CHAPTER 20

When Forced Marriage is Slavery*

My research has sought to establish – in law – the parameters around different types of human exploitation, so as to give them legal certainty in a court of law. The underlying premise of my research has been that the term ‘slavery’ has been over-utilised and expanded, dare I say for propaganda purposes, as a means of describing various social ills at the expense of the legal meaning and, ultimately, prosecutions. Thus, my inclination is to say, in legal terms, that forced marriage is not slavery...and yet....

Where issues of human exploitation are concerned the law is under-developed. The contribution law can make at this point and time are foundational: simply setting out an understanding in law of what constitutes and where to draw the parameters around various types of exploitation still needs to be undertaken. Forced marriage is a case-in-point as it appears to me – especially in times of armed conflict – that in substance it is not in any way a ‘marriage’, either in a formal or substantive sense. To my way of thinking we should look not to the form – that is: what it is called – but to the substance: that is, in fact, what is transpiring; and then ask what legal definition this activity falls under.

In law, the notion of ‘forced marriage’, as such is not defined. Its most recent expression within the United Nations system is to be found in the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which considers the issue through the lens of discrimination at its Article 16:

1. States 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:
   (a) The same right to enter into marriage;
   (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

Thus, the issue is defined not negatively as victimised by forced marriage, but in the positive as a right to choose, to consent.¹

I would like to argue that we should conceptualise the type of crime which transpires in times of armed conflict which has been termed ‘forced marriage’ as something else altogether. There is, it seems to me, a distinction to be made between ‘forced marriage’ in times of peace and ‘forced marriage’ in times of armed conflict. That forced marriage in times of peace typically transpires on the basis of ancient custom or practice; there is typically a wedding which takes place, which despite the legal obligation by States to allow for entry into marriage only with “free and full consent,” the bride is coerced either individually, familially or communally into marriage. Though, if one were to set out to determine the locus of the ‘forced’ element, it would typically be the family and within the family, the parents. Or put another way, consent is removed from the bride and taken by another, typically the parents. As originally conceived this was the type of ‘forced marriage’ which was meant to be suppressed by provisions such as CEDAW. The genealogy of these provisions includes the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages which, in its preamble, speaks of “abolishing such customs, ancient laws and practices” so as to ensure “complete freedom in the choice of a spouse.”² Where the issue of consent is concerned – that is: as opposed to what would thus constitute forced marriage – a 1955 Report regarding Pride Price in Eastern colonial Nigeria recommended that where ‘native marriages’ were concerned “a reappraisal is necessary of the fact that a women has a right to a say in the choice of her future partner in life. Consent should lie with the girl and the part played by the parents should be limited to giving advice.”³ In other words, as originally conceived the suppression of forced

¹ See United Nations, Report of the Secretary General, Forced Marriage of the Girl Child, UN Doc. E/CN.6/2008/4, p. 3; which notes: “In recent years, the issue of forced marriage, that is to say, the case where the free and full consent of at least one of the parties to a marriage is lacking, has gained the attention of the international community.”

² The provisions reads in full:

Reaffirming that all States, including those which have or assume responsibility for the administration of Non-Self-Governing and Trust Territories until their achievement of independence, should take all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring, inter alia, complete freedom in the choice of a spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty, establishing appropriate penalties where necessary and establishing a civil or other register in which all marriages will be recorded.