

A “Margin of Appreciation” for “Marriages of Appreciation”: Reconciling South Asian Adult Arranged Marriages with the Matrimonial Consent Requirement in International Human Rights Law

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INTRODUCTION

Manju was a twenty-one-year-old Indian female studying art in California. Jagdesh—an ever-docile eldest son at twenty-four and recent engineering graduate—had started learning the ins and outs of his father’s import-export business. Both were educated, both enjoyed cosmopolitan upbringings. (Manju was born

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in Nigeria and raised in Hong Kong; Jagdesh moved from New York to the Philippines, where he spent most of his formative years.) Both came from respectable, well-to-do families. And, at a time when the future seemed an open book and life pregnant with possibilities, both were *told* that they would be a good match and should marry. After listening to her mother's pleas—"If you wait too long, you'll be in the same position as your two sisters and won't be able to get a boy" and "I just want the best for you"—and meeting her prospective groom, Manju somewhat hesitantly agreed to the arrangement. Then, before she could even process the momentous production awaiting her—the purchase of rich, silk saris, night after night of prenuptial parties, the lavish, henna-stained, three-day marriage ceremony—news of the engagement spread like wildfire among Sindhi families from Manila to London to Lagos.

Manju and Jagdesh are my parents. At twenty-three years old—a year shy of the age when my father married—I came across a rather curious provision of the International Covenant on Civil and Political Rights: "No marriage shall be entered into without the free and full consent of the intending spouses."¹ My eyes burned into the seemingly innocent phrase "FREE and FULL," magnifying it by the second. As my stomach lurched and my hands began fidgeting, a chilling question invaded and slowly consumed my mind: "Am I the product of a human rights violation?"

Adult arranged marriages—broadly defined as unions "in which people other than the bride and groom, typically parents or other family members, play important or decisive roles in determining who marries whom"²—present a unique, gray-zone situation, falling somewhere between forced marriages, in which the consent of the prospective spouses (often children) is wholly absent,³ and "love" or choice marriages where third-party involvement is kept to a minimum.⁴ This quasi-theoretical, quasi-anecdotal Note will thus explore the human rights implications of South Asian adult arranged marriage practices.⁵

1. International Covenant on Civil and Political Rights art. 23(3), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

2. Monisha Pasupathi, *Arranged Marriages: What's Love Got To Do with It?*, in *INSIDE THE AMERICAN COUPLE: NEW THINKING/NEW CHALLENGES* 211, 214 (Marilyn Yalom & Laura L. Canstensen eds., 2002).

3. Loosely defined, a child marriage is a union in which at least one of the intended spouses is less than eighteen years old. See Convention on the Rights of the Child art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] ("[A] child means every human being *below* the age of eighteen years unless under the law applicable to the child, majority is attained earlier." (emphasis added)). For more information on child marriages, see GEORGE P. MONGER, *MARRIAGE CUSTOMS OF THE WORLD: FROM HENNA TO HONEYMOON* 62–64 (2004); JAYA SAGADE, *CHILD MARRIAGE IN INDIA: SOCIO-LEGAL AND HUMAN RIGHTS DIMENSIONS* (2005); Jeff Timmerman, *When Her Feet Touch the Ground: Conflict Between the Roma Familistic Custom of Arranged Juvenile Marriage and Enforcement of International Human Rights Treaties*, 13 *J. TRANSNAT'L L. & POL'Y* 475 (2003).

4. A love marriage is "based on romantic attraction, arranged by bride and groom." Pasupathi, *supra* note 2, at 214. Kalman D. Applbaum stresses that "only the two principals, ideally, need be involved" in this type of marriage. See Kalman D. Applbaum, *Marriage with the Proper Stranger: Arranged Marriage in Metropolitan Japan*, 34 *ETHNOLOGY* 37, 37 (1995).

5. An "adult," for purposes of this Note, is eighteen years old or above. See CRC, *supra* note 3, at art. 1; see also GOVERNMENT OF INDIA, LAW COMMISSION OF INDIA, PROPOSAL TO AMEND THE PROHIBITION OF

More specifically, it seeks to determine whether such marriages (or at least a subset thereof) deserve a “margin of appreciation”—a degree of laxity afforded to cultural practices that do not clearly collide with core human rights.⁶ In pursuit of this goal, the Note will take on the following structure: Part I provides an overview of arranged marriage practices in South Asia; Part II gives a brief account of human rights provisions enshrining some form of a “free and full” consent requirement; and, finally, Part III offers a textualist and purposivist analysis of the provisions.

This Note argues that arranged marriages do not merit blanket condemnation as an “oppressive” and “anachronistic” practice.⁷ Though they may not satisfy the *plain language* of various human rights instruments (arguably even love marriages involve a degree of coercion that undercuts “free and full” consent), they could be consistent with the consent requirement when the “free and full” language is interpreted in light of its potential *purposes*. These purposes include: (1) protecting the right to love/care for one’s partner and (2) respecting one’s self-sovereignty *and* family *while* avoiding exploitation or a situation akin to slavery. Ultimately, those who oppose arranged marriages may be engaging in unwarranted interventionism. That is, they are futilely trying to save individuals from a paternalism that could prove beneficial in terms of the *result* it produces (that is, love—whether romantic or understood in a broader sense) and/or the decision-making *process* it drives (that is, consent by knowledgeable and concerned proxy). The arranged marriages borne from this benevolent paternalism are essentially marriages of appreciation, and, as such, they merit a “margin of appreciation.”

CHILD MARRIAGE ACT, 2006 AND OTHER ALLIED LAWS, Rep. No. 205, Feb. 2008, at 10, *available at* lawcommissionofindia.nic.in/reports/report205.pdf [hereinafter Government of India Proposal] (remark- ing that the prevailing international standard for marriage is eighteen years old). In India, the current minimum marrying age is eighteen for women and twenty-one for men. Government of India Proposal, *supra*, at 10.

6. I use this term more as a rhetorical device than for its technical meaning in international human rights law: a “degree of leeway allowed to States by [the European Commission of Human Rights and European Court of Human Rights] when it falls to be decided whether the States have complied with European Convention obligations.” Ann Sherlock, Book Review, 46 INT’L & COMP. L.Q. 488, 488 (1996) (reviewing HOWARD CHARLES YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996)); *see also* Aaron A. Ostrovsky, *What’s So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights Within Cultural Diversity and Legitimises International Human Rights Tribunals*, 1 HANSE L. REV. 47, 48 (2005) (defining “margin of appreciation” as “an interpretational tool by which the [European Court of Human Rights] can delineate between what is properly a matter for each community to decide at the local level and what is so fundamental that the same requirements are imposed on every State, regardless of variations in culture”). Still, to the extent that “margin of appreciation” pertains to state action, it should also technically apply to individual, personal relationships in which the state plays a role. As a state-enforced custom, adult arranged marriages are a prime example of such relationships.

7. For a negative depiction of arranged marriage, see Kalwant Bhopal, *South Asian Women and Arranged Marriages in East London*, in *ETHNICITY, GENDER, AND SOCIAL CHANGE* 117, 117–34 (Rohit Barot et al. eds., 1999).

I. SOUTH ASIAN ARRANGED MARRIAGE PRACTICES

“It wouldn’t be a stretch to say that *shaadi*, the word for marriage in many Indian languages, is the first word a child understands after *mummy* and *papa*. To an Indian, marriage is a matter of karmic destiny.”⁸

As the above quote indicates, marriage occupies a central role in South Asian culture and tradition, joining not only the two intending spouses, but also their respective families in a permanent bond.⁹ Arranged marriages have long been the preferred and prevalent form of alliance building throughout the subcontinent,¹⁰ with sacred texts and their adherents stigmatizing self-chosen unions as “born of desire.”¹¹ This ritual is not monolithic, however; the mode of arrangement varies depending on an individual’s family, caste, and religion, among other factors.¹² For clarity and simplicity’s sake, this Note will focus on two broad classes of arranged marriage practices: traditional and contemporary (or “semi-arranged”).

A. TRADITIONAL ARRANGED MARRIAGES

In the more traditional form of arranged marriage, parents and even extended family members search for prospective marriage candidates and make an ultimate decision on behalf of the adult children.¹³ As Anita Jain observes, those entering the marriage “ha[ve] no choice for a partner; the only choice [is] how hard they’d work to be happy.”¹⁴ Though historically women have had less say in marriage arrangements (giving rise to the arranged-marriage opponents’

8. Anita Jain, *Is Arranged Marriage Any Worse than Craigslist?*, N.Y. MAG., Mar. 28, 2005, <http://nymag.com/nymetro/news/culture/features/11621/>.

9. See Sophia Kazmi, *Ancient Practice Evolves with Modern Times*, OAKLAND TRIB., Feb. 28, 2007, http://findarticles.com/p/articles/mi_qn4176/is_20070228/ai_n18637555 (“In a traditional society that values the collective and the family . . . marriage is just larger than two individuals.” (quoting Margaret Abraham, sociology professor at Hofstra University in New York)).

10. The concept of arranged marriages began in the Vedic period in Indian history, 9000 to 2000 B.C. Sarwat B. Waraich, *Arranged Marriages: An East to West Exploration of Pakistani Female Immigrants’ Experiences of Marital Satisfaction, Loss, Acculturation, and Coping* 13 (Apr. 10, 2001) (unpublished Ph.D. dissertation, California School of Professional Psychology, Alliant University) (on file with Alliant International University Libraries). “As many as 80 percent of cultures outside the Western sphere employ arranged marriage practices . . .” Pasupathi, *supra* note 2, at 214.

11. Rabindranath Tagore, *The Indian Ideal of Marriage*, in *THE BOOK OF MARRIAGE: A NEW INTERPRETATION BY TWENTY-FOUR LEADERS OF CONTEMPORARY THOUGHT* 98, 108 (Hermann Keyserling ed., 1926); see MONGER, *supra* note 3, at 152.

12. See Ratna Kapur, *Monsoon in a Teacup: In India, Arranged Marriages Are Uncontroversial. In Britain, They’re Causing a Stir*, 2002-OCT LEGAL AFF. 46, 47 (“Arranged marriages look different when performed by upper-caste Brahmans or Hindu nationalists.”).

13. See Pasupathi, *supra* note 2, at 218.

14. Jain, *supra* note 8. Traditional Japanese mate selection mirrors this South Asian practice. See ROBERT O. BLOOD, JR., *LOVE MATCH AND ARRANGED MARRIAGE: A TOKYO-DETROIT COMPARISON* 4–5 (1967) (noting that “marriage established bonds between families” and “was a family affair for middle and upper classes”; “love affairs were unheard of except in the lower classes”).

“women as property” concern¹⁵), this lack of choice in mate selection—especially today—applies more or less equally to both genders. Monisha Pasupathi critically notes that the real inequity here “revolves around power differentials between children and parents.”¹⁶ At first glance, this generational disparity may seem to invite an even bigger problem—now *both* adult children appear to be mere instrumentalities at their parents’ disposal. However, as this Note will show, marriage-arranging is not so nefarious a process; rather, it is “better characterized as treating both sons and daughters as parts in a collective whole,”¹⁷ with the collective’s longevity often riding on that of the couple.

