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Restorative Justice & Family Abuse: Extending a Socio-Legal  
Approach to Cases of Forced Marriage in Scotland.

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## **ABSTRACT**

This thesis offers a comprehensive assessment of the theoretical and practical connections between restorative justice and forced marriage from a Scottish perspective. Existing legal models aimed at addressing Scotland's forced marriage problem are focused on punitive sanctions and extracting victims from their abusive familial and community environments. It is argued that this top-down regulatory framework is falling short in several respects, leaving significant numbers of victims without legal protection. Recent evidence suggests some welfare organisations in Scotland are prepared to offer restorative and mediatory practices as alternative interventions despite significant opposition. In parallel, the Scottish Government's recent commitment to a national model of restorative justice has yet to consider potential inclusion of forced marriage cases and implications for those involved.

The aim of this thesis is twofold: to assess the potential benefits of restorative practice as an alternative legal approach to forced marriage; and consider how these cases might be incorporated within Scotland's national restorative justice strategy. Chapter one outlines the broader context to these developments and draws key boundaries in conceptualising restorative justice. An assessment of Scots forced marriage law is offered in Chapter two, followed by an overview of existing and prospective restorative justice landscapes in Chapter three. Chapter four considers the positioning of forced marriage within the surrounding feminist literature on restorative justice, reframing the existing discourse. Chapter five analyses how a restorative approach might address some of the crucial conceptual concerns of forced marriage through dialogic engagement, taking note of important feminist insights for addressing power imbalances and instilling victim safety. Discussion concludes in Chapter six with key considerations for a more desirable professional response to forced marriage through restorative practice. The overall objective is to demonstrate how the positioning of these cases within a socio-legal framework of restorative justice might extend protection to a great number of victims and offer fuller appreciation of the cultural and collectivist contexts within which minority individuals exercise marital autonomy.

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## **LIST OF AUTHORITY**

### **UK and Scottish Legislation**

Anti-social Behaviour, Crime and Policing Act 2014

Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011

Victim and Witnesses (Scotland) Act 2014

### **International Instruments**

Council of Europe, Convention on preventing and combating violence against women and domestic violence, No.210 (Istanbul, 11.V.2011).

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4<sup>th</sup> November 1950, ETS5.

Council of Europe, Recommendation CM/Rec(2018)8 of the Committee of Ministers to member States concerning restorative justice in criminal matters (Adopted by the Committee of Ministers on 3<sup>rd</sup> October 2018 at 1326<sup>th</sup> meeting of the Ministers' Deputies).

Directive 2012/29/EU of the European Parliament and the Council of 25<sup>th</sup> Oct 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. [2012] OJ L315/57.

Sentencing Act 2002 (2002, No.9), (NZ).

UN CEDAW (1994), General Recommendation No.21: Equality in Marriage and Family Relations, adopted at the Thirteenth Session of the Committee on the Elimination of Discrimination against Women, in 1994 (Contained in Document A/49/38).

UN General Assembly (1948), Universal Declaration of Human Rights, Adopted by UN General Assembly Resolution 217 A(III) of 10<sup>th</sup> December 1948.

### **UK and Scottish Cases**

*AB v CD* [2021] SLT (Sh Ct) 347.

*City of Edinburgh Council v S* 2015 SLT (Sh Ct) 69.

*C v T* [2021] 5 WLUK 395.

*Mahmood v Mahmood* [1993] SLT 589.

*Mahmud v Mahmud* [1994] SLT 599.

*Re M Minors* [2003] EWHC 852.

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My final thanks go to my close family and friends for their endless encouragement and inspiration.

## **AUTHOR'S DECLARATION**

I declare that this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution. Where information or ideas are obtained from any source, that source is acknowledged in the footnotes and/or text.

The sources used are up to date as of April 2022; all cited URLs were last accessed and functioning on 01/04/2022. Short-form citations of international legal instruments are used in footnotes with full citations provided in the preceding List of Authority. Where sources are used more than once, citation is made of the author and year of publication for ease of reference to the bibliography.

Printed Name: Cameron James Gaw

Signature:



## LIST OF ABBREVIATIONS

<b>ACJRD</b>	The Association for Criminal Justice, Research and Development (Ireland)
<b>ADR</b>	Alternative Dispute Resolution
<b>AM</b>	Arranged Marriage
<b>CCTM</b>	Cross-cultural Transformative Mediation
<b>CJ</b>	Criminal Justice
<b>CJS</b>	Criminal Justice Statistics
<b>COPFS</b>	Crown Office and Procurator Fiscal Service
<b>DA</b>	Domestic Abuse
<b>DFP</b>	Diversion from Prosecution
<b>DVC</b>	Domestic Violence Courts
<b>FM</b>	Forced Marriage
<b>FMPO</b>	Forced Marriage Protection Order
<b>FMU</b>	Forced Marriage Unit
<b>HBVA</b>	Honour-based Violence and Abuse
<b>HOFCO</b>	Home Office and Foreign Commonwealth Office
<b>IDAC</b>	Integrated Domestic Abuse Court
<b>LCM</b>	Legislative Consent Memorandum
<b>LOKK</b>	Landsorganisation af Kvindekrisecentre (National Organisation of Women's Shelters, Denmark)
<b>LSS</b>	Law Society of Scotland
<b>ME</b>	Minority Ethnic
<b>RJ</b>	Restorative Justice
<b>RJM</b>	Restorative Justice and Mediation
<b>SCTS</b>	Scottish Courts and Tribunals Service
<b>SPEOC</b>	Scottish Parliament Equal Opportunities Committee
<b>SPJC</b>	Scottish Parliament Justice Committee
<b>TF</b>	Tværkulturel familierådgivning (cross-cultural family counselling, Denmark)
<b>UN</b>	United Nations
<b>CEDAW</b>	Committee on the Elimination of Discrimination Against Women
<b>VAWG</b>	Violence Against Women and Girls

## CHAPTER ONE

### INTRODUCTION

Marriage is to be entered ‘only with the free and full consent of the intending spouses.’<sup>1</sup> This human rights standard has shaped the legal context of Forced Marriage (FM) and the obligation on Western jurisdictions to act against it.<sup>2</sup> Throughout Europe, a top-down regulatory framework of immigration policies and criminal sanctions has been enacted, with lesser emphases on private law measures including civil protection orders and the minimum marriageable age.<sup>3</sup> Whilst seemingly aligning with the issue’s severity, the political temptation behind these ‘solutions’ in declaring the problem as ‘dealt with’ overlooks the interests of many victims.<sup>4</sup> The result is a body of rules applied disproportionately to the number of reported cases, preserving perceptions that minority communities wherein FM is most observed are to be controlled.<sup>5</sup>

This context is extended to two Scottish developments. The Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 (‘the 2011 Act’) introduced a civil response of Forced Marriage Protection Orders (FMPOs) – of which 16-18 have been granted since the Act’s enforcement with no recorded prosecution for breach.<sup>6</sup> A specific criminal offence of forcing another to marry was introduced by s.122 of the Anti-social Behaviour, Crime and Policing Act 2014 (‘the 2014 Act’) and has yet to result in conviction. Beneath this framework exists a network of welfare organisations offering targeted support, the bulk of this work focused on protecting service users outwith Scotland’s legal system.<sup>7</sup> A concern raised through Chantler et al.’s 2017 study – the only national research into the perpetration of FM in Scotland – is that some organisations evidence restorative practices as effective intervention,

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<sup>1</sup> Universal Declaration of Human Rights, Art.16(2).

<sup>2</sup> M. Enright (2009), Choice, Culture and the Politics of Belonging: The Emerging Law of Forced and Arranged Marriage, *MLR* 72(3) 331-359, 340; Council of Europe Committee on Equality and Non-Discrimination (2018), *Forced Marriage in Europe Report*, Doc.14574 (11<sup>th</sup> June), (Available at: <https://pace.coe.int/en/files/24806/html>).

<sup>3</sup> A. Sabbe et al. (2014), Forced marriage: an analysis of legislation and political measures in Europe, *Crime, Law, and Social Change* 62(2) 171–189; B. Clark & C. Richards (2008), The Prevention and Prohibition of Forced Marriages: A Comparative Approach, *The International and Comparative Law Quarterly* 57(3) 501-528.

<sup>4</sup> Sabbe et al. (2014), 182; Scottish Women’s Aid et al. (2013), *Written Submission to Scottish Parliament Justice Committee* (ASB2), (Available at: [https://archive2021.parliament.scot/S4\\_JusticeCommittee/Inquiries/ASB2\\_Womens\\_Aid\\_organisations.pdf](https://archive2021.parliament.scot/S4_JusticeCommittee/Inquiries/ASB2_Womens_Aid_organisations.pdf)), 5.

<sup>5</sup> Sabbe et al. (2014), 182.

<sup>6</sup> K. Chantler et al. (2022), Policy and Professional Responses to Forced Marriage in Scotland, *British Journal of Social Work* 52 833-849, 4; *AB v CD* 2021 SLT (Sh Ct) 347; *C v T* [2021] 5 WLUK 395.

<sup>7</sup> Saheliya (2012), *Women and Forced Marriage in Scotland: Research Report*, (Available at: <https://www.yumpu.com/en/document/view/53878799/women-and-forced-marriage-in-scotland>), 42.

involving dialogic engagement with perpetrators (most commonly the victim's family) as a means of addressing abusive behaviour.<sup>8</sup> Given longstanding opposition to this 'softer' approach, these third sector practices have been administered unofficially, absent notable scrutiny of their risks or, more controversially, benefits.

The revival of Restorative Justice (RJ) in Scotland has arisen through the Scottish Government's recent commitment to a nationally applicable model, available to all those desiring access.<sup>9</sup> Aligning with European developments,<sup>10</sup> this has consisted of research into existing Scottish models, an Action Plan of systemic targets, and a Rapid Evidence Review drawing on elements of international practice to inform considerations.<sup>11</sup> Despite desire to roll out this model to all types of offending, consideration has yet to be afforded to the implications of these policy moves for individual case-types and the demographics of those involved.<sup>12</sup>

The purpose of this research is not to provide an exhaustive account of RJ theory, various existing models, and their application to FM. Rather, it offers a particular route through which a restorative approach to FM in Scotland may be realised. The aim is twofold: to assess the potential benefits of a restorative approach as a means of countering the shortcomings of Scotland's existing legal approach to FM cases; and consider how FM as a specific form of family abuse might be incorporated within Scotland's recently revived discourse in respect of a national RJ forum.

Discussion proceeds in six parts. This chapter confines RJ to a particular justice mechanism, offering a basic overview of restorative theory for these purposes. Parameters are drawn in respect of terminology adopted throughout with background offered in positioning FM cases as an intersection between civil and criminal diversionary mechanisms. The implementation of Scotland's FM laws is considered in Chapter Two, highlighting crucial concerns to be overcome through subsequent discussions on a RJ model for these cases. The definitional

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<sup>8</sup> K. Chantler et al. (2017), *Understanding forced marriage in Scotland* (Scottish Government), (Available at: <https://www.gov.scot/publications/understanding-forced-marriage-scotland/>), 24.

<sup>9</sup> Scottish Government (2019a), *Restorative Justice: Action Plan*, (Available at: <https://www.gov.scot/publications/restorative-justice-action-plan/>), 4.

<sup>10</sup> See Directive 2012/29/EU of the European Parliament and the Council of 25<sup>th</sup> Oct 2012; Council of Europe Recommendation CM/Rec(2018)8 of the Committee of Ministers.

<sup>11</sup> Scottish Government (2018a), *Restorative Justice – Baseline Survey Report*, (Available at: <https://www.gov.scot/publications/restorative-justice-survey-response-analysis/>); S.Gov (2019a); Scottish Government (2019b), *Uses of Restorative Justice: Rapid Evidence Review*, (Available at: <https://www.gov.scot/publications/rapid-evidence-review-uses-restorative-justice/>).

<sup>12</sup> S.Gov (2019a); S.Gov (2019b), 3.

bounds of FM, the professional response, and victim engagement with the legal system form the primary considerations. Chapter Three considers Scotland's RJ foundations within which a FM model might fall, noting some systemic obstacles to creation of a national model that would foreseeably impact on adaptation to FM. Chapter Four positions FM as a distinctive form of family abuse, re-framing key arguments against restorative approaches to these cases. The substantive considerations of this thesis are developed through the final two chapters, addressing the key difficulties of existing FM and RJ initiatives highlighted in preceding chapters. Chapter Five considers a restorative approach as a return to the previously ruled out 'dialogue approach' to FM, furthering RJ as a fuller appreciation of the contextual nuances and definitions of FM. Particular thought is given to how feminist concerns in respect of rebalancing power structures and engendering victim safety can be acknowledged in practice. Chapter Six concludes with suggestions for reorienting current professionalism, taking account of perceptions of culture, participants' engagement with the legal system, and the structuring of effective intervention.

The FM and RJ discourses in Scotland are limited and there is no literature considering the relationship between them. International contexts, primarily Scandinavian systems of RJ, remain informative throughout. Particular inspiration is drawn from the Danish approach as the most developed model for FM from which guidance can be offered for Scotland. The overall objective is to demonstrate how positioning Scotland's FM cases within a RJ framework might extend protection of the legal system to a greater number of victims, instilling greater appreciation of the value in family and community life and complexity of constraints within which marital autonomy is exercised.

## **1.1 – Restorative Justice: A Working Definition**

RJ has been criticised as an amorphous ideal, attributed to its breadth and evolutionary character.<sup>13</sup> The 'conceptual fault-lines and power battles' within the movement mean a 'consensual definition accommodating all normative and practical peculiarities' is not possible.<sup>14</sup> The concept has progressed furthest in a legal context, as a movement in Criminal Justice (CJ) towards informal case resolution promoting healing, reparation, and direct

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<sup>13</sup> R.E. Mackay (2003), Restorative Justice and the Children's Hearings – A Proposal, *European Journal of Crime, Criminal Law, and Criminal Justice* 11(1) 1-17, 2; D.W. Van Ness & K.H. Strong (2010), *Restoring Justice: An Introduction to Restorative Justice* (edn.4, Lexis Nexis), 41.

<sup>14</sup> Gavrielides suggests the only consensus in RJ's definition is that there is none – T. Gavrielides (2008) Restorative justice—the perplexing concept: Conceptual fault-lines and power battles within the restorative justice movement, *Criminology & Criminal Justice* 8(2) 165-183, 168-169.

accountability of offenders to those harmed.<sup>15</sup> Practitioners vary in background, aspirations, methodology, and approach and distinctions remain in terms of aims, models, and relationships with the legal system.<sup>16</sup> Internationally, RJ models are applied across all offence types at all stages of the CJ process.<sup>17</sup> In Scotland, RJ is a newer ideal, gaining traction within the Government's commitment to a national model by 2023.<sup>18</sup>

The problem is not always that practitioners mean different things when speaking of RJ but fail to articulate how they define it, on the assumption of a universally cohesive term.<sup>19</sup> RJ as a philosophy reflects a modern way of thinking about crime; a theory of how justice should be reached, encompassing a set of guiding principles rather than any specific activity or process.<sup>20</sup> Process-oriented definitions home in on practical elements of communication between those affected by crime, typically assessed through parties meeting in an informal environment to discuss the harm, its personal consequences, and how they are to be resolved.<sup>21</sup> These processes are incorporated within a variety of models including victim-offender mediation, family group conferencing, and sentencing circles.<sup>22</sup> Scottish policy favours this conception, defining RJ as 'a process of independent, facilitated contact which supports constructive dialogue between a victim and a person who has harmed'<sup>23</sup> in respect of an offence or alleged offence, 'with a view to resolving any matter arising' therein.<sup>24</sup> Recent developments focus on conferencing – direct communication through closed face-to-face meetings, prepared and facilitated by trained third parties.<sup>25</sup> Given the aims of this thesis in considering Scotland's prospective RJ forum as an alternative to existing FM

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<sup>15</sup> M. Liebmann (2007), *Restorative Justice: How it Works* (Kingsley Publishing), 25-26; K. Daly (2016), What is Restorative Justice? Fresh Answers to a Vexed Question, *Victims & Offenders* 11(1) 9–29. For RJ in other contexts see D. Roche (2006), Dimensions of Restorative Justice, *Journal of Social Issues* 62(2) 217–238.

<sup>16</sup> Gavrielides (2008), 169. D. Miers (2001), *An International Review of Restorative Justice* (Home Office), (Available at: <https://restorativejustice.org.uk/sites/default/files/resources/files/An%20International%20Review%20of%20Restorative%20Justice.pdf>).

<sup>17</sup> S.Gov (2019b), 8.

<sup>18</sup> S.Gov (2019a), 4.

<sup>19</sup> Scottish practitioners note a tendency to 'band about' the term without explanation as to meaning – G. Maglione et al. (2020), The Local Provision of Restorative Justice in Scotland: An Exploratory Empirical Study, *European Journal on Criminal Policy and Research*, 8.

<sup>20</sup> Van Ness & Strong (2010), 42; Daly (2016), 12. This holistic approach is reflected by Scotland's existing practitioners who stress RJ as 'an overarching value-based approach to a wide range of problematic situations...and only secondarily a specific set of practices...which directly embody those values' – Maglione et al. (2020), 7.

<sup>21</sup> T. Marshall (1999), *Restorative Justice: An Overview* (Home Office), (Available at: [http://www.antonioacasella.eu/restorative/Marshall\\_1999-b.pdf](http://www.antonioacasella.eu/restorative/Marshall_1999-b.pdf)), 5. See 'encounter conception' in Van Ness & Strong (2010), 41-42.

<sup>22</sup> For overview of definitions see Liebmann (2007), 27-28.

<sup>23</sup> Scottish Government (2017), *Guidance for the Delivery of Restorative Justice in Scotland*, (Available at: <https://www.gov.scot/publications/guidance-delivery-restorative-justice-scotland/>), 6.

<sup>24</sup> Victim and Witnesses (Scotland) Act 2014, s.5(3).

