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“An Unhappy Interlude”: Trivialisation and Privatisation of Forced Marriage in Asylum-Seeker Women’s Cases in the UK

Nora Honkala  *

ABSTRACT

This article examines asylum-seeker women’s appeals involving forced marriage at the Upper Tribunal (Immigration and Asylum Chamber) in the UK over the past 20 years. Internationally forced marriage has long been understood as a human rights issue. In the UK, the government has introduced a range of policy and legislative measures to tackle forced marriage of its nationals that have been framed within human rights discourse. The aim of this article is to examine the ways in which forced marriage has been framed by the Tribunal in women’s asylum claims. Informed by feminist contributions to gender and refugee law, the article reveals two problematic and interrelated trends. First, that gendered harm in the form of forced marriage continues to be contained in the “private” sphere. And secondly, that a noteworthy trend of trivialisation through conflation of forced and arranged marriage, and the use of euphemisms emerges. As a result, these gendered representations evidence a continuing failure of refugee law to take women’s rights violations seriously.

KEYWORDS: refugee, law, gender, forced marriage, women, asylum, Tribunal

1. INTRODUCTION

Forced marriage is a form of gender-based violence that is internationally recognised as a human rights violation. Indeed, it has long been known that much of the persecution women face occurs in the so-called private sphere and that violence against women in its various forms is often supported by the “social legitimacy of marriage”.¹ Forced marriages are often unofficial and undocumented by States and therefore their global numbers are difficult to estimate.

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1 D. Cheal, *Families in Today’s World: A Comparative Approach*, 2008, London, Routledge, 80.

For example, of the 40.3 million people that the International Labour Organisation estimates are enslaved, 15.4. are in situations of forced marriage.² The Office of the High Commissioner for Human Rights states that without further accelerated efforts on gender equality, no region in the world is on track to eliminate child, early and forced marriage by 2030, as set out by the United Nations Sustainable Development Goals 2030.³ Although forced marriage predominantly affects young girls and women, it can occur at any age and as such is not solely dependent on age or lack of consent but rather the intersecting societal, political and economic inequalities inherent in the girl's or woman's position in relation to others.

Since the 1980s, significant developments have occurred in the field of gender and asylum. Feminist academics and activists have long critiqued the gender bias inherent in international law and promoted a gender-sensitive interpretation of the Refugee Convention.⁴ In the refugee policy "sphere", through the pronouncements of the Office of the United Nations High Commissioner for Refugees (UNHCR), its Guidelines and the development of national gender guidelines, it is now clear "on paper" that forced marriage can amount to serious harm. Although American decision-makers have been slow to recognise forced marriage as gender-based persecution,⁵ a number of international and national guidelines on gender-based persecution recognise forced marriage as an example of such persecution. This is the case in

- 2 *International Labour Organisation: Global Estimates on Modern Slavery: Forced Labour and Forced Marriage*, 2016, available at: [wcms_575479.pdf \(ilo.org\)](https://www.ilo.org/wcmsp5/files/content/pub/2016/20160101/wcms_575479.pdf) (last visited 14 Jan. 2022).
- 3 Office of the United Nations High Commissioner for Human Rights, available at: [OHCHR | Child, early and forced marriage, including in humanitarian settings](https://www.ohchr.org/en/press-releases/2022/01/child-early-and-forced-marriage-in-humanitarian-settings) (last visited 11 Jan. 2022).
- 4 See e.g. J. Greatbatch, "The Gender Difference: Feminist Critiques of Refugee Discourse", *International Journal of Refugee Law*, 1, 1989, 517–527; A. Macklin, "Refugee Women and the Imperative of Categories", *Human Rights Quarterly* 17(2), 1995, 213–277; T. Spijkerboer, *Gender and Refugee Status*, London, Routledge, 2000; H. Crawley, *Refugees and Gender: Law and Process*, London, Jordan Publishing, 2000; J. Freedman, *Gendering the International Asylum and Refugee Debate*, 2nd edn, Basingstoke, Palgrave Macmillan, 2007, 2015; A. Edwards, "Transitioning Gender: Feminist Engagement With International Refugee Law and Policy 1950-2010", *Refugee Survey Quarterly*, 29(2), 2010, 21–45; E. Arbel et al. (eds.), *Gender in Refugee Law*, London, Routledge, 2014; H. Crawley, "[En]gendering International Refugee Protection: Are We There Yet?" in B. Burson and D. Cantor (eds.), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory*, Leiden, Brill Nijhoff, 2016, 321–348; N. Honkala, "She, Of Course, Holds No Political Opinions': Gendered Political Opinion Ground In Women's Forced Marriage Asylum Claims", *Social & Legal Studies*, 26(2), 2017, 166–187; C. Briddick, "Some Other(ed) Refugees?: Women Seeking Asylum Under Refugee and Human Rights Law", in S. S. Juss (ed.), *Routledge Handbook in International Refugee Law*, London, Routledge, 2019, 281–294; N. Honkala, "The Rights of Women Seeking Asylum: Procedural and Evidential Barriers to Protection", in S. S. Juss (ed.), *Routledge Handbook in International Refugee Law*, London, Routledge, 2019, 295–309; C. Querton, "Gender and the Boundaries of International Human Rights Law: Beyond the Category of 'Gender-Related Asylum Claims'", *Netherlands Quarterly of Refugee Law*, 37, 2019, 379–395; S. Dehm and J. Millbank, "Witchcraft Accusations as Gendered Persecution in Refugee Law", *Social & Legal Studies*, 26(2), 2019, 202–226; D. Anker, "The History and Future of Gender Asylum Law and Recognition of Domestic Violence as a Basis for Protection in the United States", *American Bar Association*, 45 (2), 2020; C. Querton, "One Step Forward, Two Steps Back? Interpreting 'Particular Social Group' in the European Union", *International and Comparative Law Quarterly*, 71(2), 2022, 425–451.
- 5 See for e.g. J. Millbank and C. Dauvergne, "Forced Marriage and the Exotization of Gendered Harms in United States Asylum Law", *Columbia Journal of Gender and Law*, 19(3), 2010, 898–964 and N. Nanasi, "Death of The Particular Social Group", *New York University Review of Law & Social Change*, 45(2), 2021, 269–309.

UNHCR,⁶ Canadian,⁷ and Australian⁸ Gender Guidelines. In the UK, the Gender Guidelines for the Tribunal level included forced marriage as an example of “gender specific forms of harm”, although following the restructuring of the Tribunal system, the new Tribunal stated that it was not bound by its predecessor’s guidelines.⁹ UK Gender Guidelines operate currently only at first instance decision-making level. They also include a reference to forced marriage as a form of gender-related persecution.¹⁰

In the academic “sphere”, significant feminist work focusing on forced marriage in the refugee determination context has also been undertaken. Most notably, a study of forced marriage decisions in Australia, Canada, and the UK, by Catherine Dauvergne and Jenni Millbank, published over a decade ago, found a marked disjuncture between domestic and international legislation relating to forced marriage and the treatment of forced marriage in the refugee determination context.¹¹ Even though much has been written on gender and refugee law in general, the subject remains resistant to change. Indeed, it has been said that scholarship on women as refugee claimants has slowed,¹² and yet the concerns articulated about the inequalities in the treatment of women’s asylum claims persist and hence remain as relevant as ever. Forced marriage, as a paradigmatic example of gender-based persecution, can therefore serve as a useful focus for this up-to-date study of these questions in the UK context. It is hoped that in so doing the article contributes to the renewal of a critique on gendered international refugee determination systems.

The article begins by discussing some of the causes and consequences of forced marriage from a global view. Next, it provides an overview of the international and domestic legislative approaches to forced marriage, and in particular the manner in which forced marriage has been characterised as a human rights violation in both contexts. The article then explores whether this has been the case in women’s asylum claims that involved a forced marriage element. The third section therefore

6 UN High Commissioner for Refugees (UNHCR), UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, 21 November 2008, available at: <https://www.refworld.org/docid/48abd5660.html> (last visited 29 Mar. 2022), see paras. 13, 27, and 28. See also, CEDAW Committee, General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, U.N. Doc. CEDAW/C/GC/32 (2014).

7 Canada, Immigration and Multicultural Affairs: Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution, S A 1 4 and S B (1993).

8 Australia: Department of Immigration and Multicultural Affairs: Guidelines on Gender Issues for Decision Makers, 17 (1996).

9 Asylum Aid, Submission of Evidence to the Independent Asylum Commission, 2007, 40.

10 U.K. Home Office Asylum Policy Instructions, Gender Issues in the Asylum Claim 12 (2004, revised 2006, 2011, and 2018).

11 C. Dauvergne and J. Millbank, “Forced Marriage as a Harm in Domestic and International Law”, *Modern Law Review*, 73(1), 2010, 57–88, 66. The author has also published work focusing on forced marriage, especially relating to the (under)use of the political opinion ground in such cases, in Honkala, “She, Of Course, Holds No Political Opinions”, 166–187, and the internal relocation option in forced marriage cases, in N. Honkala, “A Feminist Human Rights Perspective on the Use of Internal Relocation by Asylum Adjudicators”, in J. A. Green and C. P. M. Waters (eds.), *Adjudicating International Human Rights*, Leiden, Brill Nijhoff, 2015, 148–166.