Hoping to ensure the future couple’s compatibility, the collective (that is, the family) seeks to match the spouses on the basis of several criteria:¹⁸ caste, class, family, occupation, education, appearance, and familial economics, such as dowry.¹⁹ Sikander Lal Sandhir, an Indian parent looking for a wife for his son, devised a rather intricate ranking system (that *The Washington Post* aptly deemed the “Sandhir Scale”) in which he gives “points for education and professional accomplishment: three for an MD or MBA, two for a CPA, one for a bachelor’s degree . . . a point if [the woman] is a Punjabi Hindu . . . a point for desirable family background,” and up to four points for “[v]arious physical

15. See Pasupathi, *supra* note 2, at 231.

16. *Id.* at 228. Gender inequity is more at issue in the case of forced marriage, with women (mostly young girls) literally being sold to willing, often older men. See MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 24–30 (2000) (discussing the persistence of gender inequality in the context of child marriages, domestic violence, and rape in India). But see AMRIT WILSON, FINDING A VOICE: ASIAN AMERICAN WOMEN IN BRITAIN 117 (1978) (“[Arranged marriage] is an essential part of the gigantic and oppressive framework of the joint family which has for so many generations kept women in subjugation.”); but see also Shibani Ivy Das, Strangling the Female Voice: Silencing Mechanisms in Indian Women’s Discourse on Arranged Marriage 43 (1999) (unpublished M.A. thesis, North Carolina State University) (on file with North Carolina State University Libraries) (“The system of arranged marriage promotes and maintains women’s status as marginalized members through ideologies that silence them into submission or that make their voices echo patriarchal motives.”).

17. Pasupathi, *supra* note 2, at 231.

18. *Id.* at 221–22. Guided by the saying “bamboo door is to bamboo door as wooden door is to wooden door,” the Chinese take a similar approach to arranged marriage. See MONGER, *supra* note 3, at 13. These criteria are also used in South Asian semi-arranged marriages. See *infra* notes 37–47 and accompanying text.

19. The present-day importance of dowry—traditionally known as the money or goods that a bride brings to her husband’s family—is unclear. Though Indian courts banned the practice in 1961, Nilufer P. Medora claims that the dowry is still widespread. See Nilufer P. Medora, *Mate Selection in Contemporary India: Love Marriages Versus Arranged Marriages*, in MATE SELECTION ACROSS CULTURES 209, 223 (Raean R. Hamon & Bron B. Ingoldsby eds., 2003). A young Indian-American (“Paul”) interviewed in a Massachusetts Institute of Technology study affirms that money and socio-economic status remain important in India. Loyda Rodríguez, *Arranged Marriages Among First Generation Indian Americans* 26 (May 11, 1993) (unpublished B.A. thesis, Massachusetts Institute of Technology) (on file with author). However, an interviewee in the film *Modern Brides* asserts that present-day forms of “dowry” do not have the negative, gendered connotation of their predecessors. In many Indian states, *both* families exchange household gifts, and an adult child’s education is valued just as highly as (if not higher than) material possessions. Videotape: *Modern Brides* (Luchsinger Productions 1985) (on file with the University of Wisconsin) [hereinafter *Modern Brides*]. Indeed, one can conceptualize today’s dowry practices, like the gift-exchange, as a form of insurance that the respective families will take care of the parties to the arranged marriage.

attributes—slimness, height, fair skin, general attractiveness.”²⁰ Notably, these investigations into a prospect’s qualifications can become more important and intrusive when that individual was born or resided at length in the United States: “from what he eats for breakfast, to the clothes [s]he wears, to whether or not [s]he had dated [an] American”²¹ In one case, a concerned Indian father even called a prospective suitor’s employer in San Francisco to collect his work information.²²

The marrying agent’s well-wishers use these criteria as they conduct the basic search for a spouse.²³ Most commonly (especially in rural areas), parents rely on a word-of-mouth network, sending a family relative to look for or inquire after a seemingly suitable bride or groom and that person’s family.²⁴ Though less frequent today, “marriage bazaars”—sites where parents interested in marrying their adult children could meet other sets of parents—also offer a means of negotiating marriage deals (often within that very day!).²⁵ In recent years, primarily upper-class, Westernized, and educated families have taken to placing matrimonial advertisements in newspapers like *Times of India*, with the goal of attracting a wide readership. The following are examples of typical advertisements:²⁶

ALLIANCE INVITED from North Indian Hindu gentlemen [sic] based in US/Canada for tall, slim, beautiful, 28yr., educated, professionally employed, Girl has East/West values. Respond to matrisearch01@yahoo.com with bio-data/photo.

SEEKING ALL pretty professional [sic] with Indian values for very handsome Jat-Sikh boy, 26, 6’4” clean shaven, software engineer, six figures, from very well connected, affluent and high status family. Returnable photograph to PO Box M-9145 c/o India-West or ruby_2000@yahoo.com.

20. Paula Span, *Marriage at First Sight*, WASH. POST, Feb. 23, 2003, at W16, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A32226-2003Feb19¬Found=true>.

21. Rodríguez, *supra* note 19, at 13.

22. Kazmi, *supra* note 9.

23. See Amitrajeet A. Batabyal, *STOCHASTIC MODELS OF DECISION MAKING IN ARRANGED MARRIAGES 2* (2006).

24. Liann N. Seiter, *Arranged Marriages in India: A Conversation with Rural Women About Their Beliefs, Perceptions, and Feelings* 38 (April 2006) (unpublished B.A. thesis, Brigham Young University) (on file with Harold B. Lee Library, Brigham Young University).

25. Videotape: *Saheri’s Choice* (Films for the Humanities 1998) (on file with Gleeson Library, University of San Francisco).

26. Medora, *supra* note 19, at 217. Parents may run these ads secretly as was the case with Sarita James’s parents. Without their daughter’s knowledge, they put a marital ad in a major Indian newspaper that included her “vital statistics”—“5-foot-6, 22 years old, slim, pretty, Ivy-League-educated girl”—along with their personal email address for responses. James eventually learned of the ad and, though “impressed by her parents’ audacity,” asked them to take it down. See Sarita James, *Mom, Dad, Let Me Find My Own Husband*, N.Y. TIMES, May 28, 2006, http://www.nytimes.com/2006/05/28/fashion/sundaystyles/28love.html?_r=1&oref=slogin.

Parents on the prowl also take advantage of the technology available in this modern, Internet age. For example, they can create profiles for their adult children on matrimonial sites like Shaadi.com and BharatMatrimony.com. Using the filtering functions on these popular websites, parents can narrow down prospects to those who match their regional, language, caste, and dietary demands. Unbeknownst to Tali Kapadia—a twenty-eight-year-old graduate student at Columbia University—her mother had undertaken such an Internet search: Mrs. Kapadia surfed Shaadi.com for Gujarati men in the New York area, created a profile for Tali, and fielded responses from prospective suitors. She only told Tali about the online search when she found a man that she liked.²⁷

Once they have identified a decent prospect, Hindu families in particular will consult an astrologer to confirm that the two prospective partners are well suited for each other.²⁸ This step is particularly important because of the strong belief in destiny and the “celestial forces of the universe.”²⁹ According to Shoba Narayan, “[a]strologers look for balance and cyclicity, so that the woman’s strengths balance the man’s weaknesses and vice versa.”³⁰ They may also determine a union’s auspiciousness by assigning points (or *gunas*) to a couple’s mental and physical compatibility, ability to deal with crises, longevity of attraction between the partners, and longevity of life of each partner.³¹ If partners score less than eighteen points, the match is rejected; if they score more than thirty-two points, the match is supposed to be excellent.³²

The partners in a traditional arranged marriage rarely, if ever, get to see each other before their marriage ceremony.³³ In recounting the story of her father’s marriage, Jain noted that “he lost sight of [my mother] at a bazaar the day after their wedding and lamented to himself that he would never find her again, as he’d forgotten what she looked like.”³⁴ Even present-day traditional weddings may feature the “ceremony of first look”—wherein the bride and groom coyly set their eyes upon one another for the first time.³⁵ Though a Westerner may find the apparent overtones of parental constraint and control unsavory, traditional marriages are “alive and well in India.”³⁶

27. See Jocelyn Voo, *Arranged Marriage Gets High-Tech Twist*, CNN, Apr. 23, 2008, <http://www.cnn.com/2008/LIVING/personal/04/23/web.arranged.marriages>. The article also notes that adult children frequently use these sites to carry on their own searches. *Id.*; see also Kazmi, *supra* note 9.

28. Medora, *supra* note 19, at 218.

29. *Id.*

30. Shoba Narayan, *Close to Home: When Life’s Partner Comes Pre-Chosen*, N.Y. TIMES, May 4, 1995, <http://query.nytimes.com/gst/fullpage.html?res=990CE1DF123EF937A35756C0A963958260>.

31. Medora, *supra* note 19, at 218–19.

32. *Id.*

33. Modern Brides, *supra* note 19.

34. Jain, *supra* note 8.

35. Videotape: *Arranged Marriages* (Filmmakers Library 2001) (on file with Milne Library, SUNY College at Geneseo) [hereinafter *Arranged Marriages*].

36. Jain, *supra* note 8; see also Waraich, *supra* note 10, at 15 (“[T]raditional arranged marriages . . . is [sic] still largely practiced on South Asian continents.”).

B. CONTEMPORARY ARRANGED MARRIAGES

The more contemporary variant, prevalent among young adults belonging to the urban middle-class in both India and abroad, is known as a “semi-arranged” or “arranged introduction” marriage.³⁷ Likened to a “parental dating service,”³⁸ a semi-arranged marriage involves parents finding prospective mates for their adult children and then consulting their children in the decisionmaking process. The children may even have the power to reject a potential marriage.³⁹ Notwithstanding the child’s considerable input in this type of arranged marriage, the practice differs significantly from merely being set up on a date: parents and extended family members have a large say in deciding who gets through initial vetting;⁴⁰ both sets of parents establish contact with one another;⁴¹ meetings between the prospective spouses are frequently chaperoned and carry an expectation of commitment;⁴² parents exert pressure on their children to make a decision by a certain date (often the second or third meeting);⁴³ and both parties recognize that the sole purpose of the meeting is marriage.⁴⁴

Vibha Jasani’s semi-arranged marriage—reported in a fairly recent *Washington Post* article—exemplifies how parents continue to exert influence and pressure over their adult children’s courtships and marriage plans. Her uncle prescreened a hundred suitors who had responded to local newspaper advertisements and narrowed them down to thirty men. When each came to her uncle’s house, her mother and uncle chatted with the potential bridegroom as Vibha served refreshments. Then, she would briefly meet with the man in a separate room. “After each session, her family wanted to know how she liked the latest candidate, whether she wanted to get engaged, ‘like [she] was going to decide on the spot.’”⁴⁵

Sabiha Ansari underwent a similar experience in 1991. Anxious that she get married, her parents flew her to India where she met her husband-to-be for less

37. Medora, *supra* note 19, at 218; Span, *supra* note 20. Contemporary Japanese mate selection resembles this practice. See BLOOD, *supra* note 14, at 11 (noting that in Japan the two generations collaborate, with parents exerting pressure on their children and the latter varying in their ability to resist).

38. Rodríguez, *supra* note 19, at 20, 22; Span, *supra* note 20.

39. M.F. Small studied the 106 societies practicing arranged marriages and found some form of “veto” power in fifty percent of them. See Pasupathi, *supra* note 2, at 228; see also MONGER, *supra* note 3, at 13 (“[I]n some cultures the couple have a right of veto.”).

40. Medora, *supra* note 19, at 216.

41. Span, *supra* note 20.

42. Medora, *supra* note 19, at 217; Pasupathi, *supra* note 2, at 217. Even when adult children attend “matrimonial banquets”—a form of “speed dating” (or perhaps “speedy engagement”) for South Asian singles—their mothers frequently “s[i]t at the back of the room, watching every move.” Kazmi, *supra* note 9.

43. Lizette Alvarez, *Arranged Marriages Get a Little Rearranging*, N.Y. TIMES, June 22, 2003, <http://query.nytimes.com/gst/fullpage.html?res=9D0CE5D9173BF931A15755C0A9659C8B63>; see also Kazmi, *supra* note 9 (“[T]here is little time to get to know each other before deciding to wed.”).

44. Medora, *supra* note 19, at 217.

45. Span, *supra* note 20.

than twenty minutes. Her family, present throughout the meeting, immediately asked her whether she found him suitable. Though Sabiha accepted the match and was married five days later, she explained that the decisionmaking process “was really hard on me . . . I kind of wanted to have some time *alone* with him to talk to him, or even on the phone.”⁴⁶

An Indian-American graduate student and respondent in a Massachusetts Institute of Technology (MIT) research study further confirmed the idea that parents maintain a key role in the semi-arranged process: “If I’m attracted to somebody I would let them [my parents] know. You always go through your parents. Then my parents would talk to his parents.”⁴⁷ Thus, even though adult children now have a greater say in spouse selection, the extended family’s importance in these crucial decisions remains a constant.