<sup>25</sup> S.Gov (2019b), 4.

processes, the process-oriented definition outlined above is adopted throughout. A primary concern with existing FM initiatives stems from the reluctance of victims to utilise the law against families and communities.<sup>26</sup> Measures taken in conjunction with standard legal proceedings or those aimed at post-sentencing ‘restoration’ are unlikely to alleviate this concern. This paper limits RJ to a diversionary process of facilitated dialogue focused on redressing harm as an alternative to/diversion from existing legal processes for FM cases. Acknowledging that neither process nor values conceptions are mutually exclusive, consideration will be given to the values underpinning any prospective model.

## 1.2– Restorative Theory

The principles of restorative theory are non-exhaustive, including direct accountability and mutuality, honest and respectful dialogue, community caring and participation, healing, forgiveness, repentance, responsibility, moral learning, and reparation.<sup>27</sup> These factors reflect inclusive deliberation in responding to conflict, focused on minimising and repairing harm and strengthening relationships as an alternative to adjudication and retributive sanctions.<sup>28</sup> The most prominent image is that of sitting parties down to discuss the emotional impacts of harm and deal with its effects and aftermath.<sup>29</sup> Discussions are centred around: what happened, the consequences, and what should be done to redress the harm and prevent recurrence.<sup>30</sup> The process is commonly represented as a response to various needs overlooked by traditional CJ.<sup>31</sup> Emphasis is placed on constructive dialogue as a means of giving victims back their voice within the legal system, returning feelings of control and empowerment and allowing them to explain the effects of harm on their lives.<sup>32</sup> Offenders can take responsibility for their behaviour and make amends, reducing the psychological implications for the victim.<sup>33</sup> Braithwaite’s theory of reintegrative shaming (cited in Scotland as the most influential explanation as to how RJ works) sees the generation of social pressure through discussions of wrongdoing’s impact as the strongest driver of change and

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<sup>26</sup> Chantler et al. (2017), 36-37.

<sup>27</sup> Liebmann (2007), 31; S.Gov (2017), 9-10.

<sup>28</sup> Roche (2006), 218; N. Kearney et al. (2006), Restorative Justice in Scotland: An Overview, *British Journal of Community Justice* 4(3) 55-65; S. Kirkwood (2010), Restorative justice cases in Scotland: Factors related to participation, the restorative process, agreement rates and forms of reparation, *European Journal of Criminology* 7(2) 107–122.

<sup>29</sup> Kearney et al. (2006), 58-60; S.Gov (2019a), 3.

<sup>30</sup> S. Kirkwood (2018), *Insight 44: Restorative Justice* (Iriss, Dec), (Available at: [https://www.iriss.org.uk/sites/default/files/2018-11/insights-44\\_0.pdf](https://www.iriss.org.uk/sites/default/files/2018-11/insights-44_0.pdf)), 6.

<sup>31</sup> Kirkwood (2010), 107; S.Gov (2019a), 3; G. Maglione (2021), Restorative Justice, Crime Victims and Penal Welfarism. Mapping and Contextualising Restorative Justice Policy in Scotland, *Social & Legal Studies* 30(5) 745-767, 756.

<sup>32</sup> S.Gov (2019a), 3; S.Gov (2017), 6; Kirkwood (2018), 11.

<sup>33</sup> S.Gov (2019a), 6; S.Gov (2017), 6; Kirkwood (2018) 4,10.

rehabilitation.<sup>34</sup> Shame is presented as a force for shifting immoral behaviour, contrasting with the stigmatisation of retributivism which excludes offenders from the community.<sup>35</sup> The adversarial courtroom focused on establishing blame, guilt, and punishment, is replaced with a collaborative, future-focused response wherein justice is assessed against subjective standards of victim satisfaction and offender recidivism.<sup>36</sup> The normative assumptions behind these benchmarks are contested and raise concerns regarding the undermining of conventional CJ safeguards, including the right to a fair trial, non-incrimination, and proportionality of restitution.<sup>37</sup> These debates occur elsewhere in the literature and will not be considered beyond recognition of their existence.

### 1.3– Terminology

Traditional RJ theory sees the process as returning control of harm resolution to those most affected, otherwise ‘stolen’ by the State under conventional CJ.<sup>38</sup> Whereas retributive justice defines crimes as violations of the State, RJ emphasises personal and community violation.<sup>39</sup> This is commonly reflected through redefining offences as ‘conflicts’ and replacing the State with the community (society) as the third party.<sup>40</sup> The community perspective – by which the community reintegrates those who have wronged – remains relevant to the underlying assumptions of many restorative practices and some models continue to limit State interference.<sup>41</sup> The term ‘formal’ RJ is used to refer to national, State-run diversionary processes deployed by State-appointed professionals, as anticipated by Scottish policy projections.

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<sup>34</sup> Kirkwood (2018), 9; J. Braithwaite (1989), *Crime, Shame and Reintegration* (Cambridge University Press).

<sup>35</sup> Ibid.; J. Braithwaite (2006), Doing Justice Intelligently in Civil Society, *Journal of Social Issues* 62(2) 393-409, 403.

<sup>36</sup> S.Gov (2019b), 4-5; Kirkwood (2018), 9-11.

<sup>37</sup> MacKay (2003), 3; Kirkwood (2010), 117; A. Ashworth (2002), Responsibilities, Rights and Restorative Justice, *Brit.J.Crim* 42 578-595.

<sup>38</sup> N. Christie (1977), Conflicts as property, *Brit.J.Crim* 17(1) 1-15; S.Gov (2019b), 4; Kirkwood (2018), 4.

<sup>39</sup> H. Zehr (1991), *Changing Lenses: A New Focus for Crime and Justice* (Herald Press); Kirkwood (2018), 5.

<sup>40</sup> B. Albrecht (2010), Multicultural Challenges for Restorative Justice: Mediators’ Experiences from Norway and Finland, *Journal of Scandinavian Studies in Criminology and Crime Prevention* 11(1) 3-24, 4; S.Gov (2019b), 4; Christie (1977), 1.

<sup>41</sup> Mackay (2003), 11. See continued reference to ‘community’ in Scotland’s formal diversionary mechanisms – Community Justice Scotland (2020a), *National Guidelines on Diversion from Prosecution in Scotland* (V.4.0), (Available at: <https://communityjustice.scot/wp-content/uploads/2020/06/Diversion-from-Prosecution-Guidance-Version-4.0-FINAL-VERSION-April-2020.pdf>), 4, 9. See also RJ processes in Islamic contexts – M.J. Islam et al. (2018), Challenges of implementing restorative justice for intimate partner violence: An Islamic perspective, *Journal of Religion and Spirituality in Social Work: Social Thought* 37(3) 277-301, 285-287.



Traditional incident-focused connotations of RJ, as attending to criminal conduct that has already occurred, precludes cases involving processes of ongoing behaviour.<sup>42</sup> These notions remain prominent in Scottish policy and have long been rejected by feminist scholars as under-theorising RJ's compatibility with cases of prolonged abuse.<sup>43</sup> For some, application of restorative theory to family abuse requires a perspective so different that 'RJ' is often replaced with terms such as 'transformative justice'.<sup>44</sup> This paper draws insight from such scholarship whilst retaining the term 'RJ', recognising the difficulty of additional terms within already limited Scottish development.<sup>45</sup>

A further distinction within the literature is drawn between youth-orientated practices and those for adult offending.<sup>46</sup> Although many FM victims are youths, emphasis is placed on the age of the (typically adult) offender. Whilst victim support might differ by age, elements of the youth justice system remain informative whilst priority is afforded to adult RJ. Acknowledging the difficulties in labelling participants, for consistency the terms 'victim' and 'perpetrator' are adopted to refer to parties who might otherwise fall under the complainer-offender or pursuer-defender relationship.<sup>47</sup> The latter, private law relationship is included in recognition that a strictly criminal orientation of RJ may not be appropriate.

## 1.4 – Restorative Justice & Alternative Dispute Resolution

The mainstay of the RJ conversation is its criminal law roots and supposed dichotomy with retributive justice.<sup>48</sup> RJ remains harnessed to CJ in ways which preclude a deeper understanding of the relationships between and outwith them.<sup>49</sup> The relationship with its civil law counterpart of Alternative Dispute Resolution (ADR) is contentious, with distinctions often unclear.<sup>50</sup> At the lowest distinguishable level, ADR describes the forums

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<sup>42</sup> Maglione (2021), 754; S.Gov (2017), 10.

<sup>43</sup> S.Gov (2019a), 3; J. Stubbs (2010), Relations of Domination and Subordination: Challenges for Restorative Justice in Responding to Domestic Violence, *UNSW Law Journal* 33(3) 970-986, 979; K. Daly & J. Stubbs (2006), 'Feminist theory, feminist and anti-racist politics, and restorative justice' in G. Johnstone & D.W. Van Ness (eds), *Handbook of Restorative Justice* (Routledge), 154.

<sup>44</sup> Per Behrens, perhaps what we are talking about is not RJ at all – J. Behrens (2005), Meeting the Needs of Victims of Domestic Violence with Family Law Issues: The Dangers and Possibilities in Restorative Justice, *International Journal of Law in Context* 1(3) 215-235, 232.

<sup>45</sup> For difficulty in varying terminology see Daly (2016); Liebmann (2007), 25-26.

<sup>46</sup> MacKay (2003), 4; Kearney et al. (2006), 57; Maglione (2021), 747.

<sup>47</sup> See more recent shift towards 'person harmed' and 'person who has harmed' – S.Gov (2017), 6; S.Gov (2019a), 6.

<sup>48</sup> S.Gov (2019a), 3; Maglione (2021), 751-752; MacKay (2003), 6.

<sup>49</sup> Van Ness & Strong (2010), 51-53; A. McAlinden (2011), 'Transforming justice': challenges for restorative justice in an era of punishment-based corrections, *CJR* 14(4) 383-406.

<sup>50</sup> Roche (2006), 225-226; C. Lockyer (2018), Restorative Justice and Mediation – What's the Difference? (First ADR Kit, 12<sup>th</sup> Feb), (Available at: <http://firstadrkit.org/adr/restorative-justice-and-mediation/>).



used to solve legal ‘disputes’ between private parties without going to court.<sup>51</sup> RJ remains anchored in crime as a means of addressing ‘harm’, predicating a minimum degree of public and State oversight.<sup>52</sup> The motivations of the latter require explicit acknowledgement of moral imbalances and a requisite accountability not common to ADR, focused instead on seemingly balanced disputes.<sup>53</sup> Family mediation is available throughout Scotland, primarily involving cases where parties are (*prima facie*) deserving of equal treatment – namely, parenting disputes, family restructuring, divorce/dissolution, and separation.<sup>54</sup> Programmes exist to help ‘families in conflict’ work through their differences, providing space to make their own arrangements towards more effective communication.<sup>55</sup> Thus, many core aims of family dispute resolution are the same as those sought under RJ, including self-determination, mutual understanding, and the facilitation of ongoing relationships.<sup>56</sup> A literal interpretation of ‘RJ’ is not limited to criminal law, and Scotland’s ADR framework inherently adopts aspects of both restoration and justice.<sup>57</sup> Historically, this crossover has resulted in similar points of evaluation, meaning much of the respective scholarship applies interchangeably.<sup>58</sup>

FM is rarely considered from a RJ perspective, yet the debate on FM mediation is time-honoured.<sup>59</sup> RJ’s expansion will undoubtedly result in the inclusion of more case types at various stages of Scotland’s traditional CJ process, including high-profile issues of VAWG.<sup>60</sup> A prospect yet to be explored is that certain cases encompassed are those in which

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<sup>51</sup> Most commonly refers to models of arbitration, conciliation, and mediation (mediation is most well-known, itself classified under both RJ and ADR) – See SPJC (2018), *I won’t see you in court: alternative dispute resolution in Scotland* (Session.5, 1<sup>st</sup> Oct), (Available at: <https://digitalpublications.parliament.scot/Committees/Report/J/2018/10/1/I-won-t-see-you-in-court--alternative-dispute-resolution-in-Scotland#What-is-alternative-dispute-resolution->), 3.

<sup>52</sup> Lockyer (2018); H. Zehr (2010), Restorative Justice, mediation and ADR (Zehr Institute for RJ, 13<sup>th</sup> Aug), (Available at: <https://emu.edu/now/restorative-justice/2010/08/13/restorative-justice-mediation-and-adr/>).

<sup>53</sup> RJ is seen to require greater preparation, extensive follow-up, and training in the dynamics of trauma not inherent to ADR – Zehr (2010).

<sup>54</sup> R. Cubitt (2019), Finding the Right Support: One Size Doesn’t Fit All, *Family Court Review* 57(3) 327-331.

<sup>55</sup> R. Cubitt (2009), ‘Family Mediation’ in E. Malcolm & F. O’Donnell (eds.), *A Guide to Mediating in Scotland* (Dundee University Press).

<sup>56</sup> Roche (2006), 226; Liebmann (2007), 32-33; Cubitt (2009), 100; T. McFarlane (2012), Mediation: The Future of Dispute Resolution in Contemporary Scots Family Law, *Aberdeen Student Law Review* 3 28-53, 37.

<sup>57</sup> E.g., cases of divorce might restore amicable relations between spouses whilst ensuring just separation agreements.

<sup>58</sup> Roche (2006), 225-226. See respective benefits/drawbacks in C. Irvine (2020), What do ‘lay’ people know about justice? An empirical enquiry, *International Journal of Law in Context* 16 146-164, 147-148; S.Gov (2019b); Kirkwood (2010); D. Sivasubramaniam (2012), A special issue on restorative justice: unravelling the mystery, *Critical Criminology* 20(1) 1–7.

<sup>59</sup> G. Avan et al. (2005), *Right to choose? Research into domestic abuse and forced marriages within BME communities in Glasgow*, (Available at: <https://womensaidorkney.org.uk/wp-content/uploads/2014/08/Right-to-Choose.pdf>), 65; Home Office (2000), *A Choice by Right. Report of the working group on forced marriage*, (Available at: [https://www.basw.co.uk/system/files/resources/basw\\_22604-2\\_0.pdf](https://www.basw.co.uk/system/files/resources/basw_22604-2_0.pdf)), 19.

<sup>60</sup> S.Gov (2019a), 5; S.Gov (2019b), 11.

‘justice’ is more commonly sought under civil law routes. Restricting consideration to criminal cases of FM is illogical for two reasons. Firstly, the underlying causes of FM, the general desires of victims, and the issues hindering implementation of each route are the same regardless of whether the case is classified as civil or criminal (albeit each exists for different purposes).<sup>61</sup> Any reflection on RJ as an alternative means of addressing FM applies equally to civil or criminal cases. Secondly, and relatedly, s.122 of the 2014 Act has yet to be utilised and on the assumption that the current legal framework is flawed, it is only logical that alternatives should seek to redress the routes actually deployed (in this instance, the 2011 Act).

Just as FM exists at the civil-criminal intersection, it might be positioned as crossing the normative boundaries of respective diversionary schemes. This thesis contemplates a hybridisation of diversionary mechanisms within the wider RJ discourse as a potential pathway for FM in Scotland. Whilst respective terms of RJ and ADR are maintained throughout, the phrase ‘Restorative Justice and Mediation’ (RJM) is adopted where likely that FM would be more appropriately situated within a hybrid framework. Civil law mechanisms (primarily family mediation) and surrounding scholarship will be treated as informative, particularly where RJ discourses lack depth. Consideration will be afforded to ways in which FM as a specific form of abuse might position the harm more obviously within the sphere of ‘conflict’ resolution than other forms of family abuse. Elements of ADR practice, including cross-cultural communication and the benefits of privacy, provide further reflection. Distinctions will be drawn with traditional mediation, particularly in respect of victim safety, rebalancing power, and RJ oriented principles of accountability and harm. The importance is to stress diversification in approaches, acknowledging that most Scottish cases have fallen outwith existing FM law. The following chapter proceeds to assess why this landscape persists.

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<sup>61</sup> Chantler et al (2017), 19-43; M.M Idriss (2015), Forced marriages – the need for criminalisation?, CLR 9 687-703, 693-699.

## CHAPTER TWO

### FORCED MARRIAGE & SCOTS LAW

The extent to which FM occurs is difficult to estimate given issues in underreporting. Available statistics suggest an average of 48 Scottish cases annually, most commonly involving female victims of minority ethnic (ME) background, aged 14-25.<sup>62</sup> Current initiatives against FM are categorised under regulation, the right to exit, and dialogue.<sup>63</sup> Regulation and exit are most evident and will form the subject matter of this chapter, consideration of the third strand underpinning subsequent chapters. The purpose is to critique the current legal framework, highlighting prominent shortfalls that might be addressed through RJM. Whilst Scotland is subject to various international and domestic regulatory measures (notably UK immigration policy), focus is afforded to Scotland-specific FM law.

Scottish courts have power to grant FMPOs (including interim orders) under the 2011 Act, to secure the health, safety, and well-being of the protected person, either indefinitely or for a specified period.<sup>64</sup> Orders can incorporate a variety of restrictions tailored to individual cases, granted in light of the individual's views, age, and understanding.<sup>65</sup> Applications can be sought by victims themselves or through a 'relevant third party'.<sup>66</sup> Breach of any order is a criminal offence, resulting in an unlimited fine and up to two years imprisonment.<sup>67</sup> These provisions were followed in close succession by s.122 of the 2014 Act, creating a specific criminal offence of forcing another into marriage, punishable by fine or up to seven years imprisonment.<sup>68</sup> The right to exit emphasises removal from the abusive environment through permanent flight.<sup>69</sup> In most cases, legislative routes result in extrication of the victim, either as a complementary measure or a consequence of familial ostracism. Exit will therefore be considered in conjunction with analysis of the law. The knowledgebase in Scotland remains

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<sup>62</sup> Chantler et al. (2017), 14-16; K. Chantler & M. McCarry (2020), *Forced Marriage, Coercive Control, and Conducive Contexts: The Experiences of Women in Scotland*, VAW 26(1) 89-109, 92; HOFCE (2021), *Forced Marriage Unit Statistics 2020* (UK Government), (Available at: <https://www.gov.uk/government/statistics/forced-marriage-unit-statistics-2020/forced-marriage-unit-statistics-2020>).

<sup>63</sup> A. Phillips & M. Dustin (2004), *UK Initiatives on Forced Marriage: Regulation, Dialogue and Exit*, *Political Studies* 52 531–551; Saheliya (2012), 41.

<sup>64</sup> 2011 Act, s.1(1)-(2); s.6.