12 Arbel et al. (eds.), *Gender in Refugee Law: From the Margins to the Centre* and C. Dauvergne, “Women in Refugee Jurisprudence”, in C. Costello, M. Foster and J. Adam (eds.), *Oxford Handbook of International Refugee Law*, Oxford University Press, 2021, 728–743.

examines the discourse in appellate cases from the Upper Tribunal and its predecessors over the past 20 years to illustrate the ways in which forced marriage has been framed in these cases. The argument provided in this paper is that the portrayal of forced marriage in asylum-seeker women's cases remains significantly different to the treatment of forced marriage in international and domestic legal spheres, where it is recognised as gendered harm and a violation of human rights. Instead, when it comes to forced marriage of asylum-seeker women, misunderstandings and misrepresentations of lived experiences of asylum-seeker women remain prevalent in the Tribunal cases.

Informed by feminist contributions to gender and refugee law, the analysis in particular shows two problematic and interrelated trends. First, that privatisation of gendered harm, in other words, containing forced marriage to the “private sphere” by portraying it merely as a “private” or “familial” issue without necessitating State protection, remains a concern. Secondly, there exists a noteworthy trend of trivialisation of forced marriage, which is examined through the conflation of forced marriage and arranged marriage and through the euphemisms used to describe forced marriage and the experiences of women claimants. Consequently, these gendered representations evidence the continuing failure of refugee law to take women's rights violations seriously.

2. CAUSES AND CONSEQUENCES OF FORCED MARRIAGE

Globally, forced marriages occur in a number of different forms, including child marriage or “early marriage” of girls younger than the legal age of consent,¹³ temporary marriages such as “mut'a” or “siqueh”, where men can pay to “marry” a woman for a few hours or a few months, debt-brides, “trafficked brides”, “bride kidnapping” and “rape marriages”, “compensation marriages”, wife inheritance, levirate marriages, where the widow is forced to marry her brother in law and sororate marriages, which are the marriages of the sister of a deceased or infertile wife to marry the brother in law.¹⁴ Forced marriage disproportionately affects girls and women.¹⁵ Where boys and men are concerned, their sexuality is often questioned and forced marriage is used to force men (and women) into a heterosexual marriage, and/or discourage otherwise unfavourable, such as inter-religious or inter-ethnic relationships. Where a man is forced to marry, however, the consequences may be different. The social stigma attached to divorced men differs from that of divorced women, and men are more

13 Child marriage is found in all regions of the world, but most married girls in both proportions and numbers live in South Asia and West and Central Africa. UNFPA estimates that by 2030 150 million girls would have been married before their 18th birthday unless there are further strides made towards ending child marriage. UNFPA: “Let's End Child Marriage: UNFPA and UNICEF Global Programme to Accelerate Action to End Child Marriage”, 2017, available at: [Global_Programme_Child_Marriage_2018_Brochure-EN.pdf](https://www.unfpa.org/global-programme-child-marriage-2018-brochure-en) (unfpa.org) (last visited 22 Mar. 2022).

14 U.N. Women, Virtual Knowledge Centre to End Violence Against Women and Girls: Defining Other Forms of Forced Marriage: Wife Inheritance, Levirate and Sororate Marriages, 2011, available at: <http://www.endvawnow.org/en/articles/621-defining-other-forms-of-forced-marriage-wife-inheritance-levirate-and-sororate-marriages.html> (last visited 22 Mar. 2022).

15 U.N. General Assembly, Child, Early and Forced Marriage, 2, 69th Sess., Agenda Item 64 (a), U.N. Doc. A/C.3/69/L.23/Rev.1. (2014).

likely to be financially independent than women, thus creating different avenues for exit from the forced marriage.¹⁶

Different forms of forced marriage show the often close connection between economic inequality and gender inequality. Many forms of (forced) marriage include an economic dimension. Susan Mikhail argues that there are similarities between child prostitution and child marriage, showing for instance that dowry payments in child marriages are often received by a third party, and not the girl herself.¹⁷ Dowries received on the marriage of a daughter may then also often used to pay the dowry for the son’s future bride.¹⁸ Contemporary forms of forced marriage therefore continue to perpetuate the commodification of women and are intimately related to globalisation and capitalism. Contemporary commercialisation of child marriages also takes various forms. Research in the last few decades in Egypt, for instance, shows that siqueh marriages of Egyptian girls to wealthy older men from some Arab States are increasing and that broker markets have emerged to contract young girls to these wealthy men.¹⁹ Save the Children charity also found temporary marriages to be a concern in Iraq, and that legislation allows child marriage by “exception” in Iraq and Turkey for example.²⁰ An increase in poverty, displacement and the effects of the COVID-19 pandemic have all been factors exacerbating the risk of forced marriage.²¹

The legal nature of forced marriage depends of course on the State in question. Yet, even in States where forced marriage is criminalised, it continues, and can sometimes do so with State sanctioning by officials. For instance, in Kyrgyzstan, while legislation banning bride kidnapping and forced marriage exist, Kleinbach *et al.* in 2005 estimated that approximately 35–45 per cent of ethnic Kyrgyz women are kidnapped against their will and coerced into marriage.²² While there is some disagreement over the specific numbers, there is a general agreement that the prevalence of the practice of kidnapping for forced marriage is indeed increasing in Kyrgyzstan.²³ And furthermore that this has more to do with complex societal, political and economic realities, consequent upon the breakup of Soviet Union and increasing male dominance, than with perceived age-old traditional customs.²⁴ At the same time,

16 See for e.g. S. Lyneham and S. Bricknell, ‘When Saying No Is Not an Option: Forced Marriage in Australia and New Zealand’, Research Report of Australian Institute of Criminology, 2018.

17 S. Mikhail, “Child Marriage and Child Prostitution: Two Forms of Sexual Exploitation”, *Gender & Development*, 10(1), 2002, 143–149.

18 *Ibid.*

19 *Ibid.*

20 Either by parental or judicial consent. See: Save the Children, “Marriage by Exception: Child Marriage Policies in the Middle East and North Africa”, available at: Married by Exception: Child marriage policies in the Middle East and North Africa | Resource Centre (savethechildren.net) (last visited 22 Mar. 2022).

21 *Ibid.*

22 R. Kleinbach *et al.*, “Kidnapping for Marriage (Ala Kachuu) in a Kyrgyz Village”, *Central Asian Survey*, 24(2), 2005, 191–202, 198.

23 E. Kim and F. G. Karioris, “Bound to be Grooms: The Imbrication of Economy, Ecology, and Bride Kidnapping in Kyrgyzstan”, *Gender, Place & Culture*, 28(11), 2021, 1627–1648.

24 For an ethnographic exploration of the subject see, N. O’Neill Borbieva, “Kidnapping Women: Discourses and Social Change in the Kyrgyz Republic”, *Anthropological Quarterly*, 85(1), 2012, 141.

however, some Kyrgyz officials who ignore the legislative changes continue to perceive bride kidnapping as a traditional custom as well as being consensual.²⁵

Local legislative approaches to forced marriage and child marriage determine whether that forced marriage is formally registered. Potential losses of citizenship and inheritance rights are further concerns rising from lack of official status.²⁶ Since many types of forced marriages are banned in various States' legislation, they cannot be formally registered. However, this does not change the practical reality for many women and girls that these marriages are binding according to various religious, traditional, or other prevailing social customs. This is an important issue for forced marriage and asylum, for asylum adjudicators can attach significance to whether or not the marriage is registered legally, and some adjudicators continue to see legally "unofficial" marriages as less binding than legally registered ones. In circumstances where States have banned forced marriages in legislation, the adjudicators may play down the importance of the binding nature of these legally "unofficial" marriages to the detriment of the asylum-seeker woman's claim.²⁷

The international law approach to child and early marriage is that a child cannot give informed or meaningful consent to a marriage. Thus, child marriages are seen as forced marriages. Although the Convention on the Rights of the Child does not include an age direction for marriage, the Convention defines a child as a person under the age of 18 years. The Committee on the Rights of the Child

strongly recommends that State parties review and where necessary reform their legislation and practice to increase the minimum age for marriage with and without parental consent to eighteen years for both boys and girls.²⁸

Likewise, the Committee on The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) states in their Recommendation that the minimum age for marriage for both male and female should be 18 years, when "they have attained full maturity and capacity to act".²⁹ Furthermore, Article 16 (2) CEDAW states that

the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

25 U.N. Division for the Advancement of Women, Expert Group Meeting on Good Practices in Legislation to Address Harmful Practices Against Women: Expert paper by Cheryl Thomas: Forced and Early Marriage: A Focus on Central and Eastern Europe and Former Soviet Union Countries with Selected Laws from Other Countries, U.N. Doc. EGM/GPLHP/2009/EP.08, (2009), 12.

26 UNICEF, *Early Marriage: A Harmful Traditional Practice*, 2005.

27 See for e.g. MD (Women) Ivory Coast CG [2010] UKUT 215 (IAC).

28 U.N. Committee on the Rights of the Child, General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child, 33rd session, 2003), U.N. Doc. CRC/GC/2003/4, (2003), para. 20.

29 CEDAW, General Recommendation No. 21: Equality in Marriage and Family Relations, 13th Sess., U.N. Doc. A/49/38, (1994), para. 36.

It has been pointed out that merely focusing on the minimum age of 18 years limits the scope of analysis, and that any international legal analysis of marriage age needs to carefully assess the practices of early marriage and the conditions surrounding it.³⁰ Globally, a low level of socio-economic development appears to be the strongest indicator of early marriage.³¹ Thus, efforts to address forced marriage and early marriage need to concentrate on reducing the gender inequalities in various socio-economic areas, such as education, health, and poverty.