II. THE MARITAL CONSENT REQUIREMENT IN INTERNATIONAL HUMAN RIGHTS LAW

“No marriage shall be entered into without the *free and full* consent of the intending spouses.”⁴⁸

The “free and full consent” requirement—the source of my anxiety as relayed in this Note’s introduction—appears in various human rights instruments. Even before the United Nations (UN) General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights of 1948 provided that both potential spouses should freely and fully consent to their marriage.⁴⁹ Importantly, the Universal Declaration “was not generally conceived of as law but as a[n] [aspirational,] ‘common standard of achievement . . .’”⁵⁰ Following its near-unanimous adoption, governments were thus eager to convert the Declaration into *binding* legal norms. Turning that seminal document into convention proved an uphill battle, however.⁵¹ The democratic-libertarian and socialist-revolutionary states, in particular, clung steadfastly to their polar conceptions of the relation of society to the individual and the individual’s right and duties, and had divergent priorities and preferences.⁵² Finally, after eighteen long years, the various states agreed on two covenants that “accommodate[d], bridge[d], submerge[d], and conceal[ed] deep divisions and differences.”⁵³

46. Voo, *supra* note 27 (emphasis added).

47. Rodríguez, *supra* note 19, at 23.

48. ICCPR, *supra* note 1, at art. 23(3) (emphasis added).

49. See Universal Declaration of Human Rights, G.A. Res. 217A, at art. 16 (2), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

50. See Louis Henkin, *Introduction to THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 9 (Louis Henkin ed., 1981).

51. See *id.* at 9–11.

52. *Id.* at 10–11. Delays also resulted from “sharp differences over the inclusion or scope of particular rights,” such as the right to self-determination. *Id.* at 10.

53. *Id.* at 9–10.

A product of this contentious process, the ICCPR was drafted in terms of *individual* rights, adopted in 1966, and binding on state parties thereafter.⁵⁴ The UN Human Rights Committee—that is, the body that monitors the ICCPR’s implementation—refers to “rights” in Article 10 of the ICCPR and specifically to the “right” to enter into marriage with full and free consent. Thus, though state parties to the ICCPR are otherwise provided broad discretion in regulating the law of marriage and family in accordance with their respective social and cultural concepts, they must protect the individual’s freedom to enter into marriage against undue interference by state organs and private parties (with parents and extended families being included in the latter category).⁵⁵ Moreover, the Committee states that the requirement to “give effect” to the ICCPR, which includes the Article 23(3) “free and full” consent provision, “is unqualified and of immediate effect.”⁵⁶ If an individual believes that his or her rights under the ICCPR have been violated and he or she has exhausted all domestic remedies, the first Optional Protocol to the ICCPR allows that person to submit written communications to the Human Rights Committee.⁵⁷

Slight variations of the matrimonial consent requirement can also be found in two subject-area-specific UN conventions: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (hereinafter “Convention on Consent to Marriage”).⁵⁸ Interestingly, the conventions’ enforcement mechanisms differ markedly: whereas CEDAW has a formal

54. The other covenant adopted in 1966—the Covenant on Economic and Cultural Rights—speaks only to states. *See, e.g.*, International Covenant on Economic, Social and Cultural Rights art. 6, Dec. 16, 1966, 993 U.N.T.S. 3 (“The *State Parties* to the present Covenant recognize the right to work . . .”) (emphasis added).

55. *See* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 414–15 (1993).

56. *See* RICHARD B. LILlich ET AL., INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 369 (4th ed. 2006).

57. Optional Protocol to the International Covenant on Civil and Political Rights art. 2, Mar. 23, 1976, 999 U.N.T.S. 302. For an individual to use this procedure, his or her country must be party to the ICCPR and Protocol. *Id.* at art. 1. Some commentators have deemed the ICCPR’s enforcement mechanisms to be rather weak. *See, e.g.*, PETER W. EDGE, CHRISTOF H. HEYNS & FRANS VILJOEN, LEGAL RESPONSES TO RELIGIOUS DIFFERENCE 37 (2002). Though state parties are required to report on the measures they have taken to “give effect” to their ICCPR obligations, they often submit reports late and put them in abstract, formalized terms that reduce the reports’ value as an accurate statement of the situation within the jurisdiction. *Id.* Additionally, under the First Optional Protocol, the Committee’s views regarding individual or group complaints are “not to be understood as strictly binding in law and cannot be enforced.” *Id.*

58. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, Dec. 9, 1964, 521 U.N.T.S. 231 [hereinafter Convention on Consent to Marriage]. Notably, the Indian government has banned child marriages, reasoning that children presumptively cannot give informed consent. There is, however, no Indian equivalent of the broad, generally applicable “free and full” consent requirement found in the international instruments.

complaints and inquiry procedure monitored by the CEDAW Committee,⁵⁹ the Convention on Consent to Marriage delegates enforcement power to each state party individually with no international supervisory body.⁶⁰ Despite this notable practical difference, the provisions of both conventions—including the one regarding marital consent—are legally binding in theory on their respective state parties.⁶¹

Article 16 of CEDAW states that both future partners should have “[t]he same right to . . . enter into marriage only with their free and full consent.”⁶² It further instructs all states that have ratified the Convention to take appropriate measures to abolish discrimination against women in connection with marriage and family circumstances, including requiring authorities to ensure that both women and men have the “right freely to choose a spouse.”⁶³ Similarly, the Convention on Consent to Marriage—though more expressly concerned with the parties’ ages rather than gender inequities—affirms that marriage should be founded on “full and free consent”⁶⁴ given by men and women of “full age.”⁶⁵

Unlike CEDAW, however, the Convention on Consent to Marriage includes a curiously near-contradictory bit of diplomatic double-speak. The Preamble of the Recommendation on the Convention on Consent to Marriage *also* recognizes that “the family group should be strengthened because it is the basic unit of every society, and that men and women of full age have the right to marry

59. Both procedures are codified in CEDAW’s Optional Protocol. Optional Protocol to the Convention on the Elimination of Discrimination Against Women, G.A. Res. A/54/4, Annex, U.N. Doc. A/54/49 (Oct. 6, 2000). The communications procedure gives individuals and groups of women the right to complain in writing to the CEDAW Committee. *Id.* at art. 2, 3. Through the inquiry procedure, the Committee can conduct inquiries into grave or systematic abuses perpetrated by state parties to CEDAW. *Id.* at art. 8(1). Another method of enforcing CEDAW is through the “interstate procedure,” whereby two or more state parties can refer disputes about the interpretation and implementation of CEDAW to arbitration. CEDAW, *supra* note 58, at art. 29; *see also* Convention on the Elimination of All Forms of Discrimination Against Women: Why an Optional Protocol?, <http://www.un.org/womenwatch/daw/cedaw/protocol/why.htm> (last visited Oct. 4, 2008) (describing this process and calling it an “interstate procedure”). If the Committee cannot settle the dispute, it can refer that matter to the International Court of Justice. CEDAW, *supra* note 58, at art. 29. This procedure has never been used. Convention on the Elimination of All Forms of Discrimination Against Women: Why an Optional Protocol?, <http://www.un.org/womenwatch/daw/cedaw/protocol/why.htm> (last visited Oct. 4, 2008).

60. The Convention on Consent to Marriage may lack a more developed enforcement mechanism because its adoption pre-dated the ICCPR, which set in motion a “standard” international complaints procedure.

61. One hundred eighty-five states, representing over ninety percent of the UN’s membership, are party to CEDAW. Convention on the Elimination of All Forms of Discrimination Against Women: State Parties, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Aug. 2, 2008). The Convention on Consent to Marriage has fifty-four state parties. Multilateral Treaties Deposited with the Secretary General, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVI/treaty3.asp> (last visited Aug. 2, 2008).

62. CEDAW, *supra* note 58, at art. 16.

63. *Id.*

64. Convention on Consent to Marriage, *supra* note 58, at art. 1(1).

65. *Id.* at pmbl.

and to found a family.”⁶⁶ Thus, it calls for a fully consensual marriage *and* the strengthening of the family, where—as will be discussed below—proponents of arranged marriages fervently believe that only arranged marriages are both good for the (extended) family as a whole *and* uphold the dignity of the individual spouses.

Although no judicial body exists to enforce the ICCPR or UN conventions—and their current enforcement mechanisms arguably lack teeth—the theoretical question remains whether adult arranged marriages are consistent with this often-repeated consent requirement, which is presumably essential to safeguarding human rights. And, for those who have been party to or the product of such marriages (like me), this question carries special moral significance, potentially affecting one’s sense of personal honor and self-worth. What may seem to be mere words on paper, then, can actually emerge as the source of a scarlet letter, a stigma that one bears for life.

III. ACCOMMODATING ADULT ARRANGED MARRIAGES WITHIN THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

“[U]niversality [of human rights] cannot mean total uniformity.”⁶⁷

This Part seeks to ascertain whether adult arranged marriages are reconcilable with the aforementioned human rights provisions. It will first attempt to glean the provisions’ ordinary meaning from language alone and evaluate the marriage practices from this textualist perspective. Then, it will undertake a purposivist analysis, interpreting textual terms in light of likely purposes behind the provisions⁶⁸ and examining adult arranged marriages’ compatibility with each purpose in turn. It concludes that arranged marriages may be consistent with human rights norms from a purposive or “spirit of the law” standpoint even if they cannot survive a formalist or plain-language reading of the provisions.

A. TEXTUALIST APPROACH

“[T]o have an act at one and the same time free . . . and . . . caused by an external agency, is a contradiction in terms.”⁶⁹

66. Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, G.A. res. 2018 (XX), at pmb., 20 U.N. GAOR Supp. (No. 14) at 36, U.N. Doc. A/6014 (Nov. 1, 1965).

67. DAVID P. FORSYTHE & PATRICE C. McMAHON, HUMAN RIGHTS AND DIVERSITY: AREA STUDIES REVISITED 20 (2003) (emphasis added).

68. The Vienna Convention on Law of Treaties favors this approach. Specifically, Article 31 of Part III, § 3 (“Interpretation of Treaties”) calls for good-faith interpretation “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” Vienna Convention on the Law of Treaties pt. III, § 3 art. 31(1), Jan. 27, 1989, 1155 U.N.T.S. 331.

69. JOSEPH V. SANGMEISTER, FORCE AND FEAR AS PRECLUDING MATRIMONIAL CONSENT: AN HISTORICAL SYNOPSIS AND COMMENTARY 11 (1932).

A good textualist, carefully parsing the relevant provisions' language, could not ignore the very same (and repeated) adjectival phrase that initially struck me—"free and full." That language—modifying the nature of the parties' consent—appears unequivocal and unambiguous. Thus, a textualist would ask that we refrain from recognizing cultural practices where those practices contravene the *clear* dictates of human rights law. Marked by overt parental pressure and heavy-handedness, the traditional approach to arranging marriages seems to preclude the possibility of "free and full" consent on the adult children's part. Accordingly, one adopting this position would conclude that "[a]rranged marriages are an example of where the right of self-sovereignty *must* prevail over respect for the cultural practices of certain ethnic minorities."⁷⁰

Even an individual son or daughter's apparent willingness to enter either form of arranged marriage (that is, to consent to constraints or to choose a spouse of one's parents' choosing) might come under the staunch formalist attack. Caught up in the superlative phrase "free and full," the textualist would point to the background of parental influence—in the form of pre-screening, deadlines, and input—and argue that this subtle coercion has a tainting effect on the child's quality of choice. Textualists may go so far as to question the existence of "free and full" consent in a particular scene of *Monsoon Wedding*: Hemant Rai, a Houston-based engineer, tells his arranged bride-to-be from New Delhi (Aditi Verma) that he will "leave the choice [to marry] with you . . . the choice is yours."⁷¹ As an MIT study reported, parental oversight and expectations may impinge on the ability of an adult child, especially a woman, to use his or her "veto vote" freely.⁷² An unburdened choice—emanating solely, freely, and fully from the individual—would appear impossible in such a system. According to this reading, then, only "free market" or choice marriages—a hallmark of Western societies—meet the "free and full" requirement because "there is nothing to prevent men and women from taking spouses which do not meet their families' approval."⁷³

This plain-language line of argument is problematic in two respects. First, in the face of an unstated, orientalist assumption that the West is different from the East,⁷⁴ it ironically invalidates—as contrary to human rights norms and essentially barbaric—marriage practices common among Western-educated elites for centuries.⁷⁵

70. Patrick Parkinson, *Multiculturalism and the Regulation of Marital Status in Australia*, in *FAMILIES ACROSS FRONTIERS* 309, 313 (Nigel V. Lowe & Gillian Douglas eds., 1996) (emphasis added).