<sup>65</sup> *Ibid.*, s.1(3); s.2.

<sup>66</sup> *Ibid.*, s.3.

<sup>67</sup> *Ibid.*, s.9.

<sup>68</sup> 2014 Act, s.122.

<sup>69</sup> Saheliya (2012), 41; Phillips & Dustin (2004), 532.

limited; analysis will be couched in the available data from Chantler et al.'s 2017 study and literature from the broader discourse.

## 2.1 – Conceptualising Forced Marriage

FM denotes a human rights violation depriving freedom, dignity, and autonomy in determining who, when, or whether to marry.<sup>70</sup> Defined in Scotland as a marriage to which one or both spouses do not (or cannot) consent by reason of duress,<sup>71</sup> FM is now accepted to encompass a range of physical, psychological, financial, and sexual pressures.<sup>72</sup> The legal definitional standard is reflected in the legislation which stresses the need for 'free' and 'full' consent,<sup>73</sup> delineating FM from arranged marriage (AM).<sup>74</sup> FM is not a wedding, but a 'long-term process of socialisation' commencing in childhood and extending into adulthood, before and beyond ceremonial events.<sup>75</sup> Its normalisation is instilled from a young age through trivial acts aimed at 'planting the seed', with marriage occurring further down the line.<sup>76</sup> This process remains operative in cases of AM, distinguishable on the basis that prospective spouses have 'voluntarily' accepted a proposal at its climax.<sup>77</sup>

Binary notions of coercion and consent are overly simplistic, obscured by more subtle pressures (socially, culturally, and patriarchally construed by women's surroundings) which result in potential 'slippage' between forced and AM.<sup>78</sup> Consent and coercion are better acknowledged as opposite poles of a continuum, 'between which lie degrees of socio-

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<sup>70</sup> Council of Europe (2018), 5; UN CEDAW (1994), General Recommendation No.21: Equality in Marriage and Family Relations.

<sup>71</sup> Scottish Government (2014a), *Forced Marriage Statutory Guidance*, (Available at: <https://blogs.glowscotland.org.uk/fa/public/GirfecFalkirk/uploads/sites/2017/2015/06/Forced-Marriage-Statutory-Guidance-2014.pdf>), 37.

<sup>72</sup> See progression of Scottish cases in Phillips & Dustin (2004), 537-539.

<sup>73</sup> 2011 Act, s.1(4); 2014 Act, s.122(1)(b).

<sup>74</sup> S.Gov (2014a), 37. *Mahmood v Mahmood* [1993] SLT 589, 592; *Mahmud v Mahmud* [1994] SLT 599, 601.

<sup>75</sup> Chantler & McCarry (2020), 95. For more recent debate on defining FM by reference to post-ceremony coercion see Chantler et al. (2022), 844; A. Phillips (2008), 'Free to decide for oneself', in D. I. O'Neill, M. L. Shanley and I. M. Young (eds), *Illusion of Consent: Engaging with Carole Pateman* (Penn State University Press), 114-115; K. Chantler et al. (2009), Forced marriage in the UK: religious, cultural, economic or State violence?, *Critical Social Policy* 29(4) 587-612, 606.

<sup>76</sup> Chantler & McCarry (2020), 96.

<sup>77</sup> S.Gov (2014a), 37.

<sup>78</sup> G. Gangoli et al (2011), 'Understanding forced marriage: definitions and realities' in A.K. Gill & S. Anitha (eds), *Forced marriage: introducing a social justice and human rights perspective* (Zed books), 27; A. Bhandary (2018), Arranged marriage: Could it Contribute to Justice?, *The Journal of Political Philosophy* 26(2) 193-215; S. Anitha & A.K. Gill (2009), Coercion, Consent and the Forced Marriage Debate in the UK, *Feminist Leg Studies* 17(2) 165-184.

cultural expectation, control, persuasion, pressure, threat and force'.<sup>79</sup> Victim narratives in Scotland reflect this fluidity and overlap in definitions.<sup>80</sup> The difficulty for professionals is determining when persuasion becomes severe enough to override consent, distinguishing an illegal practice from one undeserving of intervention. The issue is how reluctant or resentful consent resulting from very considerable pressure does not equate to coercion and whether a particular occurrence of this process should merit (potentially discriminatory) intervention on the basis that it has not succeeded or involves more easily evinced coercion.<sup>81</sup> Absent explicit threats, 'the coercive potential that arises from great imbalances of power or prior historical injustices' goes undetected.<sup>82</sup> Gendered and cultural surveillance of decision-making within an insular upbringing leads many women to passive acceptance of their situations – out of respect for the family unit, to avoid stigmatisation or backlash, or preserve their sense of self within their community.<sup>83</sup> Under the 'illusion of consent', free agreement may be coercion absent no real alternative.<sup>84</sup>

It is inappropriate to assume consent is inherently unstable by virtue of cultural contexts.<sup>85</sup> Evidence demonstrates the myriad of ways in which ME youths 'actively negotiate and make deliberate strategic choices about marriage in order to manoeuvre within the grey area that exists between (relative) coercion and consent'.<sup>86</sup> Women may recognise the forced nature of their marriage but adapt to it, or accept the choices made for them in respecting their own cultural identity.<sup>87</sup> Individualist human rights standards premised on contrasting self-constituting, free individuals with those falling prey to coercion are at odds with the collective rights of minority communities within which individuals exercise their agency.<sup>88</sup> The difficulty is that questions of consent are necessary but insufficient in contextualising

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<sup>79</sup> Anitha & Gill (2009), 165. Scottish ME women's organisation, Saheliya, suggests this consists of twelve stages between which lie various levels of coercion which cannot be clearly defined and can be present simultaneously – Saheliya (2012), 27.

<sup>80</sup> Chantler & McCarry (2020), 93-94.

<sup>81</sup> See analysis of Scottish judgments in Anitha & Gill, 'Reconceptualising consent and coercion within an intersectional understanding of forced marriage', in Gill & Anitha (2011), 52.

<sup>82</sup> Anitha & Gill (2009), 171, 174.

<sup>83</sup> *Ibid.*, 176; Chantler et al. (2009), 604.

<sup>84</sup> Phillips (2008), 102.

<sup>85</sup> *Ibid.*, 108.

<sup>86</sup> Anitha & Gill (2011), 56.

<sup>87</sup> B. Collet & E. Santelli (2011), 'Forced Marriages: Between Social Construction and Experience of Family Enforcement', in R.K. Thiara et al. (eds), *Violence against Women and Ethnicity: Commonalities and Differences across Europe* (Verlag Barbara Budrich), 251-252.

<sup>88</sup> Anitha & Gill (2009), 171; F. Shariff (2012), Towards a Transformative Paradigm in the UK Response to Forced Marriage: Excavating Community Engagement and Subjectivising Agency, *Social & Legal Studies* 21(4) 549-566, 551; M.M. Haj-Yahia & E. Sadan (2008), Issues in Intervention with Battered Women in Collectivist Societies, *Journal of Marital and Family Therapy* 34(1) 1-13, 3.

FM.<sup>89</sup> How consent might be reconstructed, assisting women to navigate experiences rather than remove them from them, is considered subsequently in this thesis.

## 2.2 – The Legal Response

The focus on pressure's extent in determining whether consent has been overcome disregards pressures outwith the strictly legal perspective which might nevertheless override true consent.<sup>90</sup> The effect is to distract from more routine forms of control that do not involve the 'dramas' of volatile situations.<sup>91</sup> Those so overwhelmed by their odds they 'prefer' to acquiesce to family choice or 'choose' to marry an abusive spouse are not legally recognisable as victims.<sup>92</sup> The removal of free and full consent can coincide with pressures which do not present in forms identifiable as evidence in court.<sup>93</sup> The growth in legal recognition of psychological trauma has correlated with concern over professional ability to identify and respond to experiences.<sup>94</sup> Objective assessment of the likelihood of FM – a course of inherently private conduct requiring a pinpointing of loss of consent – is difficult.<sup>95</sup> Families are unlikely to leave testimonies unchallenged, meaning witness accounts will contrast those of perpetrators and potentially even victims, particularly where families act collectively.<sup>96</sup>

There are instances where FM is easily demarcated and the implementation of legislation comparatively straightforward. The recent case of *AB v CD*, where an Indian woman studying in the UK sought a FMPO against her parents, demonstrated quantifiable evidence of prolonged coercive control and marriage plans, much of it led by the pursuer herself.<sup>97</sup> The victim had contacted a range of professionals who attested to her deteriorating mental health, suicidal tendencies, and risks posed by her parents' continued control. The defenders had: admitted to physical chastisement throughout her childhood (albeit disputing extent and force), accepted the victim had explicitly refused their proposals, and insisted on marriage

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<sup>89</sup> Collet & Santelli (2011), 252.

<sup>90</sup> Shariff (2012), 556; Anitha & Gill (2009), 172.

<sup>91</sup> Anitha & Gill (2009), 172; Phillips & Dustin (2009), 540.

<sup>92</sup> Phillips & Dustin (2009), 541.

<sup>93</sup> E.g., showing young daughters pictures of older men – Chantler & McCarry (2020), 96.

<sup>94</sup> C. Bishop (2016), Why is it so hard to prosecute cases of coercive or controlling behaviour? (The Conversation, 31<sup>st</sup> Oct), (Available at: <https://theconversation.com/why-its-so-hard-to-prosecute-cases-of-coercive-or-controlling-behaviour-66108>); N. Pearce & A. Gill (2012), Criminalising forced marriage through stand-alone legislation: Will it work?, *Family Law* 534-542, 538; Bhandary (2018), 199.

<sup>95</sup> Idriss (2015), 697; I. Haenen (2014), *Force & Marriage: The criminalisation of forced marriage in Dutch, English and international criminal law* (Insertia), 250.

<sup>96</sup> J.M. Carruthers (2016), *City of Edinburgh Council v S*. Forced Marriage in Scotland: The Legal Response, *Edin.L.R* 20(1) 86-94, 91.

<sup>97</sup> *AB v CD* 2021 SLT (Sh Ct) 347.

regardless of whether the specific arrangement fell through.<sup>98</sup> The decision to grant a FMPO was somewhat foreseeable.

The situation is more sensitive where victims appear to consent to settings which might otherwise indicate severe risk. The judgement of *City of Edinburgh Council v S* hinged on the credibility of evidence of prior coercion exerted upon the individual's siblings; despite initial referral made by her sister and alleged history of marital abuse within the wider family, application was refused in line with the alleged victim's wishes.<sup>99</sup> This case has been criticised for applying too high a threshold, raising the evidentiary standard and discouraging future applications.<sup>100</sup> Despite rejecting a literal interpretation of the 2011 Act, otherwise requiring evidence of an actual marriage (ceremony and spouse) before a FMPO be granted,<sup>101</sup> the decision has been attributed to an overemphasis on FM as an event.<sup>102</sup>

This analysis does not criticise this decision but highlights the difficult position the legal profession is placed in when delineating FM. The absence of concrete wedding plans means professionals are to assess the likelihood of any future ceremony and its imminence in determining whether consent is likely to be invalid or whether consent has already been overridden to the extent that any future decision to marry would be non-consensual. The evidence-base would likely rely on wider control within the marital process and previous conduct of the family – neither of which signal that a future ceremony will transpire nor non-consent.<sup>103</sup> Marital processes can conceivably commence in line with AM despite risks of future manifestation of pressure. An individual might respect the legitimacy of parental authority and accept albeit coercive marital decisions. To incorporate more subtle forms of coercion risks overinclusion and undue interference in private life, encouraging 'a wholesale denial of the moral agency of people from minority cultural groups' with every minority 'choice' scrutinised and every AM brought under suspicion.<sup>104</sup> Yet, failure to intervene risks driving victims further down a precarious path.

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<sup>98</sup> *Ibid.*, 359 at [26]-[28]; 364 at [59].

<sup>99</sup> *CoEC v S* 2015 SLT (Sh Ct) 69, [88].

<sup>100</sup> Chantler et al. (2017), 37-38; Chantler et al. (2022), 843.

<sup>101</sup> *CoEC v S*, [82].

<sup>102</sup> Chantler et al. (2017), 37-38; Chantler et al. (2022), 843. See analysis of an earlier, unreported case, dismissed on the basis that a marriage 'plan' no longer existed following social work intervention, despite acceptance of illegality had it been executed – N. Gilchrist (2015), *Forced Marriage in Scotland* SLT 1 1-4, 4.

<sup>103</sup> *CoEC v S*, [87]-[88].

<sup>104</sup> Phillips (2008), 111.

Decisions to perpetrate FM are equally context-bound and familial and community dimensions give rise to sensitive questions of culpability.<sup>105</sup> Parents, themselves faced with community ostracism, work to the same cultural scripts and structures which coerce them into exercising control over their children.<sup>106</sup> Extended family, community, and in-laws are often involved, partaking in the grooming process, the reproduction of cultural norms, or restricting access to external support.<sup>107</sup> Existing conceptualisations focused on duress presuppose that the source of coercion is easily identifiable, paying little attention to the hierarchal chain of pressures within minority communities.<sup>108</sup> The question is how to determine who has contributed to the extent that they should fall within legal action. Too far up the chain could invoke an attack on minority groups, leaving families shamed by wider community.<sup>109</sup> It is likely conduct would lessen in directness the further up the chain; in *AB*, the orders granted under the 2011 Act were originally sought against two additional relatives, dropped for lack of a direct link to the coercion.<sup>110</sup> The result is that responsibility falls upon ‘principal’ perpetrators, despite powerful influences from other sources. It should be examined from a moral standpoint the desire to direct the force of the law against families paying deference to cultural norms or parents – particularly mothers – acting under gendered codes indoctrinating them into normalising marriage.<sup>111</sup> How a RJM approach may better appreciate this dynamic is considered in the penultimate chapter of this thesis.

### 2.3 – The Wider Professional Response

The complexities in identifying FM mean frontline professionals are often unaware of its ‘symptoms’, crossing paths with victims unknowingly and compromising victims’ recognition of their abuse and practitioners’ willingness to intervene.<sup>112</sup> The situation is magnified by a deficiency in training and absence of a national teaching model for dealing with cases.<sup>113</sup> Knowledge is often appointed to single individuals within organisations rather

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<sup>105</sup> H. Sowe (2018), From an emic perspective: Exploring consent in forced marriage law, *Australian & New Zealand Journal of Criminology* 51(2) 258-274, 268.

<sup>106</sup> Chantler & McCarry (2020), 95.

<sup>107</sup> *Ibid.*, 96. See extended family involvement in *AB*, 347; *CoEC v S*, [47]-[57].

<sup>108</sup> Sowe (2018), 268.

<sup>109</sup> Christine Graham (then Convenor of the Justice Committee) questioned who would fall within the 2014 Act in individual instances, highlighting the risk of leaving minority families or communities ‘tinged with criminality’ – SPJC (2013a), *Official Report* (Session.4, 10<sup>th</sup> Dec), (Available at: <https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=8787&mode=pdf>), Col.3950.

<sup>110</sup> *AB*, 354-356.

<sup>111</sup> Chantler & McCarry (2020), 95 – All survivors interviewed in the 2017 study named their mother as having introduced marriage to them as youngsters.

<sup>112</sup> Chantler et al. (2017), 29; Chantler et al. (2022), 844.

<sup>113</sup> Chantler et al. (2017), 31-32.



than distributed throughout.<sup>114</sup> Individual dealings with FM cases are rare, attributed by practitioners to the limited presence of minority communities and uncommonness of the issue within them.<sup>115</sup> This tendency to correlate perpetration with ethnicity (rather than wider social contexts) attributes FM to certain groups, supporting perceptions of ‘difference’ which result in notable barriers for ME victims accessing assistance.<sup>116</sup> Notions of ‘cultural privacy’ which ascribe FM to the private realm of certain communities manifest in professional inadequacy where service providers view themselves as insufficiently equipped to work with minorities.<sup>117</sup> ‘Race anxiety’ denotes reluctance to intervene in cases involving minority demographics for fear of being perceived as racist or culturally insensitive and has negatively impacted service provision across Scottish sectors.<sup>118</sup> This discomfort has discouraged multi-agency cooperation and hindered professionals’ ability to assess situations, leaving potential victims undetected and legal routes underutilised.<sup>119</sup> Not only does this ‘perpetuate the disempowerment of [ME] women’ but can psychologically disadvantage those who have occasioned risk in seeking help to be dismissed by the same rhetoric of ‘this is what happens in your culture’ which placed them in the situation in the first place.<sup>120</sup>

Multi-agency correspondence, necessary for dealing with individual cases and generating intersectoral consistency and ownership, is often weak.<sup>121</sup> Where ownership is less clear, the appropriate response is ‘viewed as congruent with the generic skills of frontline [professionals]’ rather than requiring differentiations from other forms of abuse.<sup>122</sup>

Practitioners have highlighted the need for an easier pathway for cases, currently requiring numerous meetings to determine who should proceed with FMPO applications.<sup>123</sup>

Despite the clarity of obligations placed on local authorities (specifically under the relevant third party provisions of the 2011 Act),<sup>124</sup> there exists a lack of willingness to proceed.<sup>125</sup>

Many are seen to act only when compelled under protective legislation where structures

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<sup>114</sup> Chantler et al. (2022), 839.

<sup>115</sup> Ibid., 840; Chantler et al. (2017), 29.

<sup>116</sup> E. Burman (2003), From difference to intersectionality: challenges and resources, *Eur.J.of Psychology, Counselling & Health* 6(4) 293-308; Scottish Government (2008), *Forced Marriage: A Civil Remedy? Consultation Paper*, (Available at: <https://www.webarchive.org.uk/wayback/archive/20150219181433/http://www.gov.scot/Publications/2008/1/25131845/15>), 4.

<sup>117</sup> Burman (2003), 300-301; Chantler et al. (2022), 841.

<sup>118</sup> Chantler et al. (2017), 30; Chantler et al. (2022), 841-842.

<sup>119</sup> Ibid.

<sup>120</sup> Saheliya (2012), 40.

<sup>121</sup> Chantler et al. (2017), 30-31; Chantler et al. (2022), 840.

<sup>122</sup> Chantler et al (2022), 840.

<sup>123</sup> Chantler et al. (2017), 39.

<sup>124</sup> 2011 Act, s.3.