Forced marriage violates other rights of girls and women in addition to the lack of consent, such as rights to education, health, liberty, and security of the person. The age gap between an older man and a girl child in many forced marriages results in an unequal power relationship within the marriage that could have several negative consequences on the girl’s life. Forced early marriage often results in interrupted schooling, which perpetuates the lack of or lower education of girls. Reducing the girl’s access to education also reduces her opportunities for economic autonomy, making the girl child dependent on the husband and limiting her possibility of getting out of a forced marriage. It also often has the effect of overloading the child with domestic and family responsibilities and reduces her chances of developing friendship ties.³² These responsibilities can have negative effects on the child’s physical as well as mental health of the child. Forced early marriage significantly increases the health risks of pregnancy and childbirth, as well as child mortality.³³

A child bride often does not have control over reproductive choices, which is a combination of lack of education, resources and lack of control over her own body and sexuality. In other words, the practice of child marriage continues to provide a “socially legitimised institutionalisation of marital rape”.³⁴ As sections of some societies accept child marriage, often right after girls start menstruating, if not before, girls have no possibility of giving or withholding personal permission for sexual activity.³⁵

Sen’s research in India found that girls married before the age of 15 years had one of the highest vulnerabilities to sexual violence in marriage, second only to those where dowry was paid.³⁶ The prevalence of forced marriage is thus connected to the unequal treatment of girls and women in society as well as the continuation of their commodification through marriage. Therefore, the economic and political realities of marriage cannot be ignored. Families in poverty may resort to the early marriage of their daughters as part of their “household livelihood strategies”.³⁷ Supporting a girl child may be seen as an economic burden on the family and marrying girls young as

30 A. Bunting, “Stages of Development: Marriage of Girls and Teens as an International Human Rights Issue”, *Social & Legal Studies*, 14(1), 2005, 17–38, 34.

31 *Ibid.*

32 Cheal, *Families in Today’s World*, 80.

33 UNFPA, “Let’s End Child Marriage: UNFPA and UNICEF Global Programme to accelerate Action to End Child marriage”.

34 C. Sweetman (ed.), *Violence Against Women*, London, Oxfam Publishing, 2004, 31.

35 M. Uttara, P. Sen and M. Thomson, “Forced Marriage, Forced Sex: the Perils of Childhood for Girls”, *Gender & Development*, 6(3), 1998, 27–33, 32.

36 P. Sen, ‘Women’s Resistance to Domestic Violence in Calcutta’, PhD Thesis, University of Bristol, 1997, as cited in her co-authored article *ibid.*

37 C. Sweetman (ed.), *Gender, Development and Marriage*, London, Oxfam Publishing, 2003, 5.

an avenue for lifting some of this financial burden.³⁸ At the same time, the child's parents and/or communities may see marriage as benefiting the girl child economically as well as socially. Nevertheless, child marriage perpetuates the cycle of poverty by reducing opportunities for education and independence as well as economic autonomy. In this way, it continues to directly contribute to the feminisation of poverty.

Economic realities, however, are not the only reason for early marriages. They can be seen as socially strengthening families' community or caste status through social alliances.³⁹ Early marriages remain rooted in gendered inequalities and control over girl's sexuality and reproduction. In circumstances where the girl lacks control over her sexuality, the decision to marry young is taken by family members to "protect her sexuality", as virginity may be seen as a condition for a "good marriage".⁴⁰ The significance of virginity is also manifested in related practices, such as female genital mutilation (FGM) and so-called "virginity reconstruction".⁴¹ As an example, in Turkey, some women are forced to undergo virginity examinations by their families, or sometimes even by State officials.⁴²

The concept of honour can be intrinsically linked to issues of forced marriage, although its consequences for women vary enormously within and between different countries and communities.⁴³ As Radhika Coomaraswamy has noted:

in many societies the ideal of masculinity is underpinned by a notion of 'honour' – of an individual man, or a family or a community – and is fundamentally connected to policing female behaviour and sexuality.⁴⁴

In this way, honour is "seen in the bodies of women", its corollary is "shame", and these concepts operate to "control, direct and regulate women's sexuality and freedom of movement by male members of the family".⁴⁵ Given this context, it is clear how forced marriage can be used as a vehicle to control women's behaviour and sexuality.⁴⁶ This is also evident in asylum-seeker women's cases, as seen below,

38 R. Jensen and R. Thornton, "Early Female Marriage in the Developing World" in *ibid.*, 9–19, 17.

39 The Advocates for Human Rights, Stop Violence Against Women: A Project for Advocates for Human Rights: Forced and Child Marriage, available at: http://www.stopvaw.org/forced_and_child_marriage.

40 S. Mathur et al., *Too Young to Wed: The Lives, Rights, and Health of Young Married Girls*, International Centre for Research on Women, 2003, 5.

41 Mikhail, "Child Marriage and Child Prostitution", 49.

42 ECOSOC, Commission on Human Rights: Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, 58th Sess., U.N. Doc. E/CN.4/2002/38, (2002), para. 61.

43 Crawley, *Refugees and Gender*, 109.

44 R. Coomaraswamy, "Violence Against Women and 'Crimes of Honour'", in L. Welchman and S. Hossain (eds.), *'Honour': Crimes, Paradigms and Violence Against Women*, London, Bloomsbury, 2005, xi–xiv.

45 For a comprehensive discussion on honour, see L. Welchman and S. Hossain (eds.), *ibid.* See also: A. Gill, "Feminist Reflections on Researching So-called 'Honour' Killings", *Feminist Legal Studies*, 21, 2013, 241–261 and A. Gill, "Patriarchal Violence in the Name of 'Honour'", *International Journal of Criminal Justice Science*, 1(1), 2006, 377–391.

46 G. Gangoli et al., "Understanding Forced Marriage: Definitions and Realities", in A. Gill and A. Sundari (eds.), *Forced Marriage: Introducing a Social Justice and Human Rights Perspective*, London, Zed Books, 2011, 25–45, 28.

though the political nature of this gendered harm often remains invisible to the Tribunal.

3. LEGISLATIVE APPROACHES TO FORCED MARRIAGE

3.1. International context

The choice of whom to marry and whether to marry is a fundamental human right enshrined in several international human rights instruments. Article 16 (2) Universal Declaration of Human Rights (UDHR) first articulated that marriage requires the “free and full consent of the intending parties”.⁴⁷ The UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage Article 1 (2) and the International Covenant on Civil and Political Rights (ICCPR) Article 23 (3) both repeat the wording of the UDHR.⁴⁸ Article 10 (1) of the International Covenant on Economic, Social and Cultural rights (ICESCR) uses only the word “free” consent.

“Free (and full) consent” is thus central to these human rights instruments in relation to marriage. The instruments also deal with equality during marriage. For instance, Art 16 (1) of UDHR states that spouses “are entitled to equal rights as to marriage, during marriage and at its dissolution”. Similarly, Art 23 (4) of the ICCPR provides that States must “take appropriate steps to ensure equality of rights and responsibilities during marriage and at its dissolution”.

CEDAW locates marriage rights in their larger political and socio-economic context. Article 16 (a) and (b) stipulates that parties

shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, and in particular shall ensure, on a basis of equality of men and women . . . the same right to enter into marriage . . . and the same right freely to choose a spouse and to enter into marriage only with their free and full consent.

In addition, Article 16 stipulates that women and men have the same rights in matters relating to their children, personal rights within marriage and importantly equality in marriage with regard to property. In this way, CEDAW tries to address the historical oppression and subordination of women within the context of marriage. This is also further articulated in CEDAW Committee’s General Recommendation No. 21: “a woman’s right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being”.⁴⁹

47 Art. 16 (21): “Marriage shall be entered into only with the free and full consent of the intending parties”, Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948).

48 In General Comment No. 19 the Human Rights Committee has reaffirmed the right of men and women of marriageable age to marry and found a family and that no marriage shall be entered into without the free and full consent of the intending spouses, see U.N. Human Rights Committee, CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, 39th Sess., U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), (1990), para. 4.

49 CEDAW, General Recommendation No. 21, 24.

Given that a choice of whether to marry and whom to marry are fundamental human rights, the absence of such consent in forced marriage means that forced marriage is a violation of a fundamental human right. In her report, Radhika Coomaraswamy, as the UN Special Rapporteur on Violence Against Women, defined forced marriage in the same way as the UK Working Group on Forced Marriage:

a marriage conducted without the valid consent of both parties, where duress is a factor. It is a violation of internationally recognised human rights standards and cannot be justified on religious or moral grounds.⁵⁰

Significantly, the UN Declaration on the Elimination of Violence Against Women defines gender-based violence as any act that

results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.⁵¹

Forced marriage can thus be seen as a paradigmatic form of gender-based violence.

In the international arena, forced marriage has been recognised not only as a human rights violation but also as a contemporary form of forced slavery generated by gender discrimination.⁵² According to the Slavery Convention 1926, forced marriage can be a form of slavery where “slave” equates to “the status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised”.⁵³ The United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 1956 includes forced marriage as one of the “practices similar to slavery”.⁵⁴ Servile marriages are included within this definition. The Ad Hoc Committee devising the Supplementary Convention stated that servile marriage consists of those practices

whereby a woman is given in marriage, without the right to refuse, at a price or under conditions which give to the husband, to his clan or family, a right of disposal over her or over her children and permit her exploitation for the advantage of others.⁵⁵

50 ECOSOC, Commission on Human Rights, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, 58th Sess., U.N. Doc. E/CN.4/2002/38 (2002), para. 57.

51 Art. 1, U.N. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, 48th Sess., U.N. Doc. A/RES/48/104 (1994).

52 U.N. Commission on Human Rights, Report of the Working Group on Contemporary Forms of Slavery on its Twenty-eighth Session, 55th Sess., U.N. Doc. E/CN.4/Sub.2/2003/31 (2003).