71. *MONSOON WEDDING* (USA Films 2002).

72. Rodríguez, *supra* note 19, at 30.

73. Robert W. Hodge & Naohiro Ogawa, *Arranged Marriages, Assortative Mating and Achievement in Japan* 4 (Nihon University Population Research Institute, Research Paper Series No. 27, 1986) (on file with author).

74. For a more comprehensive account of the theory of "Orientalism," see EDWARD M. SAID, *ORIENTALISM* 42 (1978). For a critique of "Orientalism" in the context of honor killings, see Lama Abu-Odeh, *Comparatively Speaking: The "Honor" of the "East" and the "Passion" of the "West,"* 1997 *UTAH L. REV.* 287, 306 (comparing honor killings in the Arab world with "heat of passion" crimes in the United States, and concluding that "the twain East and West, when it comes to violence against women, meet").

75. SANGMEISTER, *supra* note 69, at 27.

In Rome—the cradle of Western civilization—a legally valid marriage only required the consent of the *pater familias* (male figurehead), who negotiated the entire marriage arrangement.⁷⁶ Even after the shift in Roman law to demand the intending spouses' free and mutual consent, courts held valid a marriage concluded because of parental pressure.⁷⁷ Similarly, throughout most of history (from the twelfth to nineteenth century), the “highest ranks of European aristocracy . . . arranged marriages to forge family alliances” and maintain political dynasties.⁷⁸ Though the children of these elites may have argued against parental choice, they would generally bow to their parents' authority.⁷⁹

This social reality of arranged marriages was captured in the works of numerous writers, from Geoffrey Chaucer⁸⁰ to William Shakespeare⁸¹ to Jane Austen⁸² to Edith Wharton,⁸³ all of whom (sometimes not so subtly) advocated love or companionate unions. In *The Tempest*, for example, Shakespeare describes how King Prospero carefully engineers a romance between his daughter, Miranda, and a rich suitor named Ferdinand while letting his child believe that she closed the deal herself.⁸⁴ The master playwright's “generic shift to comedy assists the audience in accepting a marriage arranged for state purposes” at a time when the valuing of romantic love was gaining a foothold among the masses.⁸⁵ Notwithstanding the gradual ascent of the love marriage, aristocratic families in modern Europe—concerned particularly about eugenics and progeny—persisted in rigorously regulating their children's personal inclinations for marriage partners.

Today, various ethnic and religious groups within the West continue to arrange marriages, bearing in mind family status, social standing, intelligence, and appearance, among other factors. Hasidic Jews, for example, employ a

76. *Id.* at 27.

77. *See id.* at 29 (observing that the “absence of dissent rather than express consent was sufficient for espousal” in Roman society).

78. *See* MONGER, *supra* note 3, at 14.

79. *See id.*

80. *See* Nancy Wells Woodward, *The Themes of the Arranged Marriages and Marital Disparity in THE CANTERBURY TALES* (July 1970) (unpublished M.A. thesis, Louisiana State University) (on file with Earl K. Long Library, Louisiana State University). According to Woodward, Chaucer's primary concern with arranged marriages was the ill-matching of the spouses (leading to marital disparity). *Id.* at 6, 36. Thus, he might not have objected to South Asian arranged marriages in light of how they strive to ensure a couple's compatibility.

81. *See* Suzanne Gossett, “*I'll Look To Like*”: *Arranged Marriages in Shakespeare's Plays*, in *SEXUALITY AND POLITICS IN RENAISSANCE DRAMA* 57, 57–74 (Carole Levin & Karen Robertson eds., 1991).

82. Marriage is a critical theme in all of Austen's classic works: *Emma*, *Sense and Sensibility*, *Pride & Prejudice*, and *Mansfield Park*, among others.

83. *See* Elizabeth Ammons, *The Business of Marriage in Edith Wharton's The Custom of the Country*, 16 *CRITICISM* 326–38 (1974). Wharton herself was the subject of an arranged marriage. Edith Wharton: A Documentary Film, <http://www.edithwhartonfilm.com/about.html> (last visited Aug. 2, 2008).

84. *See* Gossett, *supra* note 81, at 68–69.

85. *Id.* For information on the rise of Romanticism, see Gossett, *supra* note 81, at 69 and Taline Katchinguian, *Arranged Marriages* 40–42 (July 2005) (unpublished M.A. thesis, Pacific Oaks College) (on file with Pacific Oaks Library).

shidduch—a matchmaking approach that bears a striking resemblance to South Asian arranged marriage practices: family members make inquiries about prospective partners for their adult children, possibly seek the assistance of a professional *shadchan* (matchmaker), and then chaperone any meetings between the intended spouses.⁸⁶ In some Hasidic sects, couples might only see each other once before they marry.⁸⁷ Though acknowledging that arranging marriage is not without its flaws (even instances of abuse), one recently wed Lubavitch⁸⁸ woman nonetheless maintained that, “this is the system we know and trust, the way we couple, and the way we learn to love.”⁸⁹

Certain evangelical Christian groups in the United States also engage in marriage-arranging practices that mirror those common to South Asia. The “courtship” or “betrothal” movement, which has been on the rise since the 1990s (particularly within the home-school community),⁹⁰ rests on the belief that young adults should rely on God and their parents, rather than their own romantic feelings, to find their ideal mate.⁹¹ Under this system, Christian parents—like their South Asian counterparts—are not only particularly well-suited to evaluating marriage candidates, but also have a religious (purportedly biblically given) authority over even *adult* children. Rich Murphy, a member of a Protestant group called “Marantha Life,” describes the “courtship” process as follows:

If either they [the children], or us [sic] as parents see a possibility in someone, we will mention it. Then we [the parents] will investigate that person, to find out everything we can about them and their family. If they still look like a possible candidate for marriage after this investigation, we will go together to talk with that possible mate and his or her parents. Together, the two families will seek God’s will in the matter. If the couple seems compatible, and everyone is in agreement that it is God’s will, then, and only then, will wedding plans be made.⁹²

86. Rebecca Segall, *Sikh and You Shall Find: The American Face of Arranged Marriage*, VILLAGE VOICE, Dec. 15, 1998, <http://www.villagevoice.com/news/9850,segall,2082,1.html>.

87. *Id.*

88. Lubavitch (or Chabad-Lubavitch) is a sect of Hasidism, which in turn is a subset of Ultra-Orthodox (or *Haredi*) Judaism. Unlike many other Hasidic sects (such as Satmar or Belzer), the Lubavitchers go out into the world and try to get non-religious Jews interested in Judaism. Jewish Dictionary, <http://www.techhouse.org/dj/terms.html> (last visited Oct. 4, 2008).

89. Segall, *supra* note 86.

90. According to Reverend S.M. Davis of Park Meadows Baptist Church in Lincoln, Illinois, “[h]undreds of evangelical churches across the country, but by no means a majority, teach Christian courtship.” Tom Heinen, *For Devout Couples, Love Is Divine*, MILWAUKEE J. SENTINEL, Feb. 11, 2006, <http://www.jsonline.com/story/index.aspx?id=400999>. Perhaps because courtship prizes parental involvement, home-school parents, in particular, are supporters of the practice. See SARA DIAMOND, NOT BY POLITICS ALONE: THE ENDURING INFLUENCE OF THE CHRISTIAN RIGHT 181–82 (1998). I thank David J. Shaw for directing my attention to the courtship phenomenon.

91. DIAMOND, *supra* note 90, at 181–82.

92. Rich Murphy, *Christian Dating* (2004), <http://maranathalife.com/teaching/dating.htm> (last visited Aug. 2, 2008) (link can also be found in online posting entitled *White American Christians Emulate Arranged Marriages*, posting of ennis to Sepia Mutiny, <http://www.sepiamutiny.com/sepia/archives/>

Thus, as in South Asian marriages, parents play a pivotal role in orchestrating lifelong partnerships for their children, who are not allowed to physically interact during their preliminary meetings.⁹³ The young men and women, like their Indian counterparts, recognize the primacy of the collective and the divine and thus willingly put aside their romantic pangs, even relishing the idea that the first kiss with their intended will be at the wedding altar. In short, they embrace a philosophy best expressed by Joshua Harris, a major proponent of modern courtship and author of the bestselling *I Kissed Dating Good-Bye*: “Smart love looks beyond personal desires and the gratification of the moment. It looks at the big picture: serving others and glorifying God.”⁹⁴ Although groups like Marantha Life, along with the Hasidic Jews, by no means represent the American mainstream, they still illustrate how the West has not rid itself entirely of an ostensibly barbaric practice.

Second, in claiming that even subtle coercion has a “tainting effect” on consent, this textualist reading sets the threshold for a valid marriage unreasonably high.⁹⁵ Because coercion is everywhere, nothing would qualify as “free and full.”⁹⁶ As Robert W. Hodge observed in his study of assortative mating in Japan, “[t]hose contracting marriage on the basis of free market romances may well act as if their marriage were arranged, bowing to family conceptions of appropriate mates.”⁹⁷ M. F. Small, a scholar in the field of gender and sexuality, likewise noted that Western women, arguably, are not *totally* free to select their own partners as the “free and full” requirement would facially demand: “after all, we want our families and friends to like and welcome our new spouses.”⁹⁸ Taking this point even further, Anél Boshoff, Louise Du Toit, and Karin Van Marle have argued that all subjects are unstable, contingent, and intersubjec-

001379.html (Apr. 18, 2005, 20:25 (time zone unknown)); see also Kazmi, *supra* note 9 (observing that “Western and Eastern courtship practices are borrowing practices from each other as the world becomes smaller through media and technology”). A set of core concerns seem to animate Christian and South Asian parents alike: “how a boy should be introduced to a girl; how much time the two should spend together; should there be time for the couple alone . . . how long should the courtship/betrothal take.” See Fortifying the Family, *Courtship vs. Betrothal*, http://www.fortifyingthefamily.com/Courtship_and_Betrothal.html (last visited Aug. 2, 2008).

93. See DIAMOND, *supra* note 90, at 182.

94. JOSHUA HARRIS, *I KISSED DATING GOODBYE* 24 (2003). Other foundational “courtship” texts include: ERIC & LESLIE LUDY, *WHEN GOD WRITES YOUR LOVE STORY* (1999); JEFF & DANIEL MYERS, *OF KNIGHTS AND FAIR MAIDENS* (1996); MICHAEL & JUDY PHILLIPS, *BEST FRIENDS FOR LIFE* (1997); and DOUGLAS WILSON, *HER HAND IN MARRIAGE: BIBLICAL COURTSHIP IN THE MODERN WORLD* (1997).

95. A moderate textualist approach might acknowledge the need to deviate from plain language when adhering to it would lead to absurd results. However, in order to draw lines (determining what is adequately within the scope of “free and full”) in a principled way, one must look to the provisions’ purpose(s), which is the subject of the next section.