<sup>125</sup> Chantler et al. (2017), 39.

overlap, demonstrating a misconception of the 2011 Act's relationship with other statutory obligations.<sup>126</sup> The onus of responsibility for pursuing legal intervention is left with victims or their supporters, bearing material and practical burdens.<sup>127</sup>

This lack of a clear route is complicated by the existence of two legislative pathways. Whilst (limited) priority remains over the civil route at the expense of the criminal, confusion remains as to their statutory relationship. The 2014 Act was portrayed as an extra protective layer to the civil route, allowing FMPO applications to proceed whilst criminal proceedings advanced under s.122.<sup>128</sup> However, the Scottish Parliament Justice Committee advised on the assumption that civil proceedings would be dropped were criminal ones initiated.<sup>129</sup> Guidance states that failed prosecution does not disentitle victims from taking the civil route;<sup>130</sup> yet in rejecting a FMPO, the judgment of *CoEC v S* highlighted the prospect of action under the 2014 Act.<sup>131</sup> Particularly concerning is the potential highlighted in having victims go through the legal system twice.<sup>132</sup> An integrated system of justice and a more culturally sensitive professionalism are contemplated in the final chapter of this thesis.

## 2.4 – Victim Engagement

The lack of professional understanding means legal routes are often not discussed with victims.<sup>133</sup> Coming forward does not necessarily equate to a desire to utilise the law; many are reluctant to employ legal force against families and communities.<sup>134</sup> Scotland's FM legislation was advanced in line with victim empowerment, yet presumes often young victims' ability to overpower the collective action of their families and risks driving perpetration further underground.<sup>135</sup> The desire to leave relatives unpunished, preserving

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<sup>126</sup> See discussion of Adult Support and Protection (Scotland) Act 2007 – Ibid., 39-40; Chantler et al. (2022), 844-845.

<sup>127</sup> Chantler et al. (2022), 845; Chantler et al. (2017), 39-41.

<sup>128</sup> Scottish Government (2014b), *Multi-agency Practice Guidelines: preventing and responding to forced marriage*, (Available at: <https://www.gov.scot/publications/forced-marriage-practitioner-guidance-update-2014/>), 5, 8. For risks of double jeopardy see Idriss (2015), 693.

<sup>129</sup> SPJC (2014), *LCM on Anti-social Behaviour, Crime and Policing Bill 2<sup>nd</sup> Report* (Session.4, 15<sup>th</sup> Jan), (Available at: <https://archive2021.parliament.scot/parliamentarybusiness/CurrentCommittees/71894.aspx>), 9.

<sup>130</sup> S.Gov (2014b), 82.

<sup>131</sup> *CoEC v S*, [80] – The reasoning is unclear by virtue of the higher standard of proof in criminal cases.

<sup>132</sup> For discussion of disproportionality in outcomes of these two routes, see Idriss (2015), 699.

<sup>133</sup> Chantler et al. (2017), 36.

<sup>134</sup> Ibid., 36, 42. SPJC (2013b), *Official Report*, (Session.4, 26<sup>th</sup> Nov), (Available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=9444&mode=pdf>), Col.3825.

<sup>135</sup> Warnings of the latter were disregarded, prioritising the symbolic message of the immorality of experiences and victims' right to refuse – SPJC (2014), 5; Chantler et al. (2017), 42. Cf. Saheliya (2013), *Written Submission to SPJC* (ASB16), (Available at: [https://archive2021.parliament.scot/S4\\_JusticeCommittee/General%20Documents/ASB16\\_Saheliya.pdf](https://archive2021.parliament.scot/S4_JusticeCommittee/General%20Documents/ASB16_Saheliya.pdf)).

personal and family honour and preventing community ostracism, is compelling.<sup>136</sup> The stakes for personal relationships are high and include links to emotional and material support systems and personal identity, with wellbeing compromised where desired long-term reconciliation is curtailed by legal intervention.<sup>137</sup> Decision-making is bound by the emotional trauma and ‘all the other alienating consequences which may flow from exclusion from most important cultural, social and religious links and heritage’.<sup>138</sup> Choice is constrained by potential repercussions for secondary victims, such as mothers bearing punishment for ‘wayward’ daughters.<sup>139</sup> Existing strategies offer little by way of protection for siblings, faced with similar or increased risk as older family members seek to regain control in the aftermath of one child’s disobedience and flight.<sup>140</sup> In contrast, these initiatives promote hostility, encouraging families to further internalise control and exert pressure of greater intensity upon those left behind.<sup>141</sup>

Positioning survivors as ‘free’ agents, independent of previously repressed lifestyles, disregards the difficulties faced by those inevitably left to navigate life in a wider (potentially racist) society alone.<sup>142</sup> Scotland’s current approach, aimed at protecting victims from conduct characterised by the suppression of autonomy, places victims in the untenable position of having to choose between safety and the protection of their support systems.<sup>143</sup> Young minorities are confronted with the choice between remaining in an abusive family situation, or ‘escaping from it on a basis which may not permit bridges to be rebuilt thereafter’.<sup>144</sup>

Having considered the shortcomings of existing approaches, any assertion that a crossroads has been reached in the FM discourse applies equally to a Scottish context.<sup>145</sup> Whilst several issues would benefit from actions taken to rectify them, not all are reparable by reference to

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<sup>136</sup> Chantler et al. (2017), 42-43; Phillips & Dustin (2009), 542-545.

<sup>137</sup> Phillips & Dustin (2009), 545; Bhandary (2018), 196; SPJC (2013b), Col.3825; Sabbe et al. (2014), 178.

<sup>138</sup> Per Mr Justice Singer, *Re M Minors* [2003] EWHC 852, [25].

<sup>139</sup> R. Aplin (2017), Exploring the role of mothers in ‘honour’ based abuse perpetration and the impact on the policing response, *Women’s Studies International Forum* 60 1-10.

<sup>140</sup> H. Askola (2018), Responding to Vulnerability? Forced Marriage and the Law, *UNSW Law Journal* 41(3) 977-1002, 996-1000; L. Vidal (2019), The art of helping: Lessons for Australia in taking a mediation approach to forced marriage (The Power to Persuade, 19<sup>th</sup> March), (Available at: <http://www.powertopersuade.org.au/blog/the-art-of-helping-lessons-for-australia-in-taking-a-mediation-approach-to-forced-marriage/18/3/2019>).

<sup>141</sup> F. Nielsen (2014), ‘Cross-Cultural Mediation: Dialogue in Honour-Related Conflicts’, in G. Overland et al., *Nordic Work with Traumatised Refugees: Do we really Care?* (Cambridge Scholars), 235; Enright (2009), 348; Vidal (2019).

<sup>142</sup> Enright (2009), 348; Shariff (2012), 550.

<sup>143</sup> Shariff (2012), 550; Phillips & Dustin (2009), 545.

<sup>144</sup> Mr Justice Singer, *Re M Minors*, [25].

<sup>145</sup> Sabbe et al. (2014), 185.

the current legal model. The 'grey area' of FM and its differentiation from AM will persist indefinitely and future attempts to utilise the legislation may fall either on the side of too intrusive or not stringent enough, with no real indication as to where to strike the balance.<sup>146</sup> Significant turnaround in the number of victims wishing to proceed with legal action against their families is difficult to imagine. The alternative is to bypass these concerns, favouring a more flexible, informal approach of direct support in accordance with individual interest, including desires to maintain or rebuild familial and cultural identity. The remainder of this thesis seeks to analyse the potential consequences and benefits of such an approach through a national, legal model of RJM, taking account of the issues highlighted throughout this chapter.

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<sup>146</sup> Ibid., 178.

## CHAPTER THREE

### A NATIONAL MODEL OF RESTORATIVE JUSTICE

Having due regard to the aims of this thesis, analysis of how a national, formal model of RJ might benefit the nuances of FM should be predicated on the existence of such a model more generally, before application to particular contexts or necessary adaptations. The following discussion scopes the unique trajectory of the Scottish discourse and surrounding attitudes. Whilst necessary that legal innovations remain sensitive to national, socio-political contexts,<sup>147</sup> examples of international practice highlight prospective options and points of potential convergence with future Scottish models. This includes the benefits of a centralised system, the roles assigned within that system, and the obscured delineation between restorative practices of the civil and criminal law within which family abuse is not so easily designated. Although this chapter generalises in reference to some systemic obstacles, discussion remains conscious of the FM backdrop. The purpose is not to offer an exhaustive analysis of the requisite issues to be overcome, but consider some of the structural concerns likely to pertain to/constrain the adaptation of any Scottish model to the specific context of FM.

#### 3.1 – Scotland’s Restorative Justice Landscape

The development of RJ in Scotland remains slow and fragmented, channelled through a restrictive focus on minor crime and anti-social behaviour.<sup>148</sup> Despite long-lasting interest and recent policy thrust, a lack of knowledge persists around RJ’s use, organisation, and delivery.<sup>149</sup> Research is scant, anecdotal, and outdated, with an absence of data on the effects of initiatives according to variables of specific crimes, the process adopted, and the ethnic, racial, and gender profiles of participants.<sup>150</sup> Whilst Scotland’s definitional emphasis on RJ as diversionary is beneficial for present purposes, RJ demonstrates one example of processes available under ‘Diversion from prosecution’ (DFP), with progress limited to the youth justice system.<sup>151</sup> Notwithstanding the general rise in DFP (including community payback

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<sup>147</sup> M. Keenan et al. (2016), Sexual violence and restorative practices in Belgium, Ireland and Norway: a thematic analysis of country variations, *Restorative Justice: An International Journal* 4(1) 86-114, 87.

<sup>148</sup> Maglione et al. (2020), 8-9; Maglione (2021), 747-750.

<sup>149</sup> For evolution and historical development see D. Miers (2004), Situating and researching restorative justice in Great Britain, *Punishment and Society* 6(1) 23-46, 27-28; Maglione et al. (2020), 3.

<sup>150</sup> Kearney et al. (2006); Kirkwood (2010); Maglione et al. (2020).

<sup>151</sup> CJS (2020a), 8; Maglione et al. (2020), 3; Maglione (2020), 750-753.

and drug treatment orders),<sup>152</sup> RJ verges on non-existent in the adult context with references in policy and legislation inconsistent and vague.<sup>153</sup> The incidence of each practice falling within RJ's remit remains unclear.<sup>154</sup> The Crown's DFP Service allows direct case referral to RJ providers (or indirectly through social workers) where prosecution is outwith the public interest.<sup>155</sup> Criminal proceedings are halted in establishing whether parties can reach and complete an action plan more acceptable than court, achieved through whichever procedure attracts consensus.<sup>156</sup> The Fiscal has been criticised for limiting scope to cases involving first-time, low-level offending and a lack of awareness of services in their area, yet adult RJ is rarely available.<sup>157</sup> The Scottish Government's 2018 study records the main providers to be social work departments, followed by third sector partners such as SACRO who, at the time of writing, offer Scotland's only adult RJ diversionary scheme, serving North and South Lanarkshire.<sup>158</sup>

International saliency in restorative practice as a nationwide response to serious conflict highlights the obscurity of Scotland's current approach.<sup>159</sup> Prolonged calls for change have been met with resistance, opposition varying upon the stakeholder perspective under scrutiny.<sup>160</sup> Until recently, RJ was seen as inconsistent with Scotland's penal welfarist traditions.<sup>161</sup> Early social work critique rejected focal points of reducing pressure on the CJ system and the victim's needs, questioning RJ's ability to address the structural issues and social factors contributing to offending behaviour.<sup>162</sup> In contrast, victims' organisations have

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<sup>152</sup> Scottish Government (2022), *Criminal Justice Social Work Statistics in Scotland: 2020-21*, (Available at: <https://www.gov.scot/publications/criminal-justice-social-work-statistics-scotland-2020-21/documents/>), 23-27.

<sup>153</sup> Maglione et al. (2020), 3, 8; Maglione (2021), 751.

<sup>154</sup> Maglione et al. (2020), 8.

<sup>155</sup> COPFS website, 'Alternative to Prosecution' (<https://www.copfs.gov.uk/about-us/what-we-do/10-about-us/297-alternative-to-prosecution>); Maglione et al. (2020), 10.

<sup>156</sup> SACRO website, 'Adult Restorative Justice' (<https://www.sacro.org.uk/services/criminal-justice/adult-restorative-justice>).

<sup>157</sup> Maglione et al. (2020), 8, 10. Note availability of post-conviction RJ for hate crimes in Edinburgh – Community Justice Scotland (2020b), *Outcome Activity Across Scotland. Annual Report 2018-2019*, (Available at: <https://communityjustice.scot/wp-content/uploads/2020/03/CJS-Improvement-Team-2018-19-Outcome-Activity-Annual-Report-FINAL.pdf>), 58; and road traffic deaths – B. Whyte & N. Kearney (2017), Peacebuilding and RiSC: Elements of a Scottish model for Restorative Justice, *Scottish Justice Matters* 5(1) 11-13.

<sup>158</sup> S.Gov (2018a), 4; SACRO website. See overall decline in services – Kearney et al. (2006), 57; Kirkwood (2018), 7; Maglione et al. (2020), 6-8.

<sup>159</sup> D. Mackie (2017), Restorative Justice Works (but not in Scotland, yet), *Scottish Justice Matters* 5(1) 22-23; E. Zinsstag (2017), How Appropriate is the Use of Restorative Justice in Cases of Sexual Violence?, *Scottish Justice Matters* 5(1) 30-31.

<sup>160</sup> See early recognition of lack of adult RJ development – Kearney et al. (2006), 57; S. Kirkwood & M. Munro (2017), Warm words but no action. The fate of restorative justice in Scotland, *Scottish Justice Matters* 5(1) 2-3.

<sup>161</sup> Maglione (2021), 757; Maglione et al. (2020), 15-16.

<sup>162</sup> Maglione (2021), 759.

criticised RJ as offering too much to perpetrators.<sup>163</sup> Despite Scotland's welfarist traditions, the persistence of a penal populist culture for adult offending, heightened by political pressure to appear tough on crime, undermines widespread use of RJ.<sup>164</sup> Youth RJ as benefiting the child, deserving of a second chance, is contrasted with adult RJ as attending to the victim, rather than the offender who ought to know better.<sup>165</sup> The criminalisation of FM marked heightened attempts to publicly denounce HBVA.<sup>166</sup> High-profile cases and their media coverage seek to exacerbate emotionalization of crime, resulting in a 'no excuses' political climate wherein RJ is seen as a 'soft option'.<sup>167</sup> These perspectives relegate RJ to subservient and weak connotations of 'lower rank justice' as a managerial task designed to address individual, one-off episodes of minor offending.<sup>168</sup>

Change is appreciable in the recent surge of policy and research, focused on victims' rights policy, in light of continued debate over their role within the CJ process.<sup>169</sup> Cautious of the 'generalised political indifference', a national model is framed by the Government as restoring the victim's voice as representative of the public interest, adopting political consensus through the common ground of victim protection.<sup>170</sup> Upon accounts of existing professionalism, the Government's Action Plan identifies four key barriers to developing a national strategy – namely, a greater multi-agency response to data protection laws and information sharing; increased public and professional awareness; an enhanced national training model for facilitators, to be reviewed and tailored to participants and offence-type; and removing inconsistency in funding through nationally available resource streams.<sup>171</sup> Other commitments include access 'for all', suggesting a desire to retract previous restrictions in respect of offence type.<sup>172</sup> The Government's Rapid Evidence Review goes further in questioning suitability for more serious crimes with reference to international

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<sup>163</sup> Ibid., 760.

<sup>164</sup> McAlinden (2011), 391-394; H. Croall (2006), Criminal justice in post-devolutionary Scotland, *Critical Social Policy* 26(3) 587-607. See Conservative opposition to growing DFP: Scottish Legal News (2022), Diversion from prosecution reach record high, (1<sup>st</sup> Feb) (Available at: <https://www.scottishlegal.com/articles/diversions-from-prosecution-reach-record-high>).

<sup>165</sup> Mackay (2003), 11; Maglione (2021), 754-756; Kirkwood (2010), 116.

<sup>166</sup> SPCJ (2014), 6; SPJC (2013b), Col.3823-3825.

<sup>167</sup> Sabbe et al. (2014), 182-183; McAlinden (2011), 391-393; Maglione et al. (2020), 12; C. Tata & F. Jamieson (2017), Just Emotions? The need for emotionally-intelligent justice policy, *Scottish Justice Matters* 5(1) 32-33.

<sup>168</sup> Maglione (2021), 760.

<sup>169</sup> Ibid., 751-752; S.Gov (2019a), 3. See also RJ Guidance which presented a significant shift in representation of wrongdoing, replacing customary terminology of 'offender' with 'person who has harmed' – S.Gov (2017), 6.

<sup>170</sup> Maglione (2021), 757, 761.

<sup>171</sup> S.Gov (2019a), 8; S.Gov (2018a), 7-8; Maglione et al. (2020), 10-13, 17-19.

<sup>172</sup> S.Gov (2019a), 4-5; S.Gov (2019b), 3; S.Gov (2017), 10.

models which proactively serve all crimes, including family abuse.<sup>173</sup> The move from an almost non-existent system to a fully-functioning model, applicable to numerous contexts, within the ambitious target set out in the Action Plan,<sup>174</sup> will require wider-ranging consideration of prospective hurdles. How RJ for ‘all’ will transpire in practice remains open to speculation. Absent from consideration are more subjective impacts of any approach on individual communities, variable participant profiles, and the intricacies of certain crimes. The purpose of this thesis is to evaluate these considerations with respect to the uniqueness of FM. The remainder of this chapter contemplates some systemic conditions of a national model to be adapted to these case-types.