53 Definition of slavery Art. 1, Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (Slavery Convention), 60 L.N.T.S. 253, 25 Sept. 1926, (entry into force 9 Mar. 1927).

54 Art. 1 (c), Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 226 U.N.T.S. 3, 7 Sept. 1956, (entry into force 30 Apr. 1957).

55 J. Allain, “Of the Curious Disappearance of Human Servitude from General International Law”, *Journal of the History of International Law*, 11, 2009, 303, 318.

Indeed, at the diplomatic conference negotiating the Supplementary Convention, it was agreed that a further provision should be included so as to advance the abolition of servile marriages.⁵⁶ This provision is included in Article 1 of the Supplementary Convention.

Consequently, human rights law is clear that forced marriage is a violation of human rights. It also provides avenues whereby forced marriage can be seen as an expression, source, and reinforcement of gendered inequalities. In particular, taken together with other Conventions and articulations of the Committees dealing with various human rights, forced marriage can be seen within the larger context of violations of other rights and not limited to the lack of consent.

3.2. The UK context

In the UK, over the last two decades, there have been several policy and legislative measures adopted to try to tackle the forced marriage of UK nationals. At times controversial and at times enjoying support from women’s right organisations, these measures have nevertheless been firmly located within human rights discourse and significant steps have been taken in policy and practice.

The Forced Marriage Unit (FMU), a joint unit by the Foreign and Commonwealth Office and Home Office, was set up in 2005. Its purpose is to lead on the UK government’s forced marriage policy, outreach, and casework. It deals with British and dual nationals both in the UK and overseas. The unit operates a public helpline through which it offers advice and support for victims of forced marriage as well as professionals. It provides assistance to prevent “unwanted spouses” in coming to the UK (what it calls “reluctant sponsor” cases) and in some circumstances operates “rescue missions” outside the UK. In 2020, the FMU gave advice and support relating to 759 cases, of which 603 (79 per cent) of the victims were female and 156 (21 per cent) were male.⁵⁷

Several civil as well as criminal remedies exist in the UK for victims of forced marriage. The traditional civil legal remedy for forced marriage in England is a decree of nullity under section 12 (c) of the Matrimonial Causes Act 1973, on the ground of lack of valid consent. For some of the victims of forced marriage, the ability to have the marriage annulled rather than dissolved is significant, as it has been said that less stigma is attached to the woman who has obtained a degree of nullity than one of divorced woman.⁵⁸ However, a decree of nullity might not be accessible to many forced marriage victims, because they may lack knowledge of the legal provisions, or lack the ability to exercise their rights, or confidence or willingness to do so for fear of reprisals.⁵⁹ Section 13 (2) of the Act provides a time limitation, stating that

56 J. Allain, *Slavery in International Law: Of Human Exploitation and Trafficking*, Leiden, Brill Nijhoff, 2012, 317.

57 U.K. Home Office and Foreign and Commonwealth Office, *Forced Marriage Unit Statistics 2020*, available at: *Forced Marriage Unit statistics 2020 - GOV.UK* (www.gov.uk), 1 July 2021 (last visited 31 Mar. 2022).

58 R. Gaffney-Rhys, “Developments in the Field of Forced Marriage”, *International Family Law Journal*, 26, 2014, 269–293, 270 citing arguments heard in evidence in the case of *P v R* (Forced Marriage: Annulment: Procedure) [2003] 1 FLR 661.

59 *Ibid.*

proceedings must be instituted within 3 years from the date of marriage. The Working Group on Forced Marriage stated that, because of this time limitation, the remedy is often not available to forced marriage victims, who are often married young and “lack confidence to challenge their situation in the first years of their marriage”.⁶⁰

Where the victim of a forced marriage is a minor, there exist other civil remedies in English law. Local Authorities can make an application for an Emergency Protection Order (EPO)⁶¹ or, where a child is going to be or has been taken abroad to be forced to marry, an application for wardship can be made to the Family Division of the High Court. Prior to the criminalisation of forced marriage *per se*, criminal law remedies were already applicable to several associated activities including kidnap, child abduction, false imprisonment, assault and battery, grievous bodily harm, threats to kill, public order offences, harassment, child cruelty, sexual offences, and blackmail.⁶²

In light of the slow progress in practice after the setting up of the FMU, many women’s organisations supported further legislative intervention.⁶³ It was thought by some organisations that a specific legislative instrument would send a clear message that forced marriage was unlawful, while some argued that it would have a potential stigmatising effect on particular communities.⁶⁴ The Forced Marriage (Civil Protection) Act 2007 came into force on 25 November 2008. The aim of this Act is to provide civil remedies for victims of forced marriage or those who are at risk of forced marriage. Under the Act, victims or a relevant third party can apply to the court for a Forced Marriage Protection Order (FMPO).⁶⁵ FMPO are unique to the specific cases and contain legally binding directions or orders to change the behaviour of the person or persons forcing someone to marry.⁶⁶ The Act also includes a provision that powers of arrest can be attached to an FMPO if the court finds that the respondent has used or threatened violence against the person being protected.⁶⁷ Section 1 of this Act inserts these provisions into the Family Law Act 1996.⁶⁸ This insertion is a result of the campaigning of voluntary organisations that did not want forced marriage and domestic violence to be treated as separate issues.⁶⁹ It is thought

60 U.K. Home Office, *The Report of the Working Group on Forced Marriage, A Choice by Right*, (2000), 7.

61 Children Act 1989, S 44.

62 U.K. Home Office, *Forced Marriage Consultation 2011*, available at: <http://www.homeoffice.gov.uk/publications/about-us/consultations/forced-marriage/>, 2011, 13–15.

63 Southall Black Sisters, *A Position Paper by Southall Black Sisters in Respect of the Proposal to Create a New Civil Law on Forced Marriage (2007)*, on file with author. For a helpful account of the developments in the UK, see M. Dustin and A. Phillips, “Whose Agenda Is It?: Abuses of Women and Abuses of ‘Culture’ in Britain”, *Ethnicities*, 8(3), 2008, 405–420 and M. Enright, “Choice, Culture and The Politics of Belonging: The Emerging Law on Forced and Arranged Marriage”, *The Modern Law Review*, 72(3), 2019, 331–359.

64 *Ibid.*

65 Section 63 C Forced Marriage (Civil Protection) Act 2007.

66 HM Courts & Tribunal Service: “Guidance on Forced Marriage Protection Orders”, last updated 27 Apr. 2020, available at: [forced marriage protection orders - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/444444/forced-marriage-protection-orders-2020.pdf), (last visited 22 Mar. 2022).

67 S 63H.

68 Part IVA.

69 R. Gaffney-Rhys, “Developments in the Field of Forced Marriage”, 29.

that this sends a clear message that forced marriage is a form of domestic abuse.⁷⁰ A breach of an FMPO is now a criminal offence under the Anti-Social Behaviour, Crime and Policing Act 2014.⁷¹

Furthermore, the most recent enactment of the Anti-Social Behaviour, Crime and Policing Act 2014, criminalised forced marriage *per se*. Prior to its enactment, the government had been pressing for criminalisation of forced marriage for some time. There have been marked differences of opinion among women’s organisations. On the one hand supporting the government’s approach, Karma Nirvana, a forced marriage NGO founded by Jasvinder Sanghera, campaigned for a criminal model. According to Sanghera criminalisation of forced marriage would “send a clear message of how this issue [forced marriage] is not cultural but a child and public protection issue”.⁷² However, most of the violence-against-women organisations, such as Southall Black Sisters, consistently favoured civil remedies arguing that criminalisation is “neither necessary nor desirable”.⁷³ This was based on the view that existing frameworks could be used more effectively, but more importantly because of the potentially limited and detrimental impact that criminalisation may have on girls and women.⁷⁴ There was also a concern that criminalisation would prevent victims from coming forward in order to avoid prosecution of family members. Whereas with civil remedies the decision to seek remedies against family members lies with the victim of forced marriage as opposed to the State in the criminalisation model. Other women’s organisations, such as End Violence Against Women, Rape Crisis and Women’s Aid, supported this position.⁷⁵

Suffice it to say that although the British model is certainly not beyond critique, being at times paternalistic and at times entangled in restrictive and racist immigration agendas,⁷⁶ it has nevertheless also been informed *in part* by “feminist and community-informed understanding that forced marriage is a harm that is based on power imbalances concerning gender and sexuality rather than simply being a reflection of ‘culture’.”⁷⁷ These few recent examples show that considerable advances have been made in recognising forced marriage as a gendered human rights violation. The question of whether that awareness has been extended to asylum-seeker women is the focus of the rest of this article.

4. ADJUDICATING WOMEN’S FORCED MARRIAGE ASYLUM APPEALS

In order to have a successful claim for refugee protection a woman who is fleeing forced marriage will need to demonstrate that they have a well-founded fear of

70 R. Gaffney-Rhys, “The Implementation of the Forced Marriage (Civil Protection) Act 2007”, *Journal of Social Welfare and Family Law*, 31(3), 2009, 245–256, 250.

71 Section 120.

72 Jasvinder Sanghera, Karma Nirvana, Jasvinder Statement, on file with author.

73 Southall Black Sisters, A Position Paper by Southall Black Sisters in Respect of the Proposal to Create a New Civil Law on Forced Marriage, Imkaan, Imkaan Response to the Government’s Forced Marriage Consultation (2012).

74 *Ibid.*

75 *Ibid.*

76 S. Anitha and A. Gill, “Coercion, Consent and the Forced Marriage Debate in the UK”, in R. Leckey (ed.), *Marital Rights*, London, Routledge, 2017. A. Phillips and M. Dustin, “UK Initiatives on Forced Marriage: Regulation, Dialogue and Exit”, *Political Studies*, 52, 2004, 531–551.