96. See CARL WELLMAN, *AN APPROACH TO RIGHTS* 86 (1997); see also Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *POL. SCI. Q.* 470, 470–78 (1923) (noting the prevalence of coercion in many forms of societal interaction).

97. See Hodge & Ogawa, *supra* note 73, at 4.

98. Pasupathi, *supra* note 2, at 228 (referencing Small’s view).

tively constructed rather than bounded, monolithic, and sovereign agents.⁹⁹ In a system where the victim/agency dichotomy has fallen apart (everyone is a victim!), “free and full” consent—that is, consent outside of any pressure from others—is a theoretical impossibility.

A textualist would find that, in absence of qualifying language, the human rights provisions require *absolute* “free and full” consent for a valid marriage. Arranged marriages can never meet this stipulation as they involve varying degrees of parental coercion on an adult child’s decision to enter into marriage and spouse selection. Yet, in singling out love or choice marriages as the only union consonant with human rights and a civilized society, textualists commit two key oversights: 1) arranged marriages of some kind have been common in the enlightened West for centuries and continue to this day, and 2) subtle, external coercive influences are at work in virtually every prospective marriage, including the much-lauded love marriages, so that attaining complete “free and full” consent is impossible. Because treaty interpretation is not limited to the strictly textual analysis outlined above, the consent requirement must be considered in light of its object and purpose.

B. PURPOSIVIST APPROACH

“Law has a purpose. It is a social device. The goal of interpretation is to achieve the social goal of law.”¹⁰⁰

Having determined that adult arranged marriages do not meet the literal *language* of the human rights provisions, this section seeks to ascertain whether these practices are consistent with the language in light of the possible object and purpose behind the “free and full” consent requirement. In identifying the purposes presented below—that is, the more outcome-oriented *right to love* and more process-based *right to choose*—I have admittedly employed a broad interpretive strategy: one that relies on evidence of what the drafters had in mind but also on what arranged-marriage opponents believe the drafters intended.

1. Right To Love

**It was only a month since I saw her
Love came somehow unseen.
Need one have heard or seen or played with the other? . . .
To be suffused with the light of love.¹⁰¹**

99. CHOICE AND CONSENT: FEMINIST ENGAGEMENTS WITH LAW AND SUBJECTIVITY 3 (Rosemary Hunter & Sharon Cowan eds., 2007) [hereinafter CHOICE AND CONSENT].

100. AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW, at xv (Sari Bashi trans., Princeton Univ. Press 2007).

101. Poem reprinted in Segall, *supra* note 86 (emphasis removed). K.S. Narasimhaswamy’s poem, written from the perspective of a recently wed Indian male, is part of a large body of romantic poetry addressing post-marriage love in India.

Conceiving human rights norms as sentimental might strike one as rather odd. After all, a “right to love”—concerned with matters of the heart and soul—does seem much squishier (and, for this reason, perhaps less tenable) than the right to a fair trial¹⁰² and other recognized human rights.¹⁰³ But human dignity represents the cornerstone of the provisions at issue and—to the extent that love constitutes part of that dignity—we may need to protect an individual’s right to love.

The question then arises: what is the connection between humanity and love? In *Woman and Human Development: The Capabilities Approach*, Martha C. Nussbaum identifies emotions, including “[b]eing able to . . . love those who love and care for us,” as one set of human capabilities that makes life “truly human” and is *necessary* for a human being’s quality of life.¹⁰⁴ Gregory M.A. Gronbacher has been even more emphatic in stressing love’s connection to human dignity: “several overlapping considerations . . . display the dignity of the human person The capacity for love is, perhaps, the *greatest* feature of human existence.”¹⁰⁵

The centrality of love to life—acknowledged by the aforementioned scholars—takes root in Western culture. Christian theologians, for their part, constantly emphasize how human beings were created for love¹⁰⁶ and have referred to the “civilization of love.”¹⁰⁷ The core principle of situation ethics, founded by the existential ethicist Joseph Fletcher, is that “[o]nly one thing is *intrinsically* good, namely, love.”¹⁰⁸ Professor Mari J. Matsuda leaves metaphysics aside, finding “the will to love” inextricably and intimately bound up with the human body: it is “bred in our bones . . . [i]t is there.”¹⁰⁹ Possibly recognizing this relationship between human existence and love, the provisions’ drafters might

102. See UDHR, *supra* note 49, at art. 10; ICCPR, *supra* note 1, at art. 14. See generally DAVID WEISSBRODT, *THE RIGHT TO A FAIR TRIAL UNDER THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (2001).

103. Some have criticized this right as being “[u]ndefined and [d]angerous.” See JOHN WARWICK MONTGOMERY, *HUMAN RIGHTS AND HUMAN DIGNITY* 194 (1986) (“Because love remains undefined in Fletcher’s (essentially utilitarian) philosophy, any ethical results can flow from its operation.”); see also MILAN KUNDERA, *IMMORTALITY* 136 (1991) (“[T]he more the fight for human rights gains in popularity, the more it loses any concrete content, becoming a kind of universal stance of everyone towards everything, a kind of energy that turns all human desires into rights. The world has become man’s right and everything in it has become a right: the desire for love the right to love, the desire for rest the right to rest . . .”).

104. See NUSSBAUM, *supra* note 16, at 78–79 (listing the other capabilities, including “affiliation”).

105. Gregory M.A. Gronbacher, *The Need for Economic Personalism*, 1 J. MARKETS & MORALITY 1, 7 (1998) (emphasis added).

106. See *The Meaning of Human Dignity*, Posting of John to The Catholic Message, <http://catholicmessage.blogspot.com/2007/03/meaning-of-human-dignity.html> (Mar. 3, 2007, 12:39 (time zone unknown)).

107. Pope John Paul II has said that “only a humanity in which there reigns the ‘civilization of love’ will be able to enjoy authentic and lasting peace.” *Civilization of Love*, <http://civilizationoflove.wordpress.com/2008/03/22/descended-into-hell-exploring-gods-silence/> (Mar. 22, 2008).

108. See MONTGOMERY, *supra* note 103 (emphasis added).

109. Mari J. Matsuda, *My Teacher Loves Me but She Hates Mice: Or, An Existential Lamentation on the Loss of the Public School*, 9 RACE ETHNICITY & EDUC. 117, 119 (2006).

have created a “free and full” consent requirement to protect an individual from a perhaps imminent loveless marriage or preserve his or her future opportunity to love and, by extension, his or her dignity.

Given the dearth of drafting history regarding the matrimonial consent requirement,¹¹⁰ however, one cannot definitively attribute this purpose to the *drafters*, who were also likely aware of the pragmatic facet of marriage—that is, as a contractual relationship offering spouses access to an array of governmental benefits. Rather, one can properly treat the “right to love” as the purpose that *arranged-marriage opponents* believe the drafters intended. These opponents mainly belong to “individualistic cultures [which] assign[] greater importance to feelings of love in marriage decisions than d[o] collectivistic cultures.”¹¹¹ Their predecessors, the romanticists, deemed “marriages of convenience” and other parent-orchestrated alliances as unions of “soulless bodily intimacy” and thus unworthy of respect.¹¹² The romanticists even claimed that loveless marriage was *less* moral than divorce.¹¹³ Assuming that any marriage in which the intending spouses have limited or no say may be devoid of love, present-day opponents raise objections similar to those voiced by the romanticists. For example, in response to an Indian woman’s favorable depiction of arranged marriages, an American said she could not see the “wisdom” of a practice that lacked “*compelling passions . . . stir[ring] the minds, hearts and loins of people contracted to live together.*”¹¹⁴ Others have unequivocally charged the matrimonial bindings with being cold and calculating, akin to nothing more than a business transaction.¹¹⁵

If one construes the consent requirement’s purpose as protecting the right to love (or, alternately stated, the right to not be subjected to loveless marriage), then defenders of arranged marriages can point to the “love as a work in progress” phenomenon and argue that those marriages in which the partners learn to love one another are consistent with human rights when assessed *ex post*. Notably, South Asians, unlike their Western counterparts, do not expect

110. According to the Commission on Human Rights (Ninth Session) (1953), most of the drafters’ discussion concerned paragraph 4 of Article 23 and, in particular, the provision regarding equal rights for spouses “as to marriage and at its dissolution.” See MARC J. BOSSUYT, GUIDE TO THE “*TRAVAUX PRÉPARATOIRES*” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 442 (1987).

111. See Medora, *supra* note 19, at 213. Plato’s writings have heavily influenced this culture. See, e.g., PLATO, SYMPOSIUM 19–22 (Seth Benardete trans., Univ. of Chi. Press 2001) (presenting the idea that each individual is split into two halves and will only become “whole” upon finding his or her other half).

112. Ricarda Huch, *Romantic Marriage*, in THE BOOK OF MARRIAGE: A NEW INTERPRETATION BY TWENTY-FOUR LEADERS OF CONTEMPORARY THOUGHT 168, 177 (Hermann Keyserling ed., 1926).

113. *Id.* at 178, 190.

114. Kathleen Slocum, “*Arranged*” *Marriage*, N.Y. TIMES, May 25, 1995, <http://query.nytimes.com/gst/fullpage.html?res=990CEED71431F936A15756COA963958260> (emphasis added) (responding to Narayan, *supra* note 30).

115. See generally Bhopal, *supra* note 7.

those entering matrimony to be attracted romantically to one another.¹¹⁶ They instead operate on the belief that love, even passion, is possible over time. Within this worldview, arranged marriages—involving a careful matching of the bride and groom—emerge as a promising way to “generate the desired emotion.”¹¹⁷ Rituals during the marriage ceremony itself, such as the application of henna dye on the bride’s hands and feet, also ostensibly contribute to ensuring that the partners will love each other.¹¹⁸

Research studies, personal anecdotes, and popular culture all support the idea that the parties to an arranged marriage may experience romantic or passionate love *after* the marriage.¹¹⁹ In his survey of Indians living in the San Fernando region of Trinidad, Lloyd Held found that respondents in arranged marriages enjoyed more romantic love experiences after their wedding than did those in love marriages.¹²⁰ One respondent in particular said that “[o]ne cannot help but fall in love when one sees one’s spouse behaving like a real woman or like a real man.”¹²¹ When Vinita Battu agreed to marry a man (pre-screened by her parents) a mere eight days after their first encounter, she was guided by a “gut feeling” that proved accurate; sixteen years and two children later, the two are still “discovering each other day by day.”¹²² Shoba Narayan, whose parents selected her husband, echoed the idea that love *evolves* over the course of the marriage:

Falling in love, for me, began with small changes. I found myself relishing a South Indian dish that I disliked, mostly because I knew how much he loved it. I realized that the first thing I wanted to do when I heard some good news was to share it with him. Somewhere along the way, the “I love you, too” that I had politely parroted in response to his endearments had become sincere.¹²³

After six months of exchanging email and instant messages with her intended husband and then getting married in a quick civil ceremony (to be followed by a big Hindu ceremony), Vibha Jasani described the imminence of love as almost

116. For comments on the Western conception of marriage, see Lloyd L. Held, *Parentally and Participant Arranged Marriages: A Comparative Analysis* 19 (May 1992) (unpublished Ph.D. dissertation, Fuller Theological Seminary) (on file with McAlister Library, Fuller Theological Seminary).

117. *See id.* at 17 (“When certain conditions have been met or have been constructed, one allows oneself to ‘fall in love.’”).

118. Henna signifies “the strength and power of love in marriage.” Medora, *supra* note 19, at 225; *see also* MONGER, *supra* note 3, at 150 (noting the saying that “[T]he longer the henna stays on the girl’s hands, the longer her husband will love her”). Additionally, the Mahabharata—an epic heroic poem of the Brahmin culture—suggests that “marriages were made for love.” MONGER, *supra* note 3, at 151–52.

119. Haredi Jews also embrace the idea that love, especially its physical manifestations, comes after marriage. *Shomer Nagia*—one of their key beliefs—translates into “guard the touch.” Many thanks to Shana Tabak for alerting me to this cultural parallel.

