly favour criminal law intervention, nor embrace the related victim status that follows from penalisation and prosecution.

Overall, it is not the symbolic nature, nor the ineffectiveness of the use of these provisions that primarily causes concern. My main objection lies in the exclusionary 'identity profiling' that results from the strongly argued penalisation, combined with the lack of empirical findings that serve to justify this. Indeed, in line with the academic tradition of the Pompe Institute, we should not discharge ourselves from the obligation to reflect on potential populist tendencies that might trigger authorities to use criminal law where there is no need to do so.

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84 E.g. *Kamerstukken II* 2010/11, 32 140, no. 3, p. 1.

85 The terminology obviously includes a reference to the case law of the ECtHR. See also: Xenos, 2012.

86 In the Dutch region only one case was prosecuted: District Court Arnhem 28 December 2012, ECLI:NL:RBARN:2012:BY7611, inter alia leading to a conviction based on Article 284 DCC.

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