77 Dauvergne and Millbank, “Forced Marriage as a Harm”, 66.

persecution for reasons of the grounds of the Refugee Convention, i.e. race, religion, nationality, membership of a particular social group, or political opinion.⁷⁸ Persecution necessitates for the claimant to show serious harm in combination with a failure of State protection. As noted above, feminist scholarship and advocacy have long argued for a gender-sensitive interpretation of the Refugee Convention.⁷⁹ While Gender Guidelines now exist, and it is generally accepted that gender is relevant to the question of who is a refugee, gender-sensitive interpretation by national administrative and judicial authorities has been inconsistent.⁸⁰ Gender-sensitive interpretation or the lack thereof can affect any part of the refugee claim. For example, women fleeing forced marriage may struggle to articulate the harm of forced marriage and to establish a causal nexus to one of the convention grounds.⁸¹ Adjudicators may use gendered interpretations of the Refugee Convention grounds, such as political opinion,⁸² and continue to rely excessively on the membership of a particular social group ground.⁸³ A gendered lens may affect analysis of persecution at the hands of non-state actors, as well as a meaningful examination of the internal relocation option.

When an asylum-seeker makes a claim, she must go through “asylum screening” where she will be assigned a caseworker from the UK Visas and Immigration (UKVI), which is part of the Home Office.⁸⁴ After a series of interviews, this case owner will make an initial decision as to whether to recognise the applicant as a refugee or to grant other forms of leave to remain. If the asylum-seeker’s claim is refused, she may be able to appeal the decision. Her ability to do so, however, is limited by the introduction of fees and cuts to legal aid.⁸⁵ From the First-tier Tribunal, an asylum-seeker has an “onward” or “second appeal” to the Upper Tribunal (Immigration and Asylum Chamber). Over the years, the “second appeals” system has undergone significant reform, motivated by immigration control and an effort to restrict avenues for challenge for certain types of migrants.⁸⁶ The grounds for appeal to the Upper Tribunal are limited to an error of law. It may be particularly difficult for unrepresented claimants to articulate their appeal grounds based on errors of law. While the Tribunal is meant to be independent, it is working within the context of constant changes not only to its structure but also to some of its fundamental

78 Convention relating to the Status of Refugees, 189 UNTS 150, 28 Jul. 1951 (entry into force 22 Apr. 1954).

79 See for scholarship referred to in footnote 4.

80 Querton, “Gender and the Boundaries of International Human Rights Law: Beyond the Category of ‘Gender-Related Asylum Claims’”.

81 Crawley, “[En]gendering International Refugee Protection: Are We There Yet?”, 339.

82 See for e.g. Crawley, *Refugees and Gender*.

83 See for example: H. Cheikh Ali, C. Querton and E. Soulard, “Gender Related Asylum Claims in Europe: A Comparative Analysis of Law, Policies and Practice Focusing on Women in Nine EU Member States”, European Parliament; C. Querton: “One Step Forward, Two Steps Back? Interpreting ‘Particular Social Group’ In the European Union”, *International and Comparative Law Quarterly*, 71(2), 2022, 425–451.

84 Previously the UK Border Agency (UKBA).

85 Current fees are £140 for an oral hearing and £80 for an appeal to be determined on papers provided. HM Courts & Tribunals Service, “Fees and Help with Fees”, last updated 18 Oct. 2021, available at: HM Courts & Tribunals Service - GOV.UK (www.gov.uk) (last visited 22 Mar. 2022).

86 For a review of the changes see, S. Craig and M. Fletcher, “The Supervision of Immigration and Asylum Appeals in the UK-Taking Stock”, *International Journal of Refugee Law*, 24(1), 2012, 60–84.

procedures such as its appeal procedures. Criticisms of the Tribunal taking the role of a subsidiary gatekeeper have also been voiced.⁸⁷

There are some difficulties with any analysis of the cases from the Upper Tribunal (Immigration and Asylum Chamber) as the cases until 2013 remained largely unreported. The Upper Tribunal adopted a new determinations database on 2 August 2013 allowing public access to unreported cases. Although the Tribunal’s new database provides improved access to unreported cases from 1 June 2013,⁸⁸ the decision to report cases still remains under the discretion of the Reporting Committee under the Direction of the President of the Tribunal.⁸⁹ Indeed, as statistics are not available, it is not possible to estimate the extent to which the currently reported cases are representative of the practice in general.⁹⁰ As there was only one reported case involving forced marriage since the opening up of the new database, an analysis of the unreported cases was also conducted.⁹¹ It is also useful to note that the appellate decisions represent only a sliver of asylum decisions overall.⁹² The ability to examine First Tier Tribunal decisions is limited by the lack of access to them by the public without the individual consent of each of the dismissed appellant.

It is within this complex context that the analysis of the reported and unreported cases from 2002 till 2022 were made. As the focus of analysis is the framing of forced marriage, primary attention is paid to reported cases as these are typically lengthier and provide more sustained analysis of the cases and their issues. Unreported cases, though varying considerably in length, more commonly remain briefer with their analysis sometimes very truncated.⁹³ Where they bring up relevant issues, unreported cases are also highlighted. A total of 14 cases are analysed here, which consists of 11 reported decisions and three unreported cases. These cases dealt with women

87 I. Macdonald, *Immigration Law and Practice in the United Kingdom*, 7th edn, London, LexisNexis, 2008, ix.

88 Senior President of Tribunals’ Annual Report, available at: https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Tribunals/SPT+Annual+Report_2014.pdf, 2014 (last visited 30 Mar. 2022).

89 Upper Tribunal, Immigration and Asylum Chamber: Guidance Note 2011 No. 2- Reporting Decisions of the Upper Tribunal Immigration and Asylum Chamber, available at: <https://www.judiciary.gov.uk/wp-content/uploads/2014/01/guidance-note-2011-no-2-reporting-decisions-july-2015.pdf> (last visited 31 Mar. 2022).

90 A practitioner interviewed by Stephen Meili estimated the number of reported cases to be around 10%, as cited in S. Meili, “U.K. Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law”, *Boston College Law Review*, 54(3), 2013, 1123, 1131. Although this remark was made before the introduction of the new database.

91 The reported decisions were obtained from the Asylum and Immigration Tribunal website (www.ait.gov.uk), the Upper Tribunal (Immigration and Asylum Chamber) decisions database (<https://tribunalsdecisions.service.gov.uk/utiac>), and Bailii (www.bailii.org). Due to the instability of the tribunal decisions database searches, the analysis of unreported cases focused on the Bailii search, which identified 153 unreported women’s cases involving forced marriage. The cases were found using the search terms “forced marriage” and “forced to marry”.

92 In 2020/2021, there were 2,359 cases at the Upper Tribunal (Immigration and Asylum Chamber), available at: <https://data.justice.gov.uk/courts/tribunals/courts-tribunals-upper-tribunal> (last visited 15 June 2022). In the same period, the First-Tier Tribunal received 2,611 cases of which 6,900 were in the “asylum/protection/revocation of protection category”, available at: <https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2022> (last visited 15 June 2022).

93 It is not uncommon for the unreported cases to be mere four pages, though some are in the region of 20. While there is nothing necessarily inherently problematic about brief judgments, for the purposes of the analysis of this specific part of the women’s cases, they provide more limited material than reported decisions.

asylum-seekers fleeing forced marriages, or the risk thereof to varying degrees. The women came from Afghanistan, Albania, Cameroon, Gambia, Iran, Ivory Coast, Kenya, Morocco, Pakistan, Tajikistan, Turkey, Sudan, and Sierra Leone. The age profile was also varied and ranged from 16⁹⁴ to 45⁹⁵ at the time of coming to the UK. In some cases, the women fled because they had already undergone forced marriage, in others because they had been threatened with forced marriage and in others where there was a risk to them, or their daughters being forced into marriage if returned. The women either came alone, with a child or children, with a husband, or were trafficked. Due to the small number of cases, any causal analysis is precluded. However, some recurrent themes do emerge, and the discourse of the Upper Tribunal can nevertheless be subjected to feminist analysis. The two main issues raised here are that the discourse of the Tribunal shows a marked privatisation and trivialisation of forced marriage. The ways in which forced marriage is portrayed is significant as it allows us to evaluate the gender-sensitiveness of the Tribunal's analysis and interpretation. It is likely that those cases in which forced marriage is trivialised or confined to being merely a "family" matter rather than a rights-based question, the ability of women to have their cases understood as cases involving serious harm necessitating refugee protection is potentially diminished.

4.1. Privatisation of gendered harm

Feminists have long shown how international law perpetuates a gendered public/private dichotomy, and this remains the case for refugee law as well.⁹⁶ In short, refugee law continues to privilege "public" acts of persecution, or persecution by State agents and subordinates "private" acts of persecution.⁹⁷ The question of framing the forced marriage as an issue of a "private matter" becomes particularly relevant in cases where the potential persecution is at the hands of non-state actors, as it is in the majority of women's cases involving a forced marriage element.

Only three of the 11 reported cases were successful.⁹⁸ Although there are significant differences among them, some interesting themes emerge. *FM (FGM) Sudan CG* [2007] UKAIT 00060⁹⁹ could be viewed as somewhat of an outlier insofar as it includes quite a clear and rare recognition by the Tribunal that life in the country of origin, Sudan, would be extremely difficult for the claimant and that internal relocation would therefore be unduly harsh. In both *TB (PSG, women) Iran* [2005] UKIAT 00065¹⁰⁰ and *NS (Social Group, Women, Forced*

94 FB (Lone women, PSG, internal relocation, AA (Uganda) considered) Sierra Leone [2008] UKAIT 00090.

95 RA & Anor, *R (on the application of) v Secretary of State for the Home Department (IJR)* [2015] UKUT 242 (IAC).

96 See for e.g. C. Charlesworth, C. Chinkin and S. Wright, "Feminist Approaches to International Law", *American Journal of International Law*, 85, 1991, 613.