120. Held, *supra* note 116, at 64.

121. *Id.*

122. Kazmi, *supra* note 9.

123. Narayan, *supra* note 30.

perceptible: “I can’t say I love him, but I’m pretty close. . . . And I know it’s going to happen.”¹²⁴

South Asian writers and film-makers have incorporated this real-life “love as a work in progress” phenomenon into their fictional works. In Jhumpa Lahiri’s *Year’s End*, for example, the twenty-something Indian male protagonist, Kaushik, wistfully describes his parents’ relationship before his mother’s death in the following way:

My parents had had an arranged marriage, but there was a touch of romance about it, too They had always been affectionate with each other, but it wasn’t until her illness that he seemed fully, recklessly to fall in love with her, so that I was witness to a courtship that ought to have faded before I was born.¹²⁵

Similarly, in *Monsoon Wedding*, the audience witnesses a passionate exchange between the two main characters, who are parties to an arranged marriage. Stealing away from a family celebration the night before the ceremony, they ardently kiss and tightly embrace one another on a rooftop decorated with sparkling lights. They stop for a moment, and Hemant—looking deeply into his soon-to-be wife’s eyes—says, “Let’s stay up all night together, Aditi, and talk.”¹²⁶ A mischievous smile spreading across her face, she inches closer to him and issues a response that would give any conservative Indian parent a mild heart attack: “Talk? Why would you want to talk?”¹²⁷ They then resume kissing, with the wind blowing through their hair and the world below unaware that the seeds of passion have started to bloom.

In her short story “Clothes,” Chitra Banerjee Divakaruni richly describes more-overtly passionate, sexual encounters between the two arranged spouses, Sumita and Somesh. Though initially reluctant to consummate the marriage for fear of ensuing physical (and perhaps psychological) pain, Sumita eventually makes love to her husband. From that point onward, the two become accustomed to feeling “lazy from lovemaking” and even “kiss[ing] guiltily.”¹²⁸ In another scene, redolent images of Sumita’s nightie-clad body captivate and mesmerize Somesh: “My mouth is an O of surprise in the mirror, my legs long and pale and sleek The legs of a movie star [E]scaped strands [of my hair] fall on his face like dark rain.”¹²⁹ Interestingly, whereas arranged marriages seem to grow “hot” over time (as illustrated in “Clothes”), love matches tend to “cool off,” losing the spark that initially ignited them.¹³⁰

124. Span, *supra* note 20.

125. Jhumpa Lahiri, *Year’s End*, *NEW YORKER*, Dec. 24, 2007, at 114.

126. *MONSOON WEDDING*, *supra* note 71.

127. *Id.*

128. CHITRA BANERJEE DIVAKARUNI, *ARRANGED MARRIAGE: STORIES* 26 (1995).

129. *Id.* at 28.

130. For a discussion of this “heating up”/“cooling down” phenomenon, see *BLOOD*, *supra* note 14, at 60–93 (“[L]ove marriages become so disillusioned with the affectional, therapeutic, companionable,

Arranged marriages not only offer the possibility of romantic love, but also what Rabindranath Tagore describes as the “cultivated emotion of wedded love”—a broader sense of love that encompasses compromise, respect, and understanding between the spouses.¹³¹ Both Western and Eastern cultures prize these values to some extent. South Asian culture places an especially high premium on reliability, dependability, and complementary family roles.¹³² Naturally, then, when Indian youth were asked to specify the most important reasons for getting married, a majority of the respondents said “companionship and a means of achieving security and stability.”¹³³ Monisha Pasupathi’s aunt aptly summed up the Indian conception of a “perfect marriage”: “living together in good and bad times, providing children a good education, and raising children to be good citizens.”¹³⁴

Significantly, cultivating the emotion of wedded love begins long *before* marriage.¹³⁵ Indian nursery rhymes and songs present the husband as protector and the wife as virtuous. The parents featured in the documentary *Modern Brides* sang a hymn to remind their daughter, Vinuta, not only of her obligations, but also the happiness that awaited her in her husband’s home: “May god shower happiness and good fortune on you / Enter your husband’s house with your right foot forward / You have tired of serving your parents / Now follow your husband and be happy oh girl.”¹³⁶ These childhood tales and songs, though perhaps disturbing in how they encode gender roles, notably do not inculcate Indian boys and girls with expectations of “roses and diamonds and hallmark cards and ‘I love yous’ and proclamations and public displays of love.”¹³⁷ Rather, as Mira Nair observes, a truly exquisite love story features spouses “who are content to be still . . . [to] look at each other over a cup of tea.”¹³⁸

and sexual aspects of marriage that by the later years of marriage the love margin is replaced by a sizable *miai* [arranged marriage] margin.”).

131. See Tagore, *supra* note 11, at 113; see also Pasupathi, *supra* note 2, at 213 (providing anecdotes from family members regarding how marriage requires adjustment, understanding, and respect). Tagore relays a personal anecdote to further explain this concept: “I was complaining to [an agriculturist] of the lack of common grazing grounds in our villages, whereupon he told me that it was a mistake to suppose that a cow would thrive best if allowed to graze at will. Scientific feeding with specially cultivated fodder-crops only could yield the best results. These must have been the lines of argument, in regard to married love, pursued in our country.” Tagore, *supra* note 11, at 112; see also Lori Gottlieb, *Marry Him!*, ATLANTIC MONTHLY, Mar. 2008, <http://www.theatlantic.com/doc/200803/single-marry> (extolling the virtues of long-term stability over “deep romantic love”).

132. Span, *supra* note 20.

133. Medora, *supra* note 19, at 220 (citing Sex Education, Counseling Research Training and Therapy, *Attitudes of Youth Towards Marriage Partner Selection and Dowry*, 39 J. FAM. WELFARE 7–18 (1993)). Contrastingly, husband-wife companionship is generally not considered important in Japan. See BLOOD, *supra* note 14, at 71.

134. Pasupathi, *supra* note 2, at 213.

135. See Tagore, *supra* note 11, at 112–13.

136. *Modern Brides*, *supra* note 19.

137. Radio Interview by Fresh Air (NPR program) with Mira Nair, director of the film adaptation of *The Namesake* (Mar. 6, 2007), <http://www.npr.org/templates/story/story.php?storyId=7728772>.

138. *Id.*

Convinced that arranged marriages are nothing more than a cold, calculated transaction requiring individuals to sacrifice their personal happiness, opponents of the practice dismiss it as contrary to the “right to love.” However, to the extent that adult arranged marriages *result* in love over time—whether understood in a romantic or more all-encompassing sense—they may be just as consistent with human dignity as their love-marriage counterparts.¹³⁹

2. Right To Choose

“[L]iberty [is] required for a perfect human act”¹⁴⁰

Given that human rights norms generally have a Western individualistic bent,¹⁴¹ the drafters could very well have intended the matrimonial consent requirement to serve an additional (or alternate) purpose: preserving an individual’s freedom of choice and self-sovereignty. The idea that marriage represents an intimate lifelong partnership and consists of indissoluble, sacred bonds—at least from a Western individualist premise—heightens the need to ensure liberty in selecting a marital partner.¹⁴² To the extent that choice and the quality of human existence are linked, then, impinging an individual’s will can interfere with his or her dignity (and, if the infringement is severe enough, possibly strip the person of his or her dignity entirely).

Though the drafting history regarding the matrimonial consent provision is rather sparse,¹⁴³ the Human Rights Committee has considered that certain practices, such as bride prices and pledging girls in marriage for economic gain, would constitute restrictions on the “free and full” consent mandated by the

139. Because the low divorce rate (less than four percent) among arranged-marriage participants is a questionable indicator of marital satisfaction, I have not relied on it in making my argument. See Arranged Marriage Success Rate in India, <http://bhavakuta.com/india/indian-arranged-marriages/index.html> (last visited Oct. 4, 2008); see also Kazmi, *supra* note 9 (“Although many couples undoubtedly are satisfied with their marriages, other couples stay together because of cultural and familial expectations, not necessarily because they are happy”).

140. SANGMEISTER, *supra* note 69, at 1.

141. See generally MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001). For theories on how the “consent” requirement is disempowering of females, see CHOICE AND CONSENT, *supra* note 99, at 10–11 (“[J]udicial interpretations of the legal requirement of female consent in cases of annulment of arranged . . . marriages . . . sustain[] and reinforce[] representations of women as immature or inexperienced, and as either too dependent on men, or as their victims in need of protection.” (citations omitted)). Some scholars have also argued that an individual’s granting of consent (even one of a “free and full” nature) paradoxically activates conditions of domination and self-subjugation (that is, the individual becomes a “consenting subject of the social order”). *Id.* at 30; see also Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 *WIS. WOMEN’S L.J.* 149, 165 (2000) (arguing that persistent threat of male sexual violence leads women to redefine themselves as “giving selves” whose consent then loses force because of that redefinition).

142. See SANGMEISTER, *supra* note 69, at 3; see also BENNETT CONSTANTINE, *THE PROBLEM OF CONSENT IN THE ARRANGED MARRIAGE OF TAMILS OF JAFFNA* 147 (1977).

143. For a brief discussion of the drafting history, see *supra* note 110.

ICCPR.¹⁴⁴ Such actions have a striking commonality aside from sharing the thread of gender inequality: they are choice-denying. Thus, in expressly invalidating the practices, the Committee may have implicitly found that “free and full” consent necessitates some degree of choice on the part of the intending spouses.

A number of cases, primarily featuring young girls rather than adults, further support the theory that the enforcers (if not the drafters) of the marital consent requirement view that stipulation as promoting choice.¹⁴⁵ In the Australian case of *In Marriage of S*, a sixteen-year old girl was forced into marriage.¹⁴⁶ Emphasizing how the “applicant is still a child,” the court determined that the marriage infringed on her right to self-sovereignty and accordingly invalidated the marriage.¹⁴⁷ In *Hirani v. Hirani*, the United Kingdom (UK) Court of Appeal faced a situation similar to the one in *In Marriage of S*: “a young girl, wholly dependent on her parents, being forced into a marriage with a man she has never seen.”¹⁴⁸ The court held that her parents’ threats and pressure to “prevent her . . . continuing in an association with a Muslim which they would regard with abhorrence” overbore the petitioner’s will and thus invalidated her consent.¹⁴⁹ Scotland’s Court of Session also found that a young girl had not given genuine consent to marry in *Mahmood v. Mahmood*.¹⁵⁰ The parents in that case threatened to financially cut off their daughter, who was entirely reliant on their financial support. They had apparently already disowned her older brother and sister for refusing to enter into arranged marriages.¹⁵¹ In light of these facts, the court determined that the young girl could prove that her parents would carry

144. See SCOTT N. CARLSON & GREGORY GRISWOLD, PRACTICAL GUIDE TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 140 (2003); see also SARAH JOSEPH ET AL., THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 455 (2000) (discussing the situation of women in Nigeria—a “low level of participation in public life, continued application of marriage regimes which permit polygamy and do not fully respect the equal rights of women, [and] widespread practice of forced marriage”— that triggered the Human Rights Committee’s denunciation of forced marriages in its General Comment 19).

145. In recently singling out forced marriage as a distinct crime against humanity, the Special Court for Sierra Leone recognized that the practice cannot be equated to “sexual slavery” because it implicates other aspects of personhood (such as freedom of choice over more than one’s body). *Prosecutor v. Brima, Kamara & Kanu*, Judgment, No. SCSL-2004-16-A, paras. 196, 202 (Feb. 22, 2008), available at <http://www.sc-sl.org/documents/AFRC/SCSL-04-16-A-1.pdf>. Importantly, the decision also noted that “arranged marriages are not to be equated to or confused with forced marriage during armed conflict.” *Id.* para. 193.

146. *In Marriage of S* (1980) 42 F.L.R. 94, 97–98.

147. *Id.* at 101.

148. *Hirani v. Hirani* [1983] 4 F.L.R. 232 (emphasis added). Case description also found in THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW 514 (David Harris & Sarah Joseph eds., 1995).