### 3.2 – A System of Facilitation

RJ as an intersection between various disciplines offers numerous perspectives not easily attributable to any particular sector.<sup>175</sup> The concern is how to merge disparate strands of practice into a cohesive system, whilst engendering credibility, consistency, and victim protection. Existing professionalism transcends individual needs of each participant, practitioners themselves viewing RJ as a single element of a ‘full package of support’ including access to medical, emotional, employability, and financial assistance.<sup>176</sup> There is potential to centralise the RJ component of this support as a communicative forum for accessing wider, localised services and establishing stronger cross-sector links.<sup>177</sup> A lack of multi-agency coordination has resulted in significant shortcomings of both Scotland’s FM response and the delivery of RJ.<sup>178</sup> Vital to a national model is a common strategy applicable across council areas and sectors, contemplating not simply the need for centralised policy but centralised RJ institutions – to counter existing ad hoc approaches and local variations.<sup>179</sup> This might translate to cross-authority RJ hubs, a single, State-run body, or some middle ground.<sup>180</sup> Maglione et al. warn of centralisation’s potential to bureaucratise or standardise RJ’s implementation, leading to a deterioration in values and professional relationships.<sup>181</sup>

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<sup>173</sup> S.Gov (2019b), 11. Scottish practitioners have pushed for similar expansion of their workload – Maglione et al. (2020), 15.

<sup>174</sup> S.Gov (2019a), 4.

<sup>175</sup> This includes law, criminology, sociology, psychology, and others.

<sup>176</sup> Maglione et al. (2020), 10-11.

<sup>177</sup> A similar approach in Norway has shifted the profile of cases dealt with, giving facilitators the option to refer serious cases to a ‘coordination group’ of professionals (e.g., protective agencies and police officers) for additional support – Keenan et al. (2016), 105.

<sup>178</sup> Chantler et al. (2017), 30-31; Maglione et al. (2020), 11-13.

<sup>179</sup> Ibid.

<sup>180</sup> Maglione et al. (2020), 19. Norway’s RJ system operates 22 offices headed under 12 district bodies, centralised under their Ministry of Justice – See Albrecht (2010), 5.

<sup>181</sup> Maglione et al. (2020), 19 – See reference to elimination of local prosecutorial marking which saw the loss of multi-agency communication at 12.



Lessons from Norway demonstrate how localisation fails for various structural reasons including pre-existing attitudes of certain organisations.<sup>182</sup> The idea that centralisation might threaten professionals' discrete practices can be countered by the fact that less localised practice does not equate with their removal from the process but denotes importance in affording roles to multiple sectors.<sup>183</sup>

Existing referral processes adopt a linear, top-down structure which sees 'appropriate' cases filtered down to local authorities, who assign cases to third sector providers.<sup>184</sup> A Scandinavian model favours a bottom-up approach allowing for multi-agency referrals and a clearer pathway.<sup>185</sup> Filtering cases up from various routes to a centralised body responsible for administration and oversight infuses accessibility of RJ and surrounding services.<sup>186</sup> This single point of contact lends itself to more consistent referrals from sectors such as education and victims' organisations, and the benefits of self-referral.<sup>187</sup> To utilise a FM-specific example, the alleged victim's sister in *CoEC v S* could have accessed RJ services for her family, either referring the case herself or through another agency such as the social services she had already contacted. Centralisation allows the (legal) system to implement strategies quickly in response to emerging trends/challenges<sup>188</sup> – a fundamental proposition given the developing FM picture and cultural variations posed. This includes overcoming the fragmentation of local FM policy and difficulties in cross-sector enforcement of data protection laws.<sup>189</sup> Should the objective be that RJ becomes the system (aligning with other jurisdictions),<sup>190</sup> resources afforded to the CJ process would likely be diverted, anticipated by some official status afforded to restorative processes – typically achieved through specific

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<sup>182</sup> Norway reformed its RJ structure in 2004, moving to State ownership and funding following failings of localised approach – See P. Andersen, 'Development of Restorative Justice Practices in Norway', in D. Cornwell et al. (2013), *Civilising Criminal Justice: An International Restorative Agenda for Penal Reform* (Waterside Press), 481, 484-486.

<sup>183</sup> This might reflect aspects of the youth justice system e.g., discrete roles afforded within Children's Hearing System. Victim organisations (traditionally sceptical of RJ) could be incorporated through initial assessment and referral of cases – Maglione et al. (2020), 15. Those with experience in FM mediatory techniques could prove valuable in informing future practice – Chantler et al. (2017), 26.

<sup>184</sup> Maglione et al. (2020), 9-10; CJS (2020a), 3.

<sup>185</sup> S.Gov (2019b), 8; Maglione et al. (2020), 19-20.

<sup>186</sup> T. Gavrielides (2014), Bringing Race Relations into the Restorative Justice Debate: An Alternative and Personalized Vision of "the Other", *Journal of Black Studies* 45(3) 216-246, 238-239. See success of Relationships Scotland's approach to family mediation – Cubitt (2019), 331.

<sup>187</sup> Referrals to Norwegian Mediation and Reconciliation Services can be made by any agency, about any conflict, at any stage of the legal process, and self-referrals are as simple as filing applications online – S.Gov (2019b), 8; Konfliktrådet website, 'Report a case to the conflict council' (Available at: <https://konflikttraadet.no/meld-inn-sak-til-konflikttraadet/>). See also discussion of Danish approach at (6.3).

<sup>188</sup> Andersen (2013), 485-486.

<sup>189</sup> Chantler et al. (2022), 839; Maglione et al. (2020), 20.

<sup>190</sup> S.Gov (2019b), 8; Liebmann (2007), 30.

legislation.<sup>191</sup> A more expansive set of provisions promotes awareness, funding, and recruitment, and can change attitudes by removing discretion from professionals sceptical of signposting services.<sup>192</sup> The importance of a system-wide approach incorporating multiple sectors is detailed further with reference to FM in the final chapter of this paper.

Despite significance in affording ancillary roles to various organisations, an outstanding decision remains as to the primary administer(s) of the process.<sup>193</sup> Existing initiatives are deployed by social workers and third sector professionals, yet a system-wide arrangement offers scope for facilitation by a variety of backgrounds. The benefit of Scotland's limited adult RJ is the clean-slate environment within which to develop a cohesive system, informed by existing practices (within and outwith the strictly 'RJ' movement). Despite various cross-sector training programmes,<sup>194</sup> there exists no national programme for facilitation which inevitably follows institution of centralised bodies.<sup>195</sup> Internationally, facilitators include professionals from various disciplines and laypersons, trained under nationally developed strategies and training courses.<sup>196</sup> Whilst many models develop expertise through experience, more serious cases are usually reserved to those with significant experience who: have specifically opted to take on complex cases, are subject to more stringent guidelines, and have undergone additional training on the complexities of specific wrongs.<sup>197</sup> As demonstrated across subsequent chapters, the understanding required for effective practice in FM cases is expansive, questioning whether facilitators should be specialist professionals with pre-existing qualifications.<sup>198</sup> Centralised standards and programmes of training allow

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<sup>191</sup> Keenan et al. (2016), 99. Scotland has fostered reluctance in offering legislative footing, currently providing little beyond defining 'RJ services' – VW(S)A 2015, s.5; Maglione (2021), 751. See 'well-known tension' between local and centralised resources within Scotland's political structure and current issues with RJ funding – Maglione et al. (2020), 15-17.

<sup>192</sup> ACJRD (2013), *Restorative Justice Submission to the Committee on Justice, Defence and Equality* (Oct), (Available at:

[https://acjrd.ie/images/PDFs/development/ACJRD\\_Submission\\_on\\_Restorative\\_Justice\\_11.10\\_13.pdf](https://acjrd.ie/images/PDFs/development/ACJRD_Submission_on_Restorative_Justice_11.10_13.pdf)), 3. Legislation in New Zealand obliges judges to remit all (criminal) cases to RJ as DFP– Sentencing Act 2002, s.24A (note requirement of prior admission of guilt). See Scottish comparison with other European approaches to compulsory family mediation – McFarlane (2012), 40-41.

<sup>193</sup> This might include consideration of multiple facilitators for each case, similar to the Children's Panel or full bench court decisions – Children's Hearings Scotland website, 'Panel Members'

(<https://www.chscotland.gov.uk/volunteering-with-us/panel-members/>). See dual-facilitation models in Albrecht (2010), 13-14.

<sup>194</sup> E.g., University of Strathclyde's RJ Essential Skills Course as a form of cross-sector CPD (<https://www.strath.ac.uk/humanities/lawschool/newsevents/restorativejusticepracticesessentialskillscourse/>).

<sup>195</sup> Kirkwood & Munro (2017), 2; Keenan et al. (2016), 102-104.

<sup>196</sup> Keenan et al. (2016), 102-104; S.Gov (2019b), 8, 13-14.

<sup>197</sup> Andersen (2013), 486; Keenan et al. (2016), 103-104; S.Gov (2019b), 11.

<sup>198</sup> See scope for RJ to be integrated within existing educational qualifications (e.g., law, social work, or psychology degrees, to be built upon by national training models) – K. van Wormer (2009), *Restorative Justice as Social Justice for Victims of Gendered Violence: A Standpoint Feminist Perspective*, *Social Work* 54(2) 107-116, 114.

strands of expertise to be accumulated within one body of facilitation, bolstered by specialists from certain sectors, deployed for enhanced expertise on a case-by-case basis.<sup>199</sup>

The distinctiveness of family abuse cases and Scotland's general RJ landscape might require a more prominent facilitatory role for the legal profession than observed elsewhere. If RJ is a competent replacement to current frameworks, one might question why existing legal actors cannot be deployed for the purposes of a new legal paradigm. Although dialogic techniques offer 'co-construction' of justice through active participation *with*, rather than before, those overseeing the process, notions of substantive justice remain reliant on the judiciary.<sup>200</sup> The legal profession's involvement is fundamental given their gatekeeping role as appropriate source of universal standards, justice, and normative authority.<sup>201</sup> For the purposes of overcoming cross-sector resistance to what is gauged as second-tier justice, credibility may be enhanced by some level of the public declaration of norms observed in traditional court settings, seemingly achieved through the oversight of the facilitation process by legal professionals.<sup>202</sup> With reference to rebalancing power in family abuse cases, such a level of formality may be necessary in attending to victims' affirmatory needs and generating appropriate accountability.<sup>203</sup>

In the context of an already burdened justice system, some level of diversion could benefit the backlog of proceedings before the courts.<sup>204</sup> One option is to consider how a centralised RJ system might be built into existing structures away from traditional courts, expanding upon expertise within the legal profession. Many solicitors are well-rehearsed in aspects of restorative practice in resolving out-of-court disputes (such as private law cases of divorce and parenting).<sup>205</sup> Allowing individuals to build upon their skillsets through a centralised

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<sup>199</sup> Behrens (2005), 231-232. See team of FM professionals deployed in Denmark at (6.4).

<sup>200</sup> C. Irvine (2020), 156, 159; See discussion of Scottish culture in rejecting mediation in C. Irvine (2016), Scotland's 'Mixed' Feelings About Mediation (Parts 1&2) (Mediate, June-July) (Available at: <https://www.mediate.com/articles/IrvineC9.cfm>).

<sup>201</sup> C. Irvine (2020), 149-150; M. Ahmed (2020), Critical Reflections on the Proposal for a Mediation Act for Scotland, MLR 83(3) 614-636, 627; B. Clark & C. Dawson (2007), ADR and Scottish commercial litigators: a study of attitudes and experience, C.J.Q 26 228-249, 229, 246.

<sup>202</sup> C. Irvine (2020), 150, 155-156; Ahmed (2020), 627.

<sup>203</sup> Behrens (2005), 227-228; McAlinden (2011), 396; S. Bano, 'The practice of law making and the problem of forced marriage: what is the role of the Muslim Arbitration Tribunal?' in Gill & Anitha (2011), 182.

<sup>204</sup> SCTS (2021), Covid-19 Court Recovery Modelling (March), (Available at: <https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/final-covid-modelling-report-cover-18-03-21-1915.pdf?sfvrsn=4>).

<sup>205</sup> See list of 'Comprehensive Accredited Lawyer Mediators' – CALM Scotland website, 'Find a mediator' (<https://www.calmscotland.co.uk/find-a-mediator/>). E.g. most divorce cases settled out of court – see Scottish Government (2021), *Civil Justice Statistics in Scotland 2019-20*, (Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2021/04/civil-justice-statistics-scotland-2019-20/documents/civil-justice-statistics-scotland-2019-20/civil-justice-statistics-scotland-2019-20/govscot%3Adocument/civil-justice-statistics-scotland-2019-20.pdf>), 48.

body of practice and specific accreditation could prompt a culture change across the legal profession in the way RJM is perceived.<sup>206</sup> From a strictly ‘justice’ perspective, there already exists a form of centralisation in the civil and criminal court systems and, for the latter, the COPFS, currently possessing experience in the referral of cases to RJ.<sup>207</sup> The COPFS is perhaps the most obvious institution to afford developments to, expanding structures to include RJ departments within Fiscal Offices, responsible for oversight and application of the process. Resources currently available to the Crown could be redirected for these purposes, developing existing referral processes (towards rather than away from the PF’s Office) and (re-)training prosecutors and other lawyers (such as those with ADR experience) as facilitators. The COPFS as central RJ body would act as coordinator for a multi-agency response to individual cases, incorporating professionals from other disciplines to enhance training models and participate as required within the process itself.<sup>208</sup>

### 3.3 – A Question of Scope

The potential to draw upon existing professionalism within the sphere of private law raises questions of RJ’s existence outwith CJ boundaries.<sup>209</sup> The Government’s RJ commitments have coincided with similar dedication to a national civil mediation framework, met with similar concerns over its application to family abuse.<sup>210</sup> Policy continues to frame RJ as a victim-sensitive CJ mechanism, yet developing international models rest between the divides of civil and criminal law.<sup>211</sup> The incorporation of civil cases results in what some see as a disparate conceptual approach regarding the model adopted, its aims, and the role of facilitators.<sup>212</sup> The Norwegian approach (which sees inclusion of civil cases as part of the service’s identity) offers a more holistic approach to justice, embracing early RJ intervention to de-escalate risks of private matters becoming criminal ones.<sup>213</sup> In limiting RJ to criminal cases, the presumption is that post-conference action would default to the criminal law upon failure to reach agreement. However, civil intervention may offer a more appropriate course

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<sup>206</sup> Ahmed (2020), 627. Scottish Government (2019c), *Response to the Independent Review of Mediation in Scotland* (10<sup>th</sup> Dec), (Available at: <https://www.gov.scot/publications/scottish-government-response-independent-review-mediation-scotland/documents/>), 6-7. See existing accreditation requirements for mediation – Law Society of Scotland website, ‘Accredited mediators’ (Available at: <https://www.lawscot.org.uk/members/career-growth/specialisms/accredited-mediators/>).

<sup>207</sup> CJS (2020a), 3; Maglione et al. (2020), 9-10.

<sup>208</sup> E.g., CALM mediators receive DA training from Scottish Women’s Aid – SPJC (2018), 20.

<sup>209</sup> See discussion of ADR as a form of RJ and their relationship – Roche (2006), 225-227.

<sup>210</sup> SPJC (2018), 19-21; S.Gov (2019c), 3; See overall evaluation – Ahmed (2020).

<sup>211</sup> See discussion of Scandinavian approaches in Albrecht (2010), 5; G. Dale & I. Hydle (2008), *Challenging the Evaluation of Norwegian Restorative Justice Experiences*, *British Journal of Community Justice* 6(2) 69-76, 70.

<sup>212</sup> Albrecht (2013), 21; Zehr (2010).

<sup>213</sup> Andersen (2013), 496-497.

of action. An enhanced multi-agency response to FM could see application for a FMPO sought by local authorities where RJ is unsuccessful, rather than immediate default to prosecution.<sup>214</sup>

For present purposes, the concern is that family abuse already traverses the civil-criminal boundary, albeit criminalisation has not materialised for FM in Scotland. The term RJM has been adopted to reflect the crossover in normative aims and practical consequences, and the ways in which RJ can learn from the larger ADR movement in family conflicts. The situation of RJ within Scotland's existing framework for FM cases will be developed throughout the final chapters of this paper. The most prominent analogy between ADR and RJ for gendered abuse is that neither are widely accepted as suitable alternatives to existing legal measures.<sup>215</sup> Having considered the background to Scotland's progress in developing a national RJ model, the purpose hereafter is to evaluate FM within such a model, considering how a reframing of the discourse for FM cases and a re-orientated professional response might allow this to transpire.

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<sup>214</sup> This would rely on overcoming the disparate relationship between the 2011 and 2014 Acts and a clearer case-route.

<sup>215</sup> SJPC (2018), 19-21; Chantler et al. (2022), 836. Cf. recent research depicting DA survivors' desired inclusion within Scotland's National RJ Strategy (note limited emphasis on RJ as diversionary) – A.T. Moore et al. (2021), *Survivors Voices National Consultation. Survivors views on Restorative Justice* (Thriving Survivors) (Available at: [http://www.thrivingsurvivors.co.uk/uploads/1/0/8/6/108624537/restorative\\_justice\\_-\\_survivors\\_voices\\_-\\_consultation\\_report.pdf](http://www.thrivingsurvivors.co.uk/uploads/1/0/8/6/108624537/restorative_justice_-_survivors_voices_-_consultation_report.pdf)).

## CHAPTER FOUR

### REFRAMING THE FAMILY ABUSE DISCOURSE

The term ‘RJ’ is seldom used in the context of FM. Its relevance can be traced throughout the discourse under terms more commonly associated with civil law mechanisms including mediation, reconciliation, and arbitration.<sup>216</sup> The recent movement across Europe towards criminalisation and the inherent breadth of ‘RJ’ means the longstanding debate on the use of such practices in addressing FM is gradually being linked to the remit of the restorative discourse.<sup>217</sup> The UK’s approach has been to downplay ‘mediation’ as a valid instrument of intervention, similar to most Western Governments who continue to grapple with the traditional definitions openly rejected by the few jurisdictions offering services for FM.<sup>218</sup> Despite positive signs across Scandinavia, there exists little to no empirical research depicting the success of a RJM approach and none from a Scottish perspective.<sup>219</sup> This endures despite early calls for increased scrutiny of mediation and reconciliation in Scotland’s FM initiatives and evidence of initiatives deployed against Government Guidance.<sup>220</sup> The proliferation of punitive justice in tackling FM, and extensive criticism of restorative approaches as inherently harmful to women, means these third sector practices have materialised underground, away from significant scrutiny.<sup>221</sup> These developments appear to aid the Government’s promise of RJ for all, offering an opportune setting within which the subject matter of this chapter proceeds.