97 C. Oxford, "Where are the Women", in E. Arbel et al. (eds.), *Gender in Refugee Law: From the Margins to the Centre*, 157–174.

98 These were *NS (Social Group, Women, Forced marriage) Afghanistan CG* [2004] UKIAT 00328, *TB (PSG, women) Iran* [2005] UKIAT 00065, *FM (FGM) Sudan CG* [2007] UKAIT 00060.

99 Hereinafter FM (Sudan).

100 Hereinafter TB (Iran).

marriage) *Afghanistan CG* [2004] UKIAT 00328,¹⁰¹ the persecution could be clearly related to a publicly political figure. It was therefore possible, simpler, and easier for the adjudicators to relate the persecution directly to the State in question and consequently to examine the failure of State protection. In *TB (Iran)*, which is discussed in more detail below, TB was forced to marry a local Mullah, a religious leader, of whom there was evidence that he could influence government officials. While NS, was raped and beaten by politically motivated militia men and fled from the threat of being forced to marry one of them.

The examination of the difference between the First-tier Tribunal’s and the Upper Tribunal’s treatment of the violence against NS is noteworthy when considering the tendency to privatise gendered harm in women’s cases. NS was married and had three children. She had become separated from her husband during their flight from Afghanistan to the UK. Her husband’s family had strong connections to the regime that was overthrown in 1992. NS and her husband fled from Kabul to Takhar in the northern part of Afghanistan. After 3 years, NS’s husband’s uncle had been killed by a local warlord Mamoor Hassan on direct orders of Ahmed Shah Masood, a local military leader. NS’ family faced regular harassment from Mamoor Hassan’s men, and she and her husband were beaten for refusing to give money to them. Her husband was taken away by them and detained in prison. One of the militiamen came to the house to demand NS’s sister marry him. After she refused, she was killed. After a few months, Mamoor Hassan’s nephew, Qasim, decided that he was going to marry NS who refused. She was raped and beaten and her uncle who tried to defend her was killed. Qasim threatened to kill her if she refused again. After being stopped from killing herself by her neighbour, a friend of her husband’s advised NS to leave the country with her children and assisted her in doing so.

The first-tier Tribunal judge stated that the “only reason for the rape of the appellant was because the assailant found her attractive and therefore the attack was a purely personal one, and no more than a common crime”.¹⁰² Consequently, the judge found that any possible persecution that might have happened was not for reasons of a Convention ground.¹⁰³ This decision is one of the most striking in its privatisation of gendered harm. As Crawley has noted, sexual violence ought to be one of the least controversial examples of serious harm and yet the interpretation of sexual violence against women has “often differed substantially from the interpretation of other forms of serious harm, including sexual violence against men”.¹⁰⁴ The tendency to depoliticise and “personalise” the experiences of women in such cases is particularly evident.¹⁰⁵

Fortunately, in this case, the Upper Tribunal found an error in law in the First-tier Tribunal’s finding that the persecution was not for a Convention reason. Indeed, the decision of the Upper Tribunal is exemplary in its gender-sensitive interpretation. The decision shows a detailed examination of a variety of international sources, such as UN Commission on Status of Women and UNHCR pronouncements, several

101 Hereinafter NS (Afghanistan).

102 NS (Afghanistan), para. 16.

103 *Ibid.*

104 Crawley, *Refugees and Gender*, 92–93.

105 *Ibid.*, 80.

NGO reports, such as from Human Rights Watch and Amnesty International, as well as a careful and gender-sensitive examination of international refugee law.¹⁰⁶ It is also the only case in which the Gender Guidelines are referenced.

Contrary to the few successful reported asylum appeals mentioned above, the issue of forced marriage in many of the other cases was more easily contained by the adjudicators to the “private sphere”. In some of the reported cases, the asylum-seeker women were portrayed in Tribunal discourse as “mere” victims of familial violence whereby the failure of State protection was rendered invisible, and the harm consequently analysed as non-persecutory.¹⁰⁷ In other cases, this privatisation of forced marriage seemed to have an effect on the analysis of the causal nexus to a relevant convention ground.

An example of this is the case of *FB (Lone women, PSG, internal relocation, AA (Uganda) considered) Sierra Leone* [2008] UKAIT 00090.¹⁰⁸ This was an appeal by a woman, who had resisted a forced polygamous marriage to a local chief in Sierra Leone. The case provides an interesting comparison to *NS (Afghanistan)* in so far as in *FB (Sierra Leone)*, the adjudicators similarly and explicitly recognise the position of the local chief as the principal source of local governance. They nevertheless refused to accept a nexus to a political opinion ground.¹⁰⁹ I have argued elsewhere how the interpretation of politics and the political opinion ground in this case remained narrow, simplistic, and gendered.¹¹⁰ Though in one part the Tribunal acknowledges that forced marriage would be persecutory treatment, they found no such risk on return in their analysis, and instead described her resistance to forced marriage as her “reluctance to marry a man for whom she does not care”.¹¹¹

Containing forced marriage to merely a “private” or “family” matter may also have consequences for subsequent analysis of the availability of internal relocation option. In *FB (Sierra Leone)* the Tribunal was able to make the finding that internal relocation option was available to FB by speculating that the man who was over 70-years old at the time of her forced marriage and from whom she had escaped, “might” be dead already.¹¹² The old age and potential death of the “husband” were also considered at the centre stage in *MD (Women) Ivory Coast CG* [2010] UKUT 215 (IAC)¹¹³ where the Tribunal stated that “her husband was already of an

106 It is noteworthy that the judgment is written by Catriona Jarvis, a now retired judge of the Upper Tribunal (IAC) known for her work in advancing law, procedure and practice, in particular in women’s cases and children’s cases. She was also the co-drafter of the Gender Guidelines for the Tribunal.

107 See for e.g. a *MD (Women) Ivory Coast CG* [2010] UKUT 215 (IAC) and *MK (Lesbians) Albania CG* [2009] UKAIT 00036.

108 Hereinafter *FB (Sierra Leone)*.

109 Cf. *NS (Afghanistan)*: The facts of the case were so evidently relating to political opinion, that the Upper Tribunal noted that even though the ground was not advanced any longer on appeal and therefore not examined further; “We nevertheless find that the evidence does show that the ill-treatment of the Appellant and her family was not merely personal, and that political opinion, imputed political opinion as far as the Appellant was concerned as opposed to her husband, was at least an effective cause of the serious harm to which she was subjected”, para. 75.

110 Honkala, “She of Course Holds No Political Opinions”.

111 *MD (Ivory Coast)*, paras. 62 and 73.

112 *Ibid.*, 62.

113 Hereinafter *MD (Ivory Coast)*.

advanced age and may well no longer be alive given a lower life expectancy in the Ivory Coast”.¹¹⁴

Connected to the ways in which gendered harm has been privatised in the jurisprudence of the Tribunal is the next theme that emerges from the cases; trivialisation of forced marriage. In the next two sections, this is discussed, first, through the conflation of forced marriage and arranged marriage, and second, through the use of euphemisms.

4.2. Conflating forced marriage and arranged marriage

The first issue of trivialisation of forced marriage that is evident is the adjudicators describing and misrepresenting a forced marriage as an arranged marriage. Forced marriage is distinguishable from arranged marriage insofar as arranged marriages are marriages in which families of one or both spouses take a leading role in choosing the suitable partner but where the spouses still have a choice on whether to accept or refuse the arrangement.¹¹⁵ In general, there are valid criticisms against a binary distinction of this kind as there can be difficulties in distinguishing between coercion and consent in matters relating to marriage.¹¹⁶ In the asylum context the issue is quite clear as there is firm evidence of a refusal by the claimant fleeing. There is no question of giving consent to an “arranged marriage” as the fact that the asylum-seeker has fled evidences her refusal and lack of consent. Any marriage that might have taken place had she not fled would therefore have been forced. It is arguable that the inherent difficulties of obtaining evidence of lack of consent in forced marriage cases provide a reason for applying the benefit of doubt to the claimant’s testimony. The UNHCR Guidance reminds decision-makers that they ought to apply the lower burden of proof of “reasonable likelihood”, i.e. to ask is it reasonably likely that the account she gives is true.¹¹⁷ The issue then of adjudicators describing a forced marriage as an arranged marriage, such as in the case of *TB (Iran)*, is problematic. If the Tribunal does not accept the marriage as forced, they are unlikely to accept that refugee protection is necessary. It also further illustrates the ways in which adjudicators seem quick to disregard women’s own experiences thereby trivialising their gendered harm.

TB was a 20-year old single woman from Iran whose father was a Colonel of the Entezami Force (police force) and a member of Etelaat (intelligence service).¹¹⁸ There was a history of domestic violence against TB’s mother and after one severe

114 *Ibid.*, para. 315. These examples further relate to the difficulties applicants face in asylum proceedings, such as burden of proof, evidential barriers, and credibility. See further, N. Honkala, “The Rights of Women Seeking Asylum”.

115 E. Psaila et al., *Forced Marriage from a Gender Perspective*, European Parliament, Directorate General for Internal Policies: Policy Department C: Citizen’s Rights and Constitutional Affairs, 2016, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556926/IPOL_STU%282016%29556926_EN.pdf (last visited 22 Mar. 2022), 19.