149. *Hirani*, 4 F.L.R. at 232. Notably, the petitioner in *Hirani* buttressed her case by pointing to a particularized threat of homelessness and ostracism as opposed to the more general pressure emanating from cultural and parental expectations. See David Bradley, *Duress and Arranged Marriages*, 46 MOD. L. REV. 499, 502 (1983).

150. *Mahmood v. Mahmood* [1993] S.L.T 589, 592.

151. *Id.* at 590.

out their threats and—lacking any bargaining power—she was under compulsion to comply.¹⁵²

Contrastingly, courts have not invalidated arranged marriages where the petitioner appears to retain some degree of liberty or freedom of choice. In *Singh v. Singh*, the UK Court of Appeal did not perceive family pressure to enter into an arranged marriage as duress where the petitioner had not been in fear of actual harm to herself.¹⁵³ Presumably, in that situation, the young woman still had room for resistance. The court in *Singh v. Kaur* gave a more express rationale for its decision regarding a petitioner husband's case. There, the petitioner's parents had threatened to foreclose him from participating in the family business if he did not accept an arranged marriage. Reasoning that he still had the ability to "make up his mind as an adult whether to go through with the marriage or whether to withstand the pressure put on him by his family,"¹⁵⁴ the court upheld the arranged marriage.

Though positing the "right to choose" as a purpose behind the consent requirement seems consistent with the general spirit of human right norms and the above-cited case law, such an *individual* right might not be absolute. Various human rights instruments and the Human Rights Committee also recognize the importance of *family*. For example, the ICCPR states that the "family is the natural and fundamental unit of society";¹⁵⁵ and devotes an entire provision, Article 23, to the "protection of the family." Article 23(3) even allows for *parental* consent to marriage on behalf of children.¹⁵⁶ And, as discussed in Part II, the Preamble of the Recommendation on the UN Convention on Consent to Marriage recognizes that "the family group should be strengthened because it is the basic unit of every society."¹⁵⁷ The importance of family particularly

152. *Id.* at 592.

153. *Singh v. Singh* [1971] P. 226, 231. Case description also found in THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND UNITED KINGDOM LAW, *supra* note 148, at 514. For a critique of the *Singh v. Singh* decision, see Anne Phillips & Moira Dustin, *UK Initiatives on Forced Marriage: Regulation, Dialogue, and Exit*, 52 POL. STUD. 531, 538 (2004) (finding that the court trivialized the young woman's dilemma by overlooking how the emotional and psychological, rather than purely physical, coercion in that case made her choice illusory). I attempt to discern the point at which parental action becomes illegitimate in "Crossing the Line." See *infra* notes 185–93 and accompanying text.

154. *Singh v. Kaur* [1981] 11 Fam. Law 152. Case description also found in Bradley, *supra* note 149, at 501.

155. ICCPR, *supra* note 1, at art. 23(1); see also GLENDON, *supra* note 141, at 93 (noting that the provision was originally proposed by Charles Malik, the representative from Lebanon).

156. See NOWAK, *supra* note 55, at 415 (observing that a number of delegates at the Third Committee of the General Assembly "particularly emphasized that [Article] 23(3) did not restrict the right of consent for parents or other legal representatives" on behalf of minors). This fact prompted me to consider the following question and develop this section in response: If the lack of personal consent is permissible in the case of *children*, or those unable to give legal consent, shouldn't it be acceptable when fully competent *adults* explicitly or implicitly "assign" their parents to exercise consent on their behalf?

157. Recommendation on Consent to Marriage, *supra* note 66; see also Maria Sophia Aguirre & Ann Wolfram, *United Nations Policy and the Family: Redefining the Ties that Bind a Study of History, Forces and Trends*, 16 BYU J. PUB. L. 113, 115 (2002) (identifying references to family in UN

resonates with the “collectivistic” South Asian culture where extended families take interest in and safeguard an individual’s well-being but expect that person’s loyalty in return.¹⁵⁸

In light of these countervailing considerations—respecting the individual and the family—perhaps arranged marriages are consistent with human rights norms where an individual explicitly or implicitly chooses to give consent by proxy (that is, the family) who is interested not only in its own fate, but also that of the couple.

a. Consent by Proxy.

I asked her in frustration and distress. “Don’t you care who you marry?” “Of course I care,” she answered. “This is why I must let my parents choose a boy for me. My marriage is too important to be arranged by an inexperienced person as myself. In such matters, it is better to have my parent’s guidance.”¹⁵⁹

Undergirding the arranged-marriage opponents’ attack on the practice is its conception of the respective roles of the parents and the intending spouse: the parents are seen as the oppressor and the adult child is viewed as the family’s slave or chattel, mindlessly fulfilling the family’s every wish. Such an image of the family-child bond, however, is more of a grotesque exaggeration, an upsetting caricature, than a realistic depiction of the prevailing norm. This section seeks to show how parties to an arranged marriage express their consent in a fundamentally different way from those involved in self-chosen or love marriages while still avoiding a slavery-like situation.¹⁶⁰ Rather than give “personal” consent to a marriage, the adult child explicitly or implicitly authorizes his or her parents and/or extended family to exercise consent on his or her behalf for both their and his or her benefit.¹⁶¹

An individual can assign his or her consent to a proxy, thereby “consenting to constraints,” in either an explicit or an implicit manner. Perhaps the easiest case,

instruments and arguing that “the UN’s approach threatens the fundamental organic unity of the family itself”).

158. See Medora, *supra* note 19, at 211; see also Rodríguez, *supra* note 19, at 32 (“[F]rom their Indian culture, Indian Americans have learned to take into consideration the common good, to think of themselves as part of a family unit and not as individuals.”).

159. Medora, *supra* note 19, at 209 (quoting Sita, a college graduate and respondent in Medora’s study of arranged marriages).

160. See CONSTANTINE, *supra* note 142, at 159 (“[T]here is consent, but of a different nature, in a different time scale, and on a different scenic scale.”); see also CHOICE AND CONSENT, *supra* note 99, at 29 (“Choice and consent may be said to exist on a spectrum . . . only by looking more closely at the context of choices can we see which choices reflect the genuine desires and wishes of those who have chosen.”).

161. I realize that I could replace consent with another liberal value (such as the overarching concept of “dignity”); however, I have tried to address the main concern of arranged-marriage opponents by engaging head-on with the concept of consent. For a brief reference to Nussbaum’s emphasis on dignity and the “care perspective”/relational feminism, see CHOICE AND CONSENT, *supra* note 99, at 11 n.2.

or least controversial in human rights terms, is the semi-arranged marriage: a young man or woman expressly asks his or her parents for *help in finding* a spouse. Here, the individual voluntarily accepts the parental pressure that comes along with looking for a suitable partner and has a say in the final decision.¹⁶² The situation where the adult child explicitly authorizes the family to arrange a match on his or her behalf may initially seem a bit more troublesome because the family plays the decisive role in the traditional system. Stutely, for one, “wondered how an executive in a Bombay-based, European-owned company could submit to an ancient tradition that denied free choice.”¹⁶³ In focusing on the parent or extended family’s machinations, however, the arranged-marriage opponents miss the key legitimizing step of the process: the adult child has (perhaps revocably) assigned his or her consent to be exercised by that trusted proxy. As the executive’s great uncle responded to Stutely, “[b]ut it *is* his choice.”¹⁶⁴

The implicit grant of authority to act on the adult child’s behalf will likely prove the most controversial among arranged-marriage opponents because it is unspoken and therefore might not be real. Nevertheless, acceptance—whether enthusiastic or by acquiescence—of the family’s spouse selection can constitute *ex post* ratification of the earlier exercise of consent by proxy.¹⁶⁵ Take, for example, the case of Vinuta in the documentary “Modern Brides.” She hoped to wait a few years before marrying, but when “nothing happened as [she] had hoped,” she “kept quiet” and accepted the arranged marriage.¹⁶⁶ In another case, Khalid Tarrar, an electrical engineer based in the United States, was caught off guard when his mother called him to announce, “You’re engaged.”¹⁶⁷ Though he did expect that she would find him a Muslim bride on her trip to Afghanistan, he nonetheless accepted the decision, confident that his mother “knows what I like, and what kind of girl I like” and would have his best interests in mind. Khalid and his wife Sonita have been together for over ten years.¹⁶⁸

Notably, consent by resignation—though perhaps very close to the boundary

162. See Jain, *supra* note 8; *True Life: I’m Having an Arranged Marriage* (MTV documentary series Dec. 1, 2007) [hereinafter *True Life*].

163. Medora, *supra* note 19, at 209.

164. *Id.* (emphasis added). Vinit Sethi’s marriage over ten years ago offers another example of consenting to constraints. Overtaken by “an incredible feeling that this was the right thing to do,” Mr. Sethi—a twenty-four-year-old investment banker at the time—chose to “marry a woman of his mother’s choosing.” Cecilia W. Dugger, *In India, an Arranged Marriage of Two Worlds*, N.Y. TIMES, July 20, 1998, <http://query.nytimes.com/gst/fullpage.html?res=9E02EEDE1230F933A15754C0A96E958260>.

165. Bennett Constantine notes that the child’s own consent to marry is implicit in his or her voluntary obedience to his or her parents. See CONSTANTINE, *supra* note 142, at 159; see also Tagore, *supra* note 11, at 113 (“She has not surrendered herself to brute force of another, but has voluntarily consecrated herself to the service of her own ideal.”).

166. *Modern Brides*, *supra* note 19.

167. Kazmi, *supra* note 9.

168. *Id.*

of coerced consent—is nonetheless distinguishable from it.¹⁶⁹ In the case of resignation, one is still able to express genuine consent—that is, act in line with one’s own wishes and intentions (however “adapted” through external influences). Jhumpa Lahiri’s most recent novel *Unaccustomed Earth* presents a prime example of this situation.¹⁷⁰ Though conscious of the “deadness” of a proposed partnership, the female protagonist Hema convinces herself that the traditional marriage will endow her life with a sense of certainty and direction.¹⁷¹ Thus, unlike a coerced bride or groom (whose will is essentially replaced by that of another), Hema herself *decides*—albeit somewhat hesitantly—to opt for a traditional arranged marriage.

Instead of adopting the arranged-marriage opponent’s view that the adult child’s complicity in the family’s mate selection is a sign of subjugation or weakness, one can thus conceive of the act of putting trust in another as supremely brave.¹⁷² Ultimately, consent by proxy—whether assigned explicitly or implicitly—does not *deny* an individual free choice, but rather expresses that choice in a different way (that is, through the medium of another).

Having established *how* an individual assigns consent to a proxy, I now explain *why* an individual would choose to precommit him or herself in such a way. As alluded to earlier, the collective is considered part of the individual in South Asian culture.¹⁷³ Thus, adult children—even those who are “more financially stable, spend more time independent of their parents, and could possibly find their own [mates]”¹⁷⁴—often put great stock in the views of their parents and relatives, reasoning that “family knows best.”¹⁷⁵ In the words of Nilufer P.

169. See *Mahmood v. Mahmood* [1993] S.L.T 589, 591 (“[C]onsent which has to be given to marriage need not be enthusiastic consent, but even reluctant consent will suffice provided that the consent is genuine.”).

170. JHUMPA LAHIRI, *UNACCUSTOMED EARTH* (2008). For a further example of how one can give consent by resignation, see Angeliki E. Laiou, *Sex, Consent, and Coercion in Byzantium*, in *CONSENT AND COERCION TO SEX AND MARRIAGE IN ANCIENT AND MEDIEVAL SOCIETIES* 109, 185–87 (Angeliki E. Laiou ed., 1993).

171. See LAHIRI, *supra* note 170, at 296–98.

172. See Huch, *supra* note 112, at 190. (“[D]uty [is not] merely cold and mechanical . . . immensity and beauty [is] inherent in strict observance of a moral principle even when it contradicts nature.”).