Whilst scholarship depicting the relationship between RJM and HBVA is sparse, that in respect of DA more generally is extensive.<sup>222</sup> Although this paper seeks to assess RJM

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<sup>216</sup> Chantler et al. (2017), 26; Avan et al. (2005), 65; S.Gov (2014b), 7.

<sup>217</sup> One respondent to the 2017 study uses ‘RJ’ and ‘mediation’ interchangeably – Chantler et al. (2017), 26. See also connections made in Australia – Askola (2018), 1000.

<sup>218</sup> D. Danna & P. Cavenaghi (2011), Transformative Mediation in Forced Marriage Cases, *Interdisciplinary Journal of Family Studies* 17(1) 45-62, 48-50; Askola (2018), 1000. Cf. S.Gov (2014b), 56; Home Office (2000), 19; HM Government (2022), *Multi-agency practice guidelines: Handling cases of Forced Marriage*, (Available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1061641/Forced\\_marriage\\_guidance\\_17.03.22\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1061641/Forced_marriage_guidance_17.03.22_FINAL.pdf)), 48-49. See hints of greater recognition in Australian Government (2010), *Discussion Paper on Forced and Servile Marriage*, (Available at: <https://www.homeaffairs.gov.au/criminal-justice/files/discussion-paper-public-release-forced-servile-marriage.pdf>), 19.

<sup>219</sup> Vidal (2019); Danna & Cavenaghi (2011), 52.

<sup>220</sup> Avan et al. (2005), 10; Chantler et al. (2017), 24.

<sup>221</sup> Sabbe et al. (2014), 176-177; Chantler et al. appear to suggest those currently offering mediation require re-training – (2017), 56.

<sup>222</sup> J. Ptacek (ed) (2009), *Restorative Justice and Violence Against Women* (Oxford University Press); H. Strang & J. Braithwaite (eds) (2002), *Restorative Justice and Family Violence* (Cambridge University Press);



specifically for FM, it is anticipated that much of the extant opposition with regards to DA would survive if applied to a FM context.<sup>223</sup> The following discussion utilises this literature where likely to raise similar questions of RJM's applicability to FM, considering also the limited scholarship which has already made these connections. The desire is to reframe the outright rejection of these cases, demonstrating how feminist critique can be utilised to strengthen and inform rather than discount the debate.

#### 4.1 – Forced Marriage: A Distinct Form of Family Abuse

FM falls under the umbrella term of DA and as such, the idea of 'mediating' these cases has been met with similar scepticism.<sup>224</sup> Scottish Guidance reflects the longstanding rejection of DA cases and those demonstrating 'a deliberate course of conduct or coercion...over a prolonged period of time', presumably including FM.<sup>225</sup> The tendency to frame FM within wider dialogues on VAWG or HBVA fails to appreciate the issue as distinctive, meriting a differentiated set of questions and responses.<sup>226</sup> FM is not easily subsumed under standard constructions of intimate partner abuse more commonly inferred from references to DA.<sup>227</sup> Whilst both reveal processual characteristics under Stark's model of coercive control, minority abuse pushes this concept to explore beyond women's entrapment by men within a one-to-one relationship.<sup>228</sup> A narrow focus on gender inequality as the sole source of abusive behaviour implies a universal female experience and confines narratives to singular intimate connections of the nuclear family household.<sup>229</sup> Emphasis on diversity is crucial to understanding the situation of ethnic minorities, bound by factors such as race, ethnicity,

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M. Fernandez (2010), *Restorative Justice for Domestic Violence Victims: An Integrated Approach to Their Hunger for Healing* (Lexington).

<sup>223</sup> See connections made between FM and family mediation in Danna & Cavenaghi (2011), 48; and within the Muslim Arbitration Tribunal in Bano (2011).

<sup>224</sup> Early UK consideration saw resignation of Southall Black Sisters from Choice by Right Working Group over refusal to reject mediation outright. See also Bano (2011); R. Goel (2005), 'Sita's Trousseau.' Restorative Justice, Domestic Violence, and South Asian Culture, *VAW* 11(5) 639-665.

<sup>225</sup> S.Gov (2017), 10. See also rejection of DA in civil mediation – SPJC (2018), 19-21.

<sup>226</sup> See Scottish practitioners' failure to differentiate FM from other responses – Chantler et al. (2022), 840. See also policy papers which frequently discuss HBVA as adjunctive to other abuse e.g. Public Health Scotland (2018), What health workers need to know about gender-based violence: an overview (May), (Available at: <http://www.healthscotland.scot/media/2096/gbv-an-overview.pdf>), 4.

<sup>227</sup> N. Mirza (2017), South Asian women's experiences of abuse by female affinal kin: a critique of mainstream conceptualisations of 'domestic abuse', *Families, Relationships and Societies* 6(3) 393-409, 397; A.K. Gill & A. Brah (2014), Interrogating cultural narratives about 'honour'-based violence, *European Journal of Women's Studies* 21(1) 72-86, 84.

<sup>228</sup> Aplin (2017), 1; Mirza (2017), 400; Chantler & McCarry (2020), 94, 104-105; E. Stark & M. Hester (2019), Coercive Control: Update and Review, *Violence Against Women* 25(1) 81-104.

<sup>229</sup> Mirza (2017), 398. Whilst the Government's Equally Safe Strategy now acknowledges intersectionality, culture, and community, emphasis remains on gendered status as cause of subordination – Scottish Government (2018b), *Equally Safe: Scotland's strategy for preventing and eradicating VAWG*, (Available at: <https://www.gov.scot/publications/equally-safe-scotlands-strategy-prevent-eradicate-violence-against-women-girls/documents/>), 19-20.

sexuality, social class, culture, and citizenship.<sup>230</sup> These complexities result in particular difficulty for minority victims of family abuse seeking to utilise the justice system and limit the scope for reporting in close-knit communities.<sup>231</sup> Power within minority households is non-linear and stems from extended kinship and family structures.<sup>232</sup> The collective decision-making inherent to minority communities correlates with a collective response where individuals reject family cohesion.<sup>233</sup> The relationship with family is often one of subordination rather than empowerment.<sup>234</sup> Mother-in-laws, for example, whom as members of the majority population might be more concerned with supporting an abused daughter-in-law might be more inclined (in the face of prospective dishonour) to conceal or perpetrate abuse.<sup>235</sup> Greater reliance is placed on self-recognition and a willingness to come forward when victims do not benefit from the family or community support afforded to ‘majority’ victims.<sup>236</sup>

Over-simplistic understandings of HBVA foster a distinction between men as oppressors and women as victims, reflecting a broader misrepresentation of honour as belonging solely to male family members and shame as shouldered only by women.<sup>237</sup> Manifesting in different ways, both men and women possess honour, resulting in a complex network of power relations not easily reflected in a binary distinction between female victims and male perpetrators.<sup>238</sup> There is now growing recognition of the influences that position men as victims within the same cultural systems that affect women.<sup>239</sup> Women too are ‘active in the struggle to preserve family honour’.<sup>240</sup> Reflected in Chantler et al.’s 2017 study, had each interviewee’s case proceeded to legal action, their mothers would all have fallen within the

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<sup>230</sup> Nielsen (2014), 238; Mirza (2017), 398; R.V. Almeida & T. Durkin (1999), *The Cultural Context Model: Therapy for Couples with Domestic Violence*, *Journal of Marital and Family Therapy* 25(3) 313-324, 315.

<sup>231</sup> See discussion at (2.6); E. McLaughlin et al. (2018), *A confident approach in responding to the needs of domestically abused South Asian women – laying the foundations for Police Scotland 2026 Strategy* (SIPR, Dec) (Available at: [https://www.sipr.ac.uk/wp-content/uploads/2021/10/South\\_Asian\\_Women\\_Domestic\\_Abuse\\_Police\\_Scotland.pdf](https://www.sipr.ac.uk/wp-content/uploads/2021/10/South_Asian_Women_Domestic_Abuse_Police_Scotland.pdf)).

<sup>232</sup> Mirza (2017), 400; Gill & Brah (2014), 84.

<sup>233</sup> Chantler & McCarry (2020), 101; Aplin (2017), 1.

<sup>234</sup> *Ibid.*; Mirza (2017), 398-400.

<sup>235</sup> Mirza (2017), 398. See FM survivor’s discussion of her in-laws manipulating various professionals—Chantler & McCarry (2020), 100.

<sup>236</sup> Mirza (2017), 397-400; Chantler & McCarry (2020), 98.

<sup>237</sup> Nielsen (2014), 236; Mirza (2017), 398-400.

<sup>238</sup> Male victims make up approximately: 20% of UK’s overall cases, 60% of cases involving LGBTQ+ victims, and 55% where mental capacity questioned – FMU Statistics (2021). See also Nielsen (2014), 236; Mirza (2017), 398-400; C. Van Eck (2003), *Purified by Blood: Honour Killings amongst Turks in the Netherlands* (Amsterdam University Press), 43-44.

<sup>239</sup> M.M. Idriss (2021), *Abused by the Patriarchy: Male Victims, Masculinity, “Honor”-Based Abuse and Forced Marriages*, *Journal of Interpersonal Violence* 1-28; Y. Samad (2010), *Forced Marriage among Men: An Unrecognised Problem*, *Critical Social Policy* 30(2) 189-207.

<sup>240</sup> Nielsen (2014), 236; Van Eck (2003), 43-44; Aplin (2017), 9.



pool of principal perpetrators.<sup>241</sup> The true question of who is a victim and who is a perpetrator is not straightforward.<sup>242</sup> Concern should be had for women not solely as victims but as those faced with considerable prospect of being (unfairly) persecuted under the current legal framework. Forms of DA should be distinguished upon the varying dynamics, effects, and implications upon decision-making.<sup>243</sup> Complex forces of honour-related abuse demand a specific knowledgebase and refined set of techniques.<sup>244</sup> For these reasons, the conventional paradigm of VAWG that often frustrates attempts to bridge the gap between restorative practices and HBVA is unfitting.<sup>245</sup>

## 4.2 – ‘Privatising’ Forced Marriage

Feminist efforts have sought to elevate DA from the private domain of the family to the status of a public concern – increasing awareness, broadening scope for protection, and enhancing women’s access to public resources (including the legal system).<sup>246</sup> It is therefore only logical that RJM, continually characterised as returning the ‘conflict’ to the parties away from State oversight, should be approached cautiously.<sup>247</sup> The public-private dilemma reflects a tension inherent to family law in reconciling the preservation of family privacy with regulation of family life in the interests of wider society.<sup>248</sup> Faced with family abuse, the State’s duty ‘to support and protect the authentic institution of the family, respecting its natural shape and natural inalienable rights’,<sup>249</sup> is reframed as necessitating intolerance of the family unit as a source of danger from which victims can only be protected by dissolution of the relationship.<sup>250</sup> FM laws reshape the family unit in an often-irreversible manner when seen as necessary in the general interests of the population.<sup>251</sup>

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<sup>241</sup> Chantler & McCarry (2020), 95-96.

<sup>242</sup> Sowey (2018), 268. See discussion at (2.1).

<sup>243</sup> Behrens (2005), 216-217; Almeida & Durkin (1999), 314-315.

<sup>244</sup> Nielsen (2014), 239.

<sup>245</sup> *Ibid.*, 238.

<sup>246</sup> D. Coker, ‘Transformative Justice: Anti-Subordination Processes in Cases of Domestic Violence’ in Strang & Braithwaite (2002), 129-131; H. Nancarrow, ‘Restorative Justice for Domestic and Family Violence’ in Ptacek (2009), 127-128; P. Grauwiler & L.G. Mills (2004), *Moving Beyond the Criminal Justice Paradigm: A Radical Restorative Justice Approach to Intimate Abuse*, *Journal of Sociology & Social Welfare* 31(1) 49-70, 49-50.

<sup>247</sup> Islam et al. (2018), 287; Liebmann (2007), 284; L. Frederick & K.C. Lizdas, ‘The Role of Restorative Justice in the Battered Women’s Movement’ in Ptacek (2009), 49-50.

<sup>248</sup> Bano (2011), 183; A. Brown (2019), *What is the family of law?: the influence of the nuclear family* (Hart Publishing), 3-5.

<sup>249</sup> J. Kurczewski (1997), *Family Law and Family Policy in the New Europe* (Aldershot), 5.

<sup>250</sup> Nielsen (2014), 234; Vidal (2019).

<sup>251</sup> Sabbe et al. (2014), 178; SPJC (2014), 7.

An *over*-emphasis on gendered abuse as a public issue shifts the dialogue from empowerment to fulfilling societal interest.<sup>252</sup> Where abuse is seen to belong solely to the public, individual women's needs or those of certain groups become peripheral.<sup>253</sup> The criminalisation of FM saw warnings from ME women's advocates of victim disempowerment disregarded in the decision to raise the maximum sentence from two years to seven (in line with England and Wales).<sup>254</sup> This fixation on punishment dismisses minority perspectives in favour of the penal populism familiar to Western legal systems.<sup>255</sup> In prioritising a public theorisation, minority victims become *under*-privatised when the often problematic realities of a victim's relationship with the State predicate the need for privacy.<sup>256</sup> In the FM context, the public-private dichotomy is often powered by the 'exposure' of 'foreign' practices of certain cultures.<sup>257</sup> Minority victims who enter the public arena not only jeopardise their personal relationships but risk exposing their communities as threatening and deserving of intolerance.<sup>258</sup> 'Given a choice between the privatising problems of community control versus the oppressive intervention of the State, some [victims] will choose the former'.<sup>259</sup>

Scholars have gauged RJM's capacity to transcend the public-private dichotomy for the empowerment of abuse survivors.<sup>260</sup> Behrens suggests that conferences can offer sufficient publicity and accountability, attending to victims' need for validation and the system's need to shame perpetrators whilst maintaining privacy in affording control to the process itself.<sup>261</sup> The conditions of FM demand that publicity be narrowly bound, to avoid unwarranted shaming of participants within the wider community (immediate relationships and the majority population).<sup>262</sup> The requisite privacy can be maintained through occurrence of the process 'in private' – away from the wider community and general public – with accountability to the State sustained through facilitators and other actors whose presence can

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<sup>252</sup> Coker (2002), 133.

<sup>253</sup> *Ibid.*; Nancarrow (2009), 129.

<sup>254</sup> SPJC (2014), 5.

<sup>255</sup> Sabbe et al. (2014), 177-178.

<sup>256</sup> Coker (2002), 132; Nancarrow (2009), 130-131; Grauwiler & Mills (2004), 55.

<sup>257</sup> Sabbe et al. (2014), 182-184.

<sup>258</sup> *Ibid.*, 183; Shariff (2012), 553-555.

<sup>259</sup> Coker (2002), 133.

<sup>260</sup> Behrens (2005), 225; J. Braithwaite & H. Strang, 'Restorative Justice and Family Violence' in Braithwaite & Strang (2002), 12.

<sup>261</sup> Behrens (2005), 228.

<sup>262</sup> Participants from collectivist societies may view legal intervention as overstepping private family matters, threatening authority, and jeopardising family and community reputation – Haj-Yahia & Sadan (2008), 10.

attend to victims' affirmatory needs through denunciation of the abuse.<sup>263</sup> A formal model of RJM is neither solely public nor private.<sup>264</sup>

### 4.3 – 'Decriminalising' Forced Marriage

This shift from a public focus of justice underpins an alleged 'decriminalisation' of abuse.<sup>265</sup> The move to the private realm of RJM is routinely portrayed as perpetuating power imbalances, lessening accountability, and minimising or trivialising gendered abuse.<sup>266</sup> The criminalisation of FM was drawn out over several years but was not universally accepted by women's advocates.<sup>267</sup> It is nonetheless questionable how a move to RJM (an 'about-turn') might be received. Doubt remains over the willingness of Scottish professionals, politicians, and the public to diverge from the benchmark of criminalisation.<sup>268</sup> FM should be recognised for what it is – a serious, often violent, process of degrading treatment.<sup>269</sup> This extremity underpins reference to FM as a human rights abuse by which States justify criminal law responses.<sup>270</sup> For many, the severity is best reflected in punitive sanctions; offering anything short of traditional legal routes is seen as enhanced tolerance of abuse within minority communities.<sup>271</sup>

There are now valuable ways of incorporating issue-specific processes within RJM systems that take gendered abuse more seriously than shame- and punishment-oriented initiatives.<sup>272</sup> From a feminist perspective, these allow for greater engagement with women as perpetrators.<sup>273</sup> A criminal system concentrated on symbolic denunciation and penal law,

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<sup>263</sup> This crossover may alleviate concerns of vigilantism directed at earlier attempts to address FM internally within communities – R. Grillo (2015), *Muslim Families, Politics and the Law: A Legal Industry in Multicultural Britain* (Routledge), 250. See more general DA context in A. Morris & L. Gelsthorpe (2000), Re-visioning Men's Violence Against Female Partners, *Howard Journal of Criminal Justice* 39(4) 412-428, 420.

<sup>264</sup> Behrens (2005), 228.

<sup>265</sup> Nancarrow (2009), 127; Liebmann (2007), 284; A. Morris (2002), Critiquing the Critics. A Brief Response to Critics of Restorative Justice, *Brit.J.Crim* 42 596-615, 603.

<sup>266</sup> Nancarrow (2009), 127; Morris (2002), 603. Scottish Women's Aid (2018), *Written Submission to SPJC* (Available at: [http://archive2021.parliament.scot/S5\\_JusticeCommittee/Inquiries/ADR-SWA.pdf](http://archive2021.parliament.scot/S5_JusticeCommittee/Inquiries/ADR-SWA.pdf)), 3.

<sup>267</sup> Scottish Women's Aid et al. (2013), 3-5; SPJC (2014), 7.

<sup>268</sup> The Council of Europe's Convention on preventing and combating VAW (Art.37) represents political consensus in tackling FM via criminalisation and was instrumental in Scotland's adoption of the 2014 Act. See R. Kool (2012), Step Forward or Forever Hold Your Peace: Penalising Forced Marriages in The Netherlands, *Netherlands Quarterly of Human Rights* 30(4) 388-413, 455-456; SPJC (2014), 3-4.

<sup>269</sup> Council of Europe (2018), 5.

<sup>270</sup> Sabbe et al. (2014), 177; Kool (2012), 447; Council of Europe (2018), 14-15.