116 A. Gill and T. Mitra-Kahn, “Modernising the Other: Assessing the Ideological Underpinnings of the Policy Discourse on Forced Marriage in the UK”, *Policy & Politics*, 40(1), 2012, 104–119, 108.

117 UN High Commissioner for Refugees (UNHCR), *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, available at: <https://www.refworld.org/docid/3ae6b3338.html> (last visited 29 Mar. 2022).

118 *Ibid.*, para. 2 (i).

attack on the mother and TB's step-sister, TB's uncle encouraged the mother to make a complaint to the authorities against her father.¹¹⁹ Four months later TB's uncle was accused of political activities against the regime and executed.¹²⁰ TB's father threatened to kill her and her mother if they did anything against him.¹²¹ In 2001, when visiting her aunt, TB and her mother saw demonstrators attacked in the street by the security forces and they opened a door to their building and let some of them in.¹²² Following this, TB and her mother were arrested.¹²³ Mr AR, a friend of TB's father, a Mullah and head of Aghidati-Siasi Department of Entezami Forces, arranged for them to be released.¹²⁴ Two years later, after TB had obtained a diploma in mathematics and passed her entrance exam to university her father told her that Mr AR wanted to marry her.¹²⁵ TB did not wish to marry Mr AR, who was 60 years old and already married with four children.¹²⁶ TB and her mother fled Iran and applied asylum in the UK.¹²⁷

The disregard of the asylum-seeker woman's own experiences and testimony is palpable in this case. The Tribunal notes that the claimant's lawyer had:

wrongly laid stress in the causation on the 'forced' marriage, rather than the reality of this appellant's situation, where the risks to her arises from her refusal to enter into an arranged marriage.¹²⁸

There is no further justification from the judge as to the reasons behind this assertion. These comments not only show the Tribunal's confusion about the distinction between arranged marriage and forced marriage. They stand in stark contrast to the legal developments on forced marriage of UK nationals and seem to suggest that Iranian women's lack of consent is viewed differently from that afforded to British women under the national forced marriage legislation.

The Tribunal members' problematic portrayal is further evidenced when they consider what is the relevant particular social group in this case. In defining it as "young Iranian women who refuse to enter into arranged marriages", the adjudicators explain that "we also consider the group we define, is not defined by the persecution, as in many cases nothing may happen to the *young women in this predicament*".¹²⁹ This way of analysing and defining the particular social group denies Iranian women's agency to consent to marriage. By denying the forced marriage, her claim to a human rights violation is delegitimised. The image that these words provoke are potentially those outside the scope of refugee protection.

119 *Ibid.*, para. 2 (iii).

120 *Ibid.*

121 *Ibid.*

122 *Ibid.*, para. 2 (v).

123 *Ibid.*

124 *Ibid.*

125 *Ibid.*, para. 2 (vi).

126 *Ibid.*

127 *Ibid.*

128 *Ibid.*, para. 57.

129 *Ibid.*

The way in which the Tribunals analyse and defines the particular social group further evidences the difficulties women claimants encounter in trying to have their experiences understood by refugee Tribunals. In general, and across jurisdictions, women’s gender-based persecution claims are overwhelmingly analysed through the particular social group ground, and this brings with it several unique challenges. Foster has noted how decision-makers rather than framing the relevant particular social group simply as women, regularly end up incessantly narrowing down the group.¹³⁰ This tendency, she remarks is endemic in gender claims and is largely not present in claims based on other Convention grounds.¹³¹

In TB, the adjudicators further explain that their particular social group is “recognisable in Iranian society, due to their lack of acceptance of generally acceptable cultural and social mores”.¹³² Through the belittling use of language and the delegitimisation of her rights-based claim through the conflation of forced and arranged marriage, the Tribunal effectively reduces her claim to what Susan Musarrat Akram describes as a mere “trivial attack on mores”.¹³³ By doing so, the adjudicators assign to culture what is rather patriarchal power and the States’ inability or unwillingness to provide protection of the woman’s rights. Rather than a question of culture, it was a question of failure of State protection to those who challenge the male power structures and “the political hegemony of the dominant political and religious elite” in a male-dominated society.¹³⁴ Post-colonial feminists have noted how by viewing women’s persecution as simply evidence of her culture, refugee Tribunals perpetuate stereotyped and racist representations of that culture, while enabling the privileging of their own.¹³⁵ In this way, we are reminded by Razack’s argument that a refugee hearing is, after all, a profoundly racialised event.¹³⁶

The conflation of forced marriage with arranged marriage in *TB (Iran)* was not an isolated occurrence as adjudicators also misrepresented forced marriage as an arranged marriage in *NK (FGM-Cameroon) Cameroon [2004] UKIAT 00247, MD (Women), MK (Lesbians) Albania CG [2009] UKAIT 00036*¹³⁷ and *SEY v Secretary of State for the Home Department*.¹³⁸ There are several problems with this conflation. First, it shows a disregard for the asylum-seekers’ experiences. Second, it

130 M. Foster, “Why We are Not There Yet: The Particular Challenge of ‘Particular Social Group’”, in Arbel et al. (eds.), *Gender in Refugee Law: From the Margins to the Centre*, 17–45.

131 *Ibid.*, 30.

132 *Ibid.*

133 S. Musarrat Akram, “Orientalism Revisited in Asylum and Refugee Claims”, *International Journal of Refugee Law*, 12, 2000, 7–40, 18.

134 *Ibid.*, 18.

135 R. Kapur, “Tragedy of the Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Legal Politics”, *Harvard Human Rights Journal*, 15, 2002, 1–38, 6.

136 S. Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms*, Toronto, University of Toronto Press, 1998, 88.

137 Hereinafter MK (Albania).

138 MK (Lesbians) Albania CG [2009] UKAIT 00036 [Hereinafter MK (Albania)]. *SEY v Secretary of State for the Home Department*, Upper Tribunal (IAC), AA/07665/2014 (Unreported). Additionally, in YK (PSG-Women) Turkey CG [2002] UKIAT 05491, without going into much further detail about a forced marriage element in her claim, the Tribunal mentions merely that the “claimant had maintained a fear of persecution from her father, who it was claimed, has arranged her marriage without her consent”, para. 3.

delegitimises her claim to a human rights violation by viewing it only as something familial, thereby restricting it to the so-called private sphere. Thirdly, it evidences problematic cultural assumptions that enable the refusal of her agency and rights. It thus provides an illustration of the persistence of gendered and cultural assumptions in asylum-seeker women's cases.

4.3. Dismissing claims through the use of euphemisms

Another way in which adjudicators downplay serious harm and trivialise forced marriage is through the use of euphemisms to describe the experiences of the asylum-seeker women fleeing forced marriage. A noteworthy example is the case of *MK (Albania)*. MK was a young lesbian born in Tirana. She was single and lived with her parents and her brother. Her parents had tried to marry her several times since the age of 17 years, and she had refused because of her sexual orientation, which her family did not know of. When she was 20 years, she began a relationship with Mira, who was later married. During an argument, MK told her mother about her sexual orientation and her previous relationship with Mira. Her mother said that she should get married immediately. When her brother found out he called MK a whore and beat her up. She fled and came to the UK.

As in the case of *TB (Iran)*, the Tribunal describes MK as being afraid that her family would force her into an "arranged marriage".¹³⁹ If she refused, she feared they would kill her. The comments by the first Immigration Judge illustrate the failure to represent the experiences of asylum-seeker women. The Immigration Judge states that "it seems absurd that someone should be entitled to sanctuary in another country because they have *fallen out with their family*".¹⁴⁰ The minimisation of harm in this case places MK as an unworthy claimant in the gaze of the Tribunal.¹⁴¹

On appeal, the Tribunal was presented with substantial evidence of how MK's sexual orientation was transgressing traditional socio-cultural norms and how control over women was still "commonly perceived as an indicator of family honour".¹⁴² Yet, the Tribunal remained confused about the threat of forced marriage stating that "the appellant's marriage would be forced *only in the sense* that she would be obliged to agree to marry as the price of returning to the family home".¹⁴³ What would an image of a "real" forced marriage look like in the eyes of the Tribunal members? The adjudicators' descriptions also evidence the tendency to individualise the claimant's experiences into something simply personal and familial. This framing illustrates the narrow interpretation of persecution and ignores the fundamental connection between her sexual orientation, threat of forced marriage, and the failure of State protection.

Similar framings were used by a First-tier adjudicator in *JM (Sufficiency of protection) Kenya* [2005] UKIAT 00050.¹⁴⁴ JM was a Christian whose family had converted to the Mungiki sect and had tried to convert her to their religion, force her

139 *Ibid.*, para. 21.

140 *Ibid.*, Annex A, para. 19 (emphasis added)

141 Razack, *Looking White People in the Eye*, 88.

142 *MK (Albania)*, paras. 17–58.

143 *Ibid.*, para. 402 (emphasis added)

144 *JM (Sufficiency of protection) Kenya* [2005] UKIAT 00050. [Hereinafter JM (Kenya)].

into a marriage and make her undergo FGM. JM fled but was traced and returned to her family where the abuse continued. JM was used as a slave and was beaten and raped by her brother’s friends. In dismissing JM’s claims, the First-tier adjudicator concluded that the State was capable of protecting her from “the unwanted attentions” of her family.¹⁴⁵ This was even after she had told the Tribunal of her experiences of having fled from her family and having subsequently been traced and forced to return to her family who had kept her under guard. To describe the experiences of abuse, rape, threat of forced marriage, and FGM as “unwanted attentions” of her family is to so fundamentally belittle the gendered harm as to render it invisible. It shows a profound disjuncture between the characterisation or representation of the persecution and the appellant’s experience.