173. In a 1998 interview with the *New York Times*, Shweta Kotahwala (then nineteen years old) aptly conveyed how Indian culture is deeply rooted in her being: “If I want to walk away from it . . . I can. . . But I don’t need to. I don’t want to. I’m happy. That’s a part of who I am. That’s my individuality.” Dugger, *supra* note 164.

174. Voo, *supra* note 27.

175. See Alvarez, *supra* note 43. Cass Sunstein and Richard Thaler’s theory of “libertarian paternalism” also takes root in the idea that individuals do not make the best decisions for themselves. See Cass Sunstein & Richard Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1167 (2003). Furthermore, Sunstein and Thaler find that the “liberty” aspect of his model comes from opt-out rights. See *id.* at 1184, 1199, 1201. This room for resistance may also be present in some arranged marriages.

Faith in one’s parents is not characteristic of every Eastern society that has traditionally practiced arranged marriages. From a comparative perspective, Blood comments that young adults in Japan are less trusting of their parents. See BLOOD, *supra* note 14, at 89 (“[B]ut today’s parents are less competent than previous generations to arrange marriages single handedly in view of the changing attitudes of the

Medora, “[M]any [Indian young adults] believe that because their parents raised them, no one knows them as well as their parents do and their parents have their best interests at heart.”¹⁷⁶

Vani Gupta, a thirty-year-old Indian male, echoed this idea in explaining the rationale behind assigning his consent over to his parents: “Our mums look at the C.V.’s They figure out whether we’re compatible on paper It’s nice to know your parents have done the work for you. You feel more secure.”¹⁷⁷ Likewise, Huma Ansari, a twenty-seven-year-old optometrist, welcomed “all the help [she could] get” and appreciated her parents’ willingness to undertake the difficult task of screening potential suitors.¹⁷⁸ Although Najwa—a twenty-three-year-old Pakistani female—ultimately broke off her arranged marriage after finding that her intended was too religiously conservative, she maintained that “I completely trust that my parents know what’s best for me.”¹⁷⁹ Further, as highly educated female proponents of perpetuating the arranged marriage tradition note, parental matching has the positive effect of maintaining homogeneity, including similar religious backgrounds, family friends, and cultural values, as well as ensuring family support (given that the parents arranged the marriage).¹⁸⁰ Thus, rather than blindly sign away control, individuals strategically assign their consent to the most benevolent and knowledgeable proxy they know: their families.

In casting the family-child relationship in decidedly more favorable terms than had been perceived by arranged-marriage opponents, I do not mean to ignore the fact that “reverential fear” can induce even full-grown adult children to (perhaps hesitantly or grudgingly) assign their consent to their family.¹⁸¹ However, though this fear—often caused by moderate parental pressure, rebukes, and chiding—may lessen to a certain extent an individual’s *complete* freedom, its influence has historically been and should continue to be regarded

younger generation For [young people], love is a sign that the choice is wise.”). He concludes that alliances formed with the input of both the older and younger generations produce the most satisfactory marriages. *Id.*

176. Medora, *supra* note 19, at 215–16. Perhaps the “consent by proxy” system (in the marriage context) is not prevalent in the West, particularly the United States, because of the lack of familial networks. See Narayan, *supra* note 30 (“For many Americans that web doesn’t exist. As my friend Karen said, ‘How can I get my parents to pick out my spouse when they don’t even talk to each other?’”).

177. Alvarez, *supra* note 43.

178. Voo, *supra* note 27.

179. *True Life*, *supra* note 162.

180. See Pasupathi, *supra* note 2, at 222, 226; see also Voo, *supra* note 27 (“Arranged marriages have going for them the fact that the in-laws have an active interest in the marriage lasting.” (quoting Stephanie Coontz, “professor of family studies at the Evergreen State College and author of books on the history of marriage”)).

181. Pure reverential fear derives its “influence solely from the respect which is due to parents and superiors, or, at the most, from some form of slight evil which a contradiction of their wishes may bring.” SANGMEISTER, *supra* note 69, at 140.

as too slight to cause a judicially defective consent.¹⁸² If one were to lower the threshold for what constitutes “grave fear,”¹⁸³ the line between that extreme coercion and reverence would become increasingly blurry and “no effective contract would be possible between superior and subject, parent and child.”¹⁸⁴ Including moderate pressure within the zone of permissible parental (or proxy) action is a pragmatic and normatively sound move because that type of pressure still allows for the adult child to exhibit resistance and hence does not severely clamp on human dignity.

b. Crossing the Line.

MRS. BENNET: People do not die of colds.

LIZZIE: Though she might well perish with the shame of having such a mother.¹⁸⁵

Thus far, I have assumed that the proxy (that is, the family) has a clearly discernable collective interest, namely upholding its reputation while promoting the best interest of the adult child. In reality, however, the constituent members of an extended family may have different motives for seeking a particular arrangement—some solely desiring to preserve family honor, others genuinely concerned for the child’s welfare and happiness, and still others mixed in sentiment.¹⁸⁶ A proxy crosses the line into impermissible action when it is motivated *solely* by self-interest.¹⁸⁷ In pursuit of economic or other gain, the proxy locks an individual into a denigrating, slavery-like situation.¹⁸⁸ Under

182. SANGMEISTER, *supra* note 69, at 140–44 (noting the permissibility of moderate pressure); *see also* Mahmud v. Mahmud [1994] S.L.T. 599 (“[P]arents, and indeed others, are well entitled to exert their influence, and indeed to apply pressure, upon a person who is refusing to marry, with a view to producing a change of mind [The marriage] will only be invalid if the consent which has thus been induced cannot sensibly be described as a genuine change of mind, but is rather to be categorised as an act contrary to the party’s own true intent . . .”).

183. The term “grave fear” is interchangeable with “qualified” or “mixed” reverential fear. *See infra* text accompanying note 189.

184. *See* SANGMEISTER, *supra* note 69, at 141.

185. PRIDE AND PREJUDICE (Focus Features 2006).

186. The individual’s personal considerations are often secondary in the normal course of affairs. Medora, *supra* note 19, at 214. Thus, as this subsection argues, the real crisis of legitimacy arises when the proxy’s *sole* motive for arranging a marriage is economic gain (or some other form of self-interest).

187. This standard is similar to the corporate-law notion of “bad faith.” Managers exhibit “bad faith” when they are driven by their *own* preferences and appetites (stemming from emotions like greed, lust, hatred, envy, revenge, pride, and so forth) rather than the best interests of those on whose behalf they exercise authority (that is, the shareholders and corporation). *See* JEFFREY D. BAUMAN ET AL., CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS 841 (6th ed. West Publishing Co. 2007) (citing *In re Walt Disney Co. Derivative Litigation*, 907 A.2d 693, 754 (Del. Ch. 2005)). Notably, unlike a breach of the duty of care, a breach of good faith is not exculpable. *See id.* at 722–23.

188. *See* CONSTANTINE, *supra* note 142, at 160 (noting how parents sometimes exercise authority “beyond the spirit and the motives for which this sacred duty was conceded to them”); *see also* Held, *supra* note 116, at 7. A recent *Asia Times* article reported that top leaders of the ruling Cambodian People’s Party (CPP) arrange adult children’s marriages to solidify their political hold over the country,

these circumstances where the family's interests and those of the individual no longer align, the individual presumably would not "allow" the family to exercise consent on his or her behalf.

The family, attempting to serve as proxy, acts illegitimately when it uses "qualified" or "mixed" reverential fear for immoral purposes—again, those that treat the parents' or family's interests not merely as a main priority, but as the *exclusive* one. Unlike pure reverential fear, the qualified version is characterized by outbursts of violence, threats of death and grave bodily harm, and/or sustained efforts to convince the child that he or she will be subject to lasting and unending indignation, anger, contempt, and abhorrence.¹⁸⁹ Bennett Constantine, who has studied arranged marriages in Sri Lanka, offers a good example of "crossing the line": two brothers, acting in their personal capacity rather than as members of the "Joint Hindu Family," essentially sold their minor brother into marriage to obtain money for gambling.¹⁹⁰ In another case, one could say that parents lacked valid authority to guide their daughter's life where they exerted relentless pressure on her and made her feel emotionally unsafe in their home.¹⁹¹ Despite or perhaps because of their rarity, extreme cases of parental abuse of authority make headlines, thereby fueling the arranged-marriage opponents' campaign.¹⁹²

The "consent by proxy" model entails a *balancing* of the individual and family considerations that co-exist within the very same human rights instruments. It thus does not require *trumping* individual freedoms for the sake of the cultural needs of society—as has happened in other instances.¹⁹³ Because this balancing leads to self-fulfillment and upholds human dignity—the core concern of the ICCPR and other human rights documents—the lack of a *personal* exercise of consent should not render it invalid.

and that Sino-Thai tycoons do the same to promote their commercial interests. See Bertil Lintner, *One Big Happy Family in Cambodia*, ASIA TIMES, Mar. 20, 2007, http://www.atimes.com/atimes/Southeast_Asia/IC20Ae03.html. The parents in these cases may well have "crossed the line" if they acted purely in their self-interest, with no regard for their offspring's personal fulfillment, and induced compliance through "mixed" reverential fear.

189. SANGMEISTER, *supra* note 69, at 145.

190. CONSTANTINE, *supra* note 142, at 160.

191. Span, *supra* note 20. Physical coercion certainly crosses the line.

192. See Pasupathi, *supra* note 2, at 212 (referencing S. Haider, *Lifting the Veil of Silence: Jamuna's Narrative of Pain*, 44 SOC. BULL. 241 (1995), which relays arranged-marriage horror stories). For an example of one such headline story, see MONGER, *supra* note 3, at 159 ("On 11 October 1975, the *Times* of London reported that the Punjab state government had ordered an investigation into a spate of suicides and fatal accidents involving young brides; the suspicion was that young brides with small dowries were . . . driven to suicide so that the husband could remarry and obtain another dowry"). An online blog posting entitled *Arranged Marriage = Terrorism* offers a more recent example. See Posting of Bill Maher to The Huffington Post, http://www.huffingtonpost.com/bill-maher/arranged-marriage-terror_b_44528.html (Mar. 29, 2007, 12:32 EST) (commenting on an interview with a former member of a radical Islamic terror network who suggested that parentally-arranged marriage is so terrible that Middle Eastern men look to radical Islam and even the prospect of "blow[ing] themselves up" as "a way out").

193. See JOSEPH, *supra* note 144, at 25.

As shown above, though arranged marriage practices may not satisfy the literal language of the “free and full” consent requirement, they can promote two possible purposes behind the relevant provisions: (1) the right to love (or alternatively, not be subjected to a life without love) and (2) the right to choose. In the case of arranged marriages, the latter goal is accomplished within certain bounds, namely an individual’s use of an informed and concerned proxy to exercise consent on his or her behalf. For an adult child to put faith in this proxy, that agent must not *solely* act on self-interest. After all, wholly ignoring an individual’s well-being leads to a wicked parentalism rather than the benevolent paternalism that can find accommodation within the human rights framework.

CONCLUSION

“In the West, they’ll think that the Indian marriage is a bad system because the bride cries . . . [it] makes her seem unhappy.”¹⁹⁴

My mother did not tell me she had an arranged marriage until I was fourteen years old. Until that point, I had been under the impression that she and my father had met through my uncle and fallen in love instantly. I recently asked her why she deferred revealing the truth: Did she share the Western sentiment that arranged marriage was a “bad system”? Was she embarrassed? Would recounting the story evoke painful memories? No, none of those reasons. She explained rather matter-of-factly that she had romanticized a relationship that was arranged for her, coming to terms with and even appreciating a process she did not *completely* own as well as its outcome. Thus, my parents’ arranged marriage, like that of other South Asians, did not impinge upon the right to choose (tempered with family considerations) or the right to love. Far from being the product of a human rights violation, I am the fruit of a marriage of appreciation—a union consistent with the spirit (if not the letter) of human rights norms.

194. Arranged Marriages, *supra* note 35 (quote from an Indian mother interviewed in the documentary film).