<sup>271</sup> SPJC (2014), 5-6. Cf. Scottish Women's Aid et al. (2013), 3-5.

<sup>272</sup> Nielsen (2014), 239-241; Almeida & Durkin (1999), 316; Coker (2002), 145-147. See discussions at (5.5)-(5.6).

<sup>273</sup> Vidal (2019); Coker (2002), 145-147; L. Vidal (2017), Let the results speak for themselves; A Danish perspective on family mediation in forced marriage cases (LinkedIn, 11<sup>th</sup> Aug), (Available at: <https://www.linkedin.com/pulse/let-results-speak-themselves-danish-perspective-family-laura-vidal/>).

and civil protection orders focused on immediate rather than long term prevention, overlook questions of why FM materialises and how underlying causes may be treated.<sup>274</sup> Morris turns the debate on its head, claiming trivialisation of wrongdoing as innate to conventional justice where victims have limited role and perpetrators are passive observers left to contend with the outcome imposed upon them.<sup>275</sup> Insight is demonstrable throughout Scotland's civil FM cases. The voice of the victim in *AB* – an educated, middle-class woman who displayed considerable strength throughout – was restricted during proceedings to the provision of evidence.<sup>276</sup> The difficulty in identifying FM means the absence of a prospective spouse and planned ceremony have been afforded particular weight, inaccurately reflecting lived experiences of marital processes.<sup>277</sup> The family unit in *AB* pursued a lengthy exercise of harassment, not only of the victim but the professionals with whom she had contacted, culminating in action for a FMPO.<sup>278</sup> Hints of conflict at earlier stages of the process, which may not satisfy FM under the 2011 Act (absent marriage plans or evidence of prolonged behaviour), could trigger a RJM response for earlier intervention. The system might therefore take FM as process-oriented more seriously, without having to wait for this process to unfold, perhaps circumventing abuse that might otherwise follow.

The case of *CoEC v S* was initiated against the victim's wishes, subjecting her to unwanted scrutiny (although it is accepted that her age was instrumental and her wishes were determinative in the outcome).<sup>279</sup> Whilst respect for the victim's perspective is important (itself at the centre of RJM), one might question whether this particular victim may decide differently if afforded the privacy and non-punitiveness of RJM or greater flexibility to influence the particularities of the case, such as the identity of any future spouse.

Subjectivity does not currently exist within a system that can be deployed against the victim's emotional and material needs.<sup>280</sup> RJM typically anticipates a range of options from which victims can make choices about their own futures, including that of traditional legal routes (dependent upon how RJM is integrated within Scotland's existing legal framework).<sup>281</sup> The Government's desire to instil presumption in favour of RJ in every case

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<sup>274</sup> Nielsen (2014), 235; Phillips & Dustin (2009), 542-543; SPJC (2014), 7.

<sup>275</sup> Morris (2002), 603-604.

<sup>276</sup> *AB*, 348-354.

<sup>277</sup> B. Kearney (2015), Forced marriage – protection orders, Fam.L.B 135 5-8, 8; Gilchrist (2015), 4; Carruthers (2016), 93; Shariff (2012), 556-560; Anitha & Gill (2011), 56.

<sup>278</sup> *AB*, 348-355.

<sup>279</sup> *CoEC v S*, [87]; Kearney (2015), 8.

<sup>280</sup> In respect of the criminal route, Idriss argues that prosecution should only proceed with permission of the victim, raising questions of proportionality and right to a fair trial – Idriss (2015), 698.

<sup>281</sup> Morris & Gelsthorpe (2000), 419; van Wormer (2009), 111; Grauwiler & Mills (2004), 64-65; Behrens (2005), 232-233.

suggests an inclination towards international models where RJ *is* the system, turning only to more traditional sanctions in limited circumstances.<sup>282</sup> Distinct from theoretical contrasts of restoration-retributivism as mutually exclusive, RJ rarely contributes to the erasure of the criminal law but embraces the benefits of an integrated system.<sup>283</sup>

The law remains a signifier and denouncer regardless of whether practical substance is afforded to RJM over traditional courtrooms.<sup>284</sup> Although impact is reduced in the context of no FM convictions, the threat of criminal law can complement RJM. Police officers deploying Denmark's model of Cross-Cultural Transformative Mediation (discussed subsequently) remind families that FM is an offence prior to restorative processes, to disarm immediate backlash to victims and allow families to challenge wider pressure.<sup>285</sup> RJM does nothing to discourage arrest of violent individuals nor prevents public education on illegality.<sup>286</sup> A crucial point for questioning legitimacy of the decriminalisation argument is the number of victims relying on the law for assistance.<sup>287</sup> The criminal provisions of the 2011 and 2014 Acts have yet to demonstrate any practical consequence. The 'decriminalisation' of FM through RJM would hold at most theoretical significance.

#### 4.4 – Preserving the Family Unit

RJM is commonly hailed as a forum for relationship repair where parties know each other personally.<sup>288</sup> Initiation in cases where abusive relationships are considered ongoing remains contentious and where processes might prolong these relationships even more so.<sup>289</sup> A focus on healing and reconciliation creates risk in encouraging victims to remain in, or return to, abusive environments.<sup>290</sup> With reference to South Asian women, Goel suggests the greatest danger is that 'instead of moving victims towards new lives of self-reliance and self-respect, [RJ] may work to 'restore' a family unit that is fundamentally flawed, thus returning victims to a life fraught with danger and abuse'.<sup>291</sup> This dynamic has resulted in a near blanket ban

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<sup>282</sup> S.Gov (2019b), 7; See discussion of New Zealand at (3.2).

<sup>283</sup> Ibid., 8-9; McAlinden (2011), 396-397; Daly (2016), 15; Morris & Gelsthorpe (2000), 418.

<sup>284</sup> Morris & Gelsthorpe (2000), 418.

<sup>285</sup> Danna & Cavenaghi (2011), 48.

<sup>286</sup> Morris & Gelsthorpe (2000), 418.

<sup>287</sup> Morris (2002), 604; Vidal (2019).

<sup>288</sup> Grauwiler & Mills (2004), 64-65; Morris & Gelsthorpe (2000), 419; Kirkwood (2010), 117; Cubitt (2009), 100.

<sup>289</sup> Goel (2005), 640; J. Stubbs (2007), Beyond apology? Domestic violence and critical questions for restorative justice, *Criminology & Criminal Justice* 7(2) 169-187.

<sup>290</sup> Ibid.; Morris & Gelsthorpe (2000), 419.

<sup>291</sup> Goel (2005), 644.

on family counselling, mediation, arbitration, and reconciliation practices in Scotland.<sup>292</sup> Risks include the prolonging of abuse, the problematic nature of negotiating safety, and the potential for new or increased violence.<sup>293</sup> The ‘one chance rule’ encourages an instantaneous professional response, recognising victims’ volatile position upon coming forward.<sup>294</sup> Any process seen to prolong emancipation is regarded as wholly unsafe, assuming no effective way of ensuring safety once families are aware of disclosure of abuse and involvement of statutory agencies.<sup>295</sup>

These policies fuel the common belief that ME women can only recover agency by cutting ties with their background and family.<sup>296</sup> The limited concept of victimisation that has matured as a result overlooks the value of the family unit in many lives and improperly equates exit with safety.<sup>297</sup> Women who remain in abusive environments are seen to do so solely as a result of patriarchal constraints, preserving the ideal that if victims are afforded the requisite political, financial, legal, and emotional support then they would always opt to leave.<sup>298</sup> Women are viewed solely as victims, and not as daughters, siblings, lovers, friends, or members of a particular religious body or tradition – roles that inhabit competing claims on decisions to leave or stay.<sup>299</sup>

For FM, anything short of leaving is seen as proof of negative influence by culture and community.<sup>300</sup> For those who lack support systems outwith their family and community structures, exit generates a poor quality of life for both themselves and their families.<sup>301</sup> Security is compromised by fears of being located or attacked; *AB* demonstrates the lengths families may go to maintain contact with victims despite varied professional intervention.<sup>302</sup> ‘Often idealised freedom [may] be void’ with the ‘strong emphasis on autonomy and individuality [masking] a reality of isolation and fear of failure’.<sup>303</sup> Some suggest the majority of victims return to the family unit at some point in life, often in secret, resulting in

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<sup>292</sup> S.Gov (2014b), 7. Chantler et al. assess ‘structural competence’ of Scottish practitioners against their rejection of these processes – (2022), 836.

<sup>293</sup> S.Gov (2014b), 56.

<sup>294</sup> *Ibid.*, 9; Saheliya (2012), 41-43.

<sup>295</sup> Vidal (2017).

<sup>296</sup> Nielsen (2014), 234; Anitha & Gill (2009), 180.

<sup>297</sup> See extent of family pressure in *AB* (350-355) long after extrication of the victim. Vidal (2019); Phillips & Dustin (2009), 542; Sowe (2018), 264.

<sup>298</sup> Grauwiler & Mills (2000), 53.

<sup>299</sup> *Ibid.*, 55; Phillips & Dustin (2009), 542.

<sup>300</sup> Shariff (2012), 550-551; Enright (2009), 352.

<sup>301</sup> Nielsen (2014), 235; Sowe (2018), 264.

<sup>302</sup> *AB*, 351-355; Nielsen (2014), 235.

<sup>303</sup> B. Bayam-Tekeli (2004), The Papatya association and the reception of young girls in Berlin, *Women Against Violence* 1248 108-111, 110.

higher risk absent the ‘safety net’ offered by professional awareness.<sup>304</sup> Although permanent separation may be the best option, safety and freedom are not simply questions of relocation or legal sanctions.

It is by reason that these family relationships are ongoing that RJM is considered as an alternative to traditional legal proceedings. The ideal presented is a more culturally sensitive response allowing victims to maintain their familial, cultural, personal, and community identities. There is incentive to consider the ways in which RJM processes might address some of the nuances of FM and their impact on those involved. The final two chapters of this paper proceed to do so, drawing on feminist scholarship to demonstrate how a dialogue approach might address a number of important questions left unanswered by Scotland’s current initiatives; in particular how those impacted can avoid the relationship of marriage but maintain their familial connections, and how a reorientated professional response might seek to instil behavioural change to allow these desires to be realised.

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<sup>304</sup> Danna & Cavenaghi (2011), 47; Vidal (2019); Sabbe et al. (2014), 178.

## CHAPTER FIVE

### THE RETURN TO A DIALOGUE APPROACH

At the centre of RJM is the sustenance of constructive dialogue. The literature and practice surrounding a dialogue approach to FM reflect two broader themes of direct engagement with ME individuals: that exercised ‘via the community’ and ‘via the family’.<sup>305</sup> The former, more common depiction favours an encounter between majority and minority communities aimed at establishing common values by which to seek the eradication of oppressive practices.<sup>306</sup> FM is ordinarily portrayed within a wider clash between Western and Eastern (typically Islamic) belief systems.<sup>307</sup> A dialogue approach recognises scope for intercultural debate, acknowledging that FM is condemned across religious boundaries.<sup>308</sup> Early UK initiatives sought to instil this dynamic, to solve the problem internally within communities.<sup>309</sup> Representatives or institutions were identified through which to channel effective communication depicting the wrongfulness of FM.<sup>310</sup> Yet, authority within these communities is ‘scattered’<sup>311</sup> and where identified, individuals were ‘elevated by the host community to the rank and position of religious leaders and provided with all the paraphernalia accompanying the position’, at odds with their religious practices.<sup>312</sup> These ‘representatives’, accused of denying FM’s existence within their communities, were disregarded as unaccountable routes for effecting change.<sup>313</sup> The community perspective has since been ‘largely dismissed as risky and potentially endorsing cultural hegemonic power hierarchies through the privileging of self-designated spokespersons and buying into a false representation of cultural groups as homogenous’.<sup>314</sup>

This rejection has overlooked the potential bypass of the wider perspective through more direct communication ‘via the family’. Most commonly referenced as a form of mediation, this dialogue embraces the persuasion of families as a pre-requisite for young minorities to

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<sup>305</sup> Grillo (2015), 254; Shariff (2012), 550-551; Nielsen (2014), 239-240.

<sup>306</sup> Phillips & Dustin (2009), 532.

<sup>307</sup> Ibid.; Grillo (2015), 247; Shariff (2012), 551; Saheliya (2012), 36.

<sup>308</sup> Phillips & Dustin (2009), 533; Saheliya (2012), 36.

<sup>309</sup> Grillo (2015), 254-255; Shariff (2012), 553.

<sup>310</sup> Grillo (2015), 254.

<sup>311</sup> Ibid.; S. Sardar-Ali (2013), Authority and Authenticity: Sharia Councils, Muslims Women’s Rights, and the English Courts, *Child and Family Law Quarterly* 25(2) 113-137, 114.

<sup>312</sup> S. Sardar-Ali (2013), ‘From Muslim migrants to Muslim citizens’ in R. Griffith-Jones (ed), *Islam and English Law. Rights, Responsibilities and the Place of Shari’a* (Cambridge University Press), 170.

<sup>313</sup> Grillo (2015), 255; M. Wind-Cowie et al. (2012), Ending Forced Marriage (Demos), (Available at [https://www.demos.co.uk/files/Forced\\_marriage\\_-\\_web\\_4\\_.pdf?1335277742](https://www.demos.co.uk/files/Forced_marriage_-_web_4_.pdf?1335277742)), 58.

<sup>314</sup> Shariff (2012), 550.



realise their wishes.<sup>315</sup> Programmes manifest a short-term goal in enabling families to work through the ‘tense and highly sensitive issues’ surrounding marriage and a longer-term aim of addressing the social, cultural, and religious premises underlying generational conflicts.<sup>316</sup> Such an approach is rare and only beginning to emerge as relevant in Scotland.<sup>317</sup> Acknowledging the need to diversify interventions, the core deficiencies of existing regulatory and exit-focused regimes are hereafter contrasted with RJM, accentuating opportunities for both victims and perpetrators beyond their current ‘unspeakable’ disposition. In familial contexts where the relationship itself is the source of wrongdoing, reconciliation requires a different perspective and has, in the most part, been rejected as problematic and unsafe.<sup>318</sup> For some, RJM is advocated on the very basis that relationships are ongoing, respecting the many victims seeking to end their abuse but not the relationship.<sup>319</sup> The following discussion contributes to this latter scholarship, acknowledging the inherent difficulties of this approach and offering feminist insight through which to build safeguards around the ‘major planks of concern’: victim safety and imbalances of power.<sup>320</sup>

## 5.1 – Cross-Cultural Transformative Mediation

Particular inspiration can be drawn from Nielsen’s model of Cross-Cultural Transformative Mediation (CCTM), as the most established national RJM model for FM. CCTM builds on traditional mediation in ways tailored to the specifics of FM, incorporating a process of facilitated dialogue wherein a trained intermediary ‘negotiates’ an appropriate resolution between the victim and their family.<sup>321</sup> The process encourages empowerment of all involved, instilling protection and change in the family’s ‘repressive traditions’.<sup>322</sup> This method, suitable for re-setting social relationships constricted by gender and age hierarchies, promotes constructive understanding between generations, acknowledging power imbalances within minority households.<sup>323</sup>

Commencing in Denmark and employed across Scandinavia, CCTM is grounded in routine practice through Tværkulturel familierådgivning (TF) – a private company established by

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<sup>315</sup> Ibid., 561; Nielsen (2014), 235.

<sup>316</sup> Grillo (2015), 256; Nielsen (2014), 238; Vidal (2019).

<sup>317</sup> Chantler et al. (2017), 26.

<sup>318</sup> Danna & Cavenaghi (2011), 46-47; Bano (2011), 193; S.Gov (2014a), 24.

<sup>319</sup> Nielsen (2014), 234; Vidal (2019); Vidal (2017); Askola (2018), 1000.

<sup>320</sup> Behrens (2005), 230.

<sup>321</sup> Nielsen (2014), 239-240; Vidal (2019).

<sup>322</sup> Grillo (2015), 257; Nielsen (2014), 239-240.

<sup>323</sup> Nielsen (2014), 239; Vidal (2019).

Nielsen, working closely with various organisations as central body for guidance and application.<sup>324</sup> Whilst operations are undertaken in collaboration with lawyers, NGOs, police, social work, and others, Nielsen has been instrumental in instructing these sectors on their own application of CCTM, establishing a system-wide framework of intervention.<sup>325</sup> Cases are referred primarily through a dedicated helpline but can be raised through teacher, social work, and police reports, reflecting a breadth in entry points.<sup>326</sup>

Following initial consultation to determine professional remit, practitioners coach families to renounce abusive conduct in accordance with the victim's own marital desires.<sup>327</sup> The professional response is differentiated upon personal choice, rejecting the presumption and value of neutrality common to traditional RJM.<sup>328</sup> Should the victim wish to exercise exit, the purpose is to encourage families to relinquish contact and help them move on; should the victim seek to return to the family, the purpose shifts to creating a safe environment for reconciliation to transpire.<sup>329</sup>

Whilst subjectivity and empowerment are reflected in RJM's core principles, CCTM is distinguished from standard one-off, incident-based meetings in following clearly defined stages.<sup>330</sup> Each of the four principal stages, outlined briefly here, is considered throughout this chapter in reference to its distinct purposes. In collaboration with numerous sectors, including health and social services, an initial 'investigative phase' involves 'thorough gathering of data and accumulation of information about the family and victim'.<sup>331</sup> This includes a detailed interview with the victim, determining their appreciation of the conflict and wider perception of their environment – to gain a holistic picture and determine the appropriate course/depth of action.<sup>332</sup> The victim is afforded accommodation and support away from the family, allowing them to make informed decisions going forward.<sup>333</sup> The family is provided space to express their views as the 'dialogue/mediation' phase commences, and through respectful dialogue are encouraged to appreciate the victim's perspective.<sup>334</sup> Distinct from other RJM forums, the victim is absent during negotiations,

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<sup>324</sup> TF website, 'Cross-cultural conflict mediation' (<https://ewc.dk/>).

<sup>325</sup> Nielsen (2014), 234; Vidal (2019); TF offers lectures and qualifying courses for professionals working with FM cases – TF website, 'Lectures and Qualifying courses'.

<sup>326</sup> Danna & Cavenaghi (2011), 50.

<sup>327</sup> TF website, 'Family Work'; Nielsen (2014), 240.