“Unwanted attentions” was not the only noteworthy euphemism employed by the Upper Tribunal. The case of *MD (Ivory Coast)* involved an 18-year-old woman who had lived in Abidjan with her parents until her mother’s death when she was 15 years old. At that point, she was forced to undergo FGM, and her father moved her back to his home village, where he forced her to marry a 70-year-old man. MD was repeatedly raped and ill-treated by the man. She began an “affair” with a young man and became pregnant. Fearing that her father and “husband” would kill her, she fled the country and came to the UK. In this case, the adjudicators described the time when the applicant’s father moved her to his home village and forced her to marry the man, as “an unhappy interlude”.¹⁴⁶ MD was further described as having “left her elderly husband” and in another paragraph after having been repeatedly raped by her “husband” and ill-treated, was described as having “left the village after the *disaster of her marriage*”.¹⁴⁷ Furthermore, when assessing the risk to her of being returned, the Tribunal noted that they did not consider the father who was a lorry driver to have the means to ascertain her whereabouts were she returned to Abidjan where her father lived. The Tribunal went further and stated that “we would not lightly conclude that a father would pursue an estranged daughter *for so little purpose*”.¹⁴⁸

The Tribunal’s use of language evokes images very different from claims of gender-based persecution. These phrases are not insignificant; they are discursive devices that have real consequences. By cloaking the asylum-seeker woman’s experiences within the language of marriage, and therefore giving them legitimacy, the gendered harm is seen as non-persecutory and meaningful analysis of State protection is absent. The Tribunal narrates her story of being forced into marriage as if it was simply a story of a marriage gone wrong.

The Tribunal also referred to forced marriage in some cases as “unwanted marriage”.¹⁴⁹ In *SEY v SSHD*, the first-tier Tribunal judge had found that even though her evidence about having to “undergo an unwanted marriage” had been corroborated by her brother, it had not been established that there was a risk of “honour

145 *Ibid.*, para. 7.

146 *MD (Ivory Coast)*, para. 295.

147 *Ibid.*, paras. 292 and 293.

148 *Ibid.*, para. 306 (emphasis added).

149 See for e.g. *Secretary of State for the Home Department v BJ*, Upper Tribunal (IAC), AA/00461/2014 (Unreported) and *SEY v Secretary of State for the Home Department*, Upper Tribunal (IAC), AA/07665/2014 (Unreported).

killing”, an assault or other harm as no threats had been made to kill the applicant.¹⁵⁰ Furthermore, the judge found that as the father had allowed the applicant to be educated and to “proceed overseas when promised in marriage”, it had not been shown that he was “an autocratic Muslim with extreme views”.¹⁵¹ Accordingly, he found that the applicant had not shown any potential persecutory treatment founded “on a refusal to undergo an arranged marriage”.¹⁵² The Upper Tribunal does find that the first-tier judge gave insufficient weight to the appellant’s evidence that her father had physically disciplined her and her siblings as children and that she was afraid of him. Her brother also gave evidence of the violence of their father, how he had been beaten and how people in the area were afraid of him.¹⁵³ The Upper Tribunal also found that the first-tier judge placed undue weight on the fact that there had not been threats to kill. Indeed, the Refugee Convention places no such expectations of evidence from claimants in order to satisfy the criteria of persecutory harm. The Upper Tribunal notes that “the judge had failed to appreciate the distinction between allowing the appellant to study abroad and wanting her to go through with an *arranged marriage*”.¹⁵⁴ While correct on the distinction point, the Upper Tribunal still slips into conflating forced and arranged marriage. Finally, in a recent unreported case, the Tribunal uses the contorted “involuntary arranged marriage” to describe the claimant’s forced marriage.¹⁵⁵

Benjamin Lawrance, an American country of origin expert, argues that it is this language of legitimacy of marriage that forms a significant hindrance for women asylum-seekers claiming forced marriage as persecution.¹⁵⁶ To make their claims intelligible for the courts, asylum-seekers and their lawyers draw from the limited language that pertains to legitimate and legal marriages, thus hindering their claims. This, Lawrance argues, is because the language resonates with the bureaucratic and judicial audience as legal and non-persecutory.¹⁵⁷ Lawrance sees this problem as chiefly conceptual,¹⁵⁸ but it seems that more is at play here.

5. CONCLUSION

As feminist activists and scholars have argued, there exists a wider problem in refugee law. For decades now the problem of representing women’s experiences has been at the heart of this critique that stressed that the problem is a structural one.¹⁵⁹ As Millbank and Dauvergne state, the problem lies in the failure of refugee law to fully embrace human rights norms, particularly when they relate to gender and sexuality.¹⁶⁰ They explain the cause of this to be the structure of refugee law that is based on “a foundation of othering” that is sustained by a recurrent division between “us”

150 *Ibid.*, para. 2.

151 *Ibid.*, para. 2.

152 *Ibid.*

153 *Ibid.*, para. 9.

154 *Ibid.*, para. 10.

155 *HB v Secretary of State for the Home Department*, Upper Tribunal (IAC), PA/07876/2019 (Unreported).

156 B. Lawrance, *Asylum and Forced Marriage*, Working Paper, draft on file with author, p. 3.

157 *Ibid.*, 10.

158 *Ibid.*, 11.

159 Dauvergne and Millbank, “Forced Marriage as a Harm”, 58.

160 *Ibid.*

and “them”.¹⁶¹ Furthermore, while pragmatic solutions to these questions have included improved and increasing first-instance decision-making as well as judicial training,¹⁶² these problems remain more fundamental. Asylum proceedings are situated within broader structures of racialised immigration control.¹⁶³ Refugee law definition remains an individualistic one that includes the selected few and excludes many others. It is built on some hierarchical categories of inclusion and exclusion familiar to Western thought, such as those between “a political refugee” and an economic migrant, between the public and private as well as hierarchies of persecution.¹⁶⁴ Forced marriage is an effective illustration of this because of the noteworthy disjuncture between domestic legal and political responses to forced marriage and the ways in which forced marriage is viewed within the refugee determination context.¹⁶⁵ A decade on, and this still remains the case.

While international refugee law has in general developed in significant ways in relation to gender-based persecution, the crucial issue of the representation of women’s experiences remains a problem for decision-makers. The tendency to frame women asylum-seekers’ experiences as something merely in the “private sphere” has been a long-standing concern.¹⁶⁶ The use of euphemisms relating to gender-based persecution and the trivialisation of forced marriage reveals a problematic portrayal of the experiences of asylum-seeker women. They are marked examples of a lack of understanding of the experiences of the claimants and gender-sensitive analysis. In some cases, the persecution is downplayed to such an extent that it ceases to exist in the narrative of the Tribunal, while in others the failure of State protection is not meaningfully analysed as forced marriage is conflated with an arranged marriage. These examples of privatising and trivialising gendered harm have the effect of delegitimising women’s asylum claims.

The tendency to portray women as victims of their “culture”,¹⁶⁷ rather than recognising the persecutory nature of forced marriage or the economic, social and political contexts surrounding it, also remains a concern. This way of characterising rights violations and systemic discrimination allows the experiences to be framed outside legal

161 *Ibid.*

162 See for e.g. Asylum Aid: Unsustainable: The Quality of Initial Decision-making in Women’s Asylum Claims, January 2011, J. Millbank, “From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom”, *International Journal of Human Rights*, 13(2–3), 2019, 319–414. Though it is useful to note that Millbank is careful to note that while training could result into improvements in consistency and reliability of decisions, it would not provide an answer to all of the criticisms the author has identified.

163 N. El-Nany, (*B*)*ordering Britain: Law, Race and Empire*, Manchester, Manchester University Press, 2020, M. Griffiths and C. Yeo, “The UK’s Hostile Environment: Deputising Immigration Control”, *Critical Social Policy*, 41(4), 2021, 521–544.

164 N. Valji, “Women and the 1951 Refugee Convention: Fifty Years of Seeking Visibility”, *Refugee*, 19(5), 2001, 25–35, 27.

165 Dauvergne and Millbank, “Forced Marriage as a Harm”, 57.

166 See for e.g. Crawley, *Refugees and Gender*; I. Doreen, “Gender: A Key Dimension of the Refugee Experience”, *Refugee*, 6, 1987, 3, and J. Greatbatch, “The Gender Difference: Feminist Critiques of Refugee Discourse”, *International Journal of Refugee Law*, 1, 1989, 517.

167 On the general tendency to view women’s claims socially and culturally, see for e.g. S. Kneebone, “Women within the Refugee Construct: ‘Exclusionary Inclusion’ in Policy and Practice- The Australian Experience”, *International Journal of Refugee Law*, 17(1), 2005, 7.

analysis and/or legal protection. The way in which the experiences are categorised and represented is crucial to asylum claims and the gendered and cultural assumptions can have real consequences resulting in the failure to recognise and protect women's rights.

Women asylum-seekers whose claims involve forced marriage, or the risk thereof, must negotiate their claims in an institutional paradox of the so-called social legitimacy of marriage combined with the persistence of gendered interpretation of refugee law and women asylum-seekers experiences. In the UK, at least in theory, the issue of forced marriage has been viewed through a rights-based discourse. Almost 15 years after the setup of the FMU and more than a decade after the introduction of forced marriage-specific legislation in the UK, the awareness of women's and girl's right to refuse a forced marriage seems not to have trickled down to the decision-making of the refugee Tribunal. Indeed, an analysis of the framing of forced marriage in the discourse of the Tribunal shows how the right to be free from gendered violence on the basis of human rights discourse is rarely extended to refugee women.