<sup>328</sup> Danna & Cavenaghi (2011), 48; Vidal (2019).

<sup>329</sup> Nielsen (2014), 240.

<sup>330</sup> Vidal (2019); Nielsen (2014), 240.

<sup>331</sup> Nielsen (2014), 240.

<sup>332</sup> *Ibid.*, 241-242.

<sup>333</sup> Danna & Cavenaghi (2011), 51; Vidal (2017).

<sup>334</sup> Vidal (2019); Nielsen (2014), 240.

conducted by a professional facilitator in the presence of a cross-sectoral team, primed to participate when necessary.<sup>335</sup> The length of this phase is determined by the nature of the conflict and terminates with a signed, written agreement between parties or, if unsuccessful, deference to other intervention (most often, permanent flight of the victim).<sup>336</sup> The third phase of ‘reconciliation’ brings parties together following sufficient inclination from both sides that this is safe – an optional step contemplated by the success of negotiations and desires of the victim.<sup>337</sup> The final and longest stage requires cross-organisational commitment to monitoring family dynamics for continuous protection.<sup>338</sup> This ‘evaluative/follow-up’ phase, ‘critical to ensuring longevity of the conflict resolution’, ensures promises made are respected long term, further intervention escalated where necessary.<sup>339</sup>

The wider aim is dedicated to FM’s eradication, predicated on the need to engage critically with minority families to effect lasting social change, shaping respectful norms of marriage one family at a time.<sup>340</sup> Despite significant criticism, CCTM has demonstrated some practical success in ‘solving’ cases of FM and other honour-based conflicts. Although firm data is limited, Nielsen estimates that over 90% of cases have resulted in resolution.<sup>341</sup> Denmark’s National Organisation of Women’s Shelters (LOKK) cites similar success with 20 positive outcomes of 21 attempts in 2007 and 19 of 20 the following year.<sup>342</sup> The model’s effectiveness and normative framework are gradually gaining recognition in other jurisdictions.<sup>343</sup> Despite need for more extensive, country-specific analyses, CCTM offers a theoretical and practical starting point for adapting Scotland’s formal RJM model to FM.

## 5.2 – A Subjective Response

Subsumed within this approach is a third dialogue exercised directly with the victim. A precondition to family engagement is creation of an environment within which the victim is empowered to make informed decisions regarding their own case.<sup>344</sup> This is not a new idea

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<sup>335</sup> Danna & Cavenaghi (2011), 51; Vidal (2019).

<sup>336</sup> Exit is typically exercised upon continued rejection of traditional legal routes by victims – Nielsen (2014), 240-241.

<sup>337</sup> Vidal (2019). Nielsen refers to 3 phases with reconciliation as a potential aim – Nielsen (2014), 240.

<sup>338</sup> Nielsen (2014), 240; Danna & Cavenaghi (2011), 57-59.

<sup>339</sup> Vidal (2019).

<sup>340</sup> Nielsen (2014), 234; Grillo (2015), 257; TF, ‘Family Work’; Vidal (2017).

<sup>341</sup> See interviews with Danna & Cavenaghi (2011), 52 and Vidal (2019).

<sup>342</sup> Danna & Cavenaghi (2011), 52.

<sup>343</sup> E.g., Australia: Askola (2018)1000; Vidal (2019); Vidal (2017). UK: Grillo (2015), 257.

<sup>344</sup> Nielsen (2014), 240-242.

but has been at the disposal of Scotland's third sector organisations for a prolonged period.<sup>345</sup> There are important ways in which the RJM movement can learn from the distinctness of operations employed by Scottish minority women's groups when contrasted with other mainstream organisations, such as police and social workers. Whilst the latter are directed by the 'one chance rule' emphasised under regulation and exit, ME organisations employ dialogue characterised by education, consultation, and advice, promoting opportunities for individual agency which engage victims more centrally in solutions.<sup>346</sup> This exchange ascertains the victim's desires and situation (including issues they themselves have overlooked), acknowledging victim testimony as the safest insight into each case.<sup>347</sup>

There exists an inherent flexibility to this approach not observed under existing initiatives. FMPOs were hailed for their capacity to be tailored to individual needs, such as the surrendering of travel documents.<sup>348</sup> However, the principal question in these cases remains actual occurrence of FM prior to any ancillary provisions.<sup>349</sup> Victim-specific measures are subordinated to the competition innate to adversarial processes, pitting two sides of the family against each other in establishing whether FM has occurred.<sup>350</sup> Whereas contemporary legal responses rely on objective assessment of evidence, RJM embraces personal narratives as primary source of information.<sup>351</sup> RJM is absent the burdensome evidentiary standards currently observed under Scotland's FM legislation yet the existence of quantifiable evidence is not irrelevant; significant fact-finding remains necessary in establishing RJM's suitability in each case, informing negotiations, and gaining the fullest appreciation of the situation, ensuring adherence to certain objective standards including the accuracy of personal accounts.<sup>352</sup> Evidence is required to ensure the needs of all parties are attended to sufficiently and prompt a professional reaction under existing initiatives should RJM fail.<sup>353</sup>

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<sup>345</sup> Avan et al. (2005), 65; Saheylia (2012), 42; Chantler et al. (2017), 25.

<sup>346</sup> Saheylia (2012), 42.

<sup>347</sup> Nielsen has developed a questionnaire to elicit these details, adapted in accordance with the 'clues' presented – Nielsen (2011), 242-243.

<sup>348</sup> Scottish Parliament (2011), Meeting of the Parliament. *Official Report* (22<sup>nd</sup> Mar), (Available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=6224&mode=pdf>), Col.34720.

<sup>349</sup> See *CoEC v S; AB; C v T*.

<sup>350</sup> *Ibid.* For general adversarial 'contests' see Van Ness & Strong (2010), 55; Cubitt (2019), 327.

<sup>351</sup> K. Pranis, 'Restorative Values and Confronting Family Violence' in Strang & Braithwaite (2002), 31; Nielsen (2014), 242; Kirkwood (2010), 109-110; Van Ness & Strong (2010), 74; McFarlane (2012), 37-38; Cubitt (2009), 101.

<sup>352</sup> Nielsen (2014), 240; Stubbs (2010), 980.

<sup>353</sup> Vidal (2017); Stubbs (2007), 181.

### 5.3 – Consensus versus Consent

A dialogue approach allows solutions to be negotiated between (rather than imposed upon) both sides of the family.<sup>354</sup> These negotiations take greater account of complex community structures, offering a flexible approach to the grey area between forced and AM.<sup>355</sup> The distinction is not only easier to draw through truly dialectic engagement but, in the absence of punitive sanctions and lesser scope for shaming, is arguably less important. The questions posed by RJM are distinct from those raised in traditional settings focused on establishing wrongdoing and guilt.<sup>356</sup> The inquiry shifts from a desire to pinpoint the occurrence of FM, intrinsic to event-based notions of marriage, to aiding individuals to navigate and morph the marriage process, allowing the system to bypass FM's definitional concern, emphasising instead the mechanisms by which to address the needs of those involved.<sup>357</sup>

Individualist notions of consent are disregarded in favour of a collectivist concept of 'consensus'.<sup>358</sup> Facilitating agency through rather than against the community, consensus offers potential to transform the very ways that FM is defined, to better reflect the lived experiences of minority communities.<sup>359</sup> Marital processes of many cultures afford primary authority to family and community involvement, at odds with current human rights perspectives founded on the liberal concept of free and full consent as a non-derogable individual right.<sup>360</sup> The judgement of ME women against Western standards of individualism fails to acknowledge that many place value on securing cultural endorsements to marriage.<sup>361</sup> These affirmations are sought as maximising personal preference whilst maintaining close family and community relations.<sup>362</sup> Incongruous with Western, event-based ideas of marriage, negotiations are attempted over time as younger community members test the limits of their surroundings.<sup>363</sup> Samad & Eade cite evidence of younger South Asians seeking

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<sup>354</sup> Nielsen (2014), 241-242.

<sup>355</sup> Saheliya (2012), 41; Shariff (2012), 551.

<sup>356</sup> Van Ness & Strong (2010), 4. See 2011 Act s.1; 2014 Act s.122; *CoEC v S; AB*.

<sup>357</sup> Vidal (2017); Danna & Cavenaghi (2011), 52; Nielsen (2014), 240-241.

<sup>358</sup> Shariff (2012), 551-552; Sowey (2018), 266.

<sup>359</sup> Shariff (2012), 551; Haj-Yahia & Sadan (2008), 3.

<sup>360</sup> Shariff (2012), 557; Enright (2009), 356-357; Y. Fletcher & E. Sacks (2021), *Position Paper on Forced Marriage. Analysis of Arranged Marriage as Practice in Jewish Communities* (Nahama, 8<sup>th</sup> Feb), (Available at: <http://nahamu.org/wp-content/uploads/2021/02/Position-Paper-on-FM-Nahamu-Feb-2021.pdf>), 2; A. Shaw (2001), Kinship, Cultural Preference and Immigration: Consanguineous Marriage among British Pakistanis, *Journal of The Royal Anthropological Institute* 7(2) 315-334, 325; A.Y. Samad & J. Eade (2002), *Community Perceptions of Forced Marriage*. Community Liaison Unit, FCO Report, (Available at: [https://bradscholars.brad.ac.uk/bitstream/handle/10454/4133/forced\\_marriages\\_research\\_report-1.pdf?sequence=1&isAllowed=y](https://bradscholars.brad.ac.uk/bitstream/handle/10454/4133/forced_marriages_research_report-1.pdf?sequence=1&isAllowed=y)), 31-32.

<sup>361</sup> Shariff (2012), 560-561; Collet & Santelli (2011), 251-252.

<sup>362</sup> Shariff (2012), 560-561; Anitha & Gill (2011), 56.

<sup>363</sup> Ibid.

to frustrate consanguineous marriages, reasoning with families over the risks of disability of future children.<sup>364</sup> As illustrated in *AB*, factors such as education and career prospects are deployed as bargaining tools by those seeking to delay prospective marriages.<sup>365</sup> Other strategies include invoking religious texts, the risks of divorce, and the suicidal tendencies of unhappy spouses.<sup>366</sup> Parents faced with prospects of a child rebelling may accommodate these moves, as ‘the surest way’ to maintain family cohesion and community standing.<sup>367</sup>

Existing initiatives characterised by limited participation and connotations of ‘liberating’ victims from their communities presume those of culture cannot be agents within marital processes.<sup>368</sup> Familial negotiations depict a ‘more processual characteristic to motivations and decision-making’ reflective of the nuanced boundary between forced and AM.<sup>369</sup> An underappreciation of this dynamic has contributed to the lack of protection currently offered by Scotland’s legal system.<sup>370</sup> A dialogue approach aimed at reaching consensus embraces a process conception of FM, which does not presuppose victims be particularly operative in the dialogue itself but recognises their power to influence its content and outcome.<sup>371</sup> This reframing of choice as subsumed within the collective rights of minority households allows for deeper understanding of motivations, micro-power, and its navigation.<sup>372</sup> Although success of negotiations may vary, RJM offers a more accountable forum for consensus to be realised. Having due regard to this transformative potential and the obscured distinction between forced and AM, it is possible this approach could reshape what might be considered a FM into an arranged one.<sup>373</sup> Those who categorically refuse to go through with marriage to a particular individual might otherwise agree to an AM with another. Others may agree to have an AM or parental approval of a specific spouse at a later point in life. Such examples suggest that consensus ultimately involves some form of compromise.<sup>374</sup>

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<sup>364</sup> Samad & Eade (2002), 88.

<sup>365</sup> *AB*, 381 at [81]; Shariff (2012), 560.

<sup>366</sup> Chantler et al. (2017), 26; Shariff (2012), 560.

<sup>367</sup> Shariff (2012), 561; Samad & Eade (2002), 111.

<sup>368</sup> Shariff (2012), 551; Enright (2009), 354-356. For conceptualisation of ‘autonomy’ as capable within oppression see Bhandary (2018), 201.

<sup>369</sup> Shariff (2012), 551.

<sup>370</sup> See discussion at (2.1).

<sup>371</sup> See discussion at (5.6).

<sup>372</sup> Shariff (2012), 552; Chantler & McCarry (2020), 95-97; Aplin (2017), 1; S.N. Shah-Kazemi (2000), *Cross-Cultural Mediation: A Critical View of the Dynamics of Culture in Family Disputes*, *International Journal of Law, Policy and the Family* 14 302-325.

<sup>373</sup> For broader societal, cultural, and personal gains of encouraging AM see Bhandary (2018).

<sup>374</sup> Shariff (2012), 561.

## 5.4 – Victim Empowerment

In the context of gendered abuse, the rejection of ‘compromise’ and other terms of RJM theory (including dialogue, discussion, forgiveness, apology, and cooperation) is appropriate.<sup>375</sup> Women should not be expected to discuss, negotiate, or accede to any aspect of their abuse and any suggestion that experiences are mere ‘conflicts’ could be detrimental.<sup>376</sup> Bano takes issue with such terminology from a FM perspective, highlighting women’s unequal position within minority households in relation to bargaining power, respect, and prestige.<sup>377</sup> Reflecting a wider tension throughout the literature, RJM processes are seen to inadequately address the power imbalances that characterises these relationships, leaving victims open to the same abuse during the process as that experienced in the home.<sup>378</sup> Processes are perceived to reflect subordination and inequality, preventing women from achieving just outcomes and increasing rather than diminishing levels of harm.<sup>379</sup> The promotion of relationship repair, family, and community cohesion seemingly predestines women’s ability to assert their needs or wishes throughout.<sup>380</sup> Empowerment remains a point of contention across the RJM landscape. Much of the traditional discourse has emerged in response to dissatisfaction with existing mechanisms, characterised by victims’ lack of control once their case has been turned over to legal professionals.<sup>381</sup> Traditional court processes, during which the victim awaits decision as to deservingness of statutory protection, violate standpoint feminism’s emphases on self-determination and vocal autonomy.<sup>382</sup> Transferring power from the abuser to the State in the ‘image of an adversarial struggle between two layers of equal might’ does little to address subordination.<sup>383</sup>

RJM is observed as giving women back their voices and personal dignity.<sup>384</sup> Processes that stress dialogic resolution can attend to victims’ desires to be treated as individuals, offering scope to determine their own needs, counter their sense of helplessness, and increase their choices.<sup>385</sup> Support is provided without requiring victims to choose between cultural identity

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<sup>375</sup> Bano (2011), 193; Stubbs (2007), 175-178; Coker (2002), 148.

<sup>376</sup> S.Gov (2014b), 56; Behrens (2005), 222; Stubbs (2007), 175-178.

<sup>377</sup> Bano (2011), 193.

<sup>378</sup> Ibid., 193-194; Fredrick & Lizdas (2009), 50; Morris & Gelsthorpe (2000), 416-417; Morris (2002), 608.

<sup>379</sup> H.H. Irving & M. Benjamin (1995), *Family Mediation. Contemporary Issues* (Sage Publishing), 204-205; Bano (2011), 194; Stubbs (2007), 172-173; Goel (2005), 657-659.

<sup>380</sup> Goel (2005), 644; Bano (2011), 194-196; van Wormer (2009), 107; Grauwiler & Mills (2004), 62-63.

<sup>381</sup> van Wormer (2009), 108; S.Gov (2019a), 3.

<sup>382</sup> van Wormer (2009), 108-109.

<sup>383</sup> Morris (2000), 608.

<sup>384</sup> Morris & Gelsthorpe (2000), 419; van Wormer (2009), 111-112.

<sup>385</sup> Van Wormer (2009), 108; Grauwiler & Mills (2004), 64; Behrens (2005), 228.

or group membership and their safety and autonomy.<sup>386</sup> Giving victims a say in proceedings may empower them to seek professional assistance, particularly in cases where prosecution of their close connections is undesired.<sup>387</sup> Victims can choose how to present themselves, express their feelings, wishes and demands going forward, and portray a subjective understanding of their experiences.<sup>388</sup>

However, RJM's communicative potential is subject to significant risks of domination and reproduction of power relations.<sup>389</sup> The expectation to converse in an intimate setting shaped by the intimacy of the relationship itself questions victims' communicative competence, particularly in the presence of their abusers.<sup>390</sup> There are significant limitations in asking victims to publicly account for aspects of their personal, potentially ongoing, relationships and without careful designing to ensure accurate story-telling, there is no guarantee that presented narratives are the victim's.<sup>391</sup> The risks of speaking openly in abusive contexts are significant; any unwelcome or 'wrongly' told story can result in rejection, ridicule, or further reprimand.<sup>392</sup> For FM, this includes initiating or bringing forward wedding plans, prompting travel for marriage abroad, or more violent outcomes.<sup>393</sup> Victims face notable pressure to accept inappropriate solutions when faced with their abusers and family intervention may diminish their capacity to make informed choices within the process.<sup>394</sup>

Goel argues that South Asian women are too easily influenced by RJM's dedication to preserving family and community structures.<sup>395</sup> RJM offers an 'attractive promise of salvation' in its emphasis on compromise and family ties, allowing victims to 'exist within the sticky contradictions' of their traditional cultural models.<sup>396</sup> Participation is not conditional on cultural deviation; rather the non-adversarial privacy and collaborative efforts uphold South Asian values of interdependence and collectivism.<sup>397</sup> Since women are 'culturally bound to live according to the very values [RJM] espouses, the conditions [RJM]

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<sup>386</sup> Nielsen (2014), 240; Vidal (2019); Shariff (2012), 550; Grauwiler & Mills (2004), 52.

<sup>387</sup> van Wormer (2009), 112; Vidal (2019); Grauwiler & Mills (2004), 63; Behrens (2005), 231.

<sup>388</sup> B. Hudson (2003), 'Victims and Offenders' in A. Von Hirsch et al. (eds), *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (Hart Publishing), 183.

<sup>389</sup> Stubbs (2010), 980; S.Gov (2014b), 56; B. Hudson (2006), Beyond white man's justice. Race, gender and justice in late modernity, *Theoretical Criminology* 10(1) 29-47, 35.

<sup>390</sup> Stubbs (2010), 981; Stubbs (2007), 173-174; Goel (2005) 660, Bano (2011), 195.

<sup>391</sup> Stubbs (2010), 980-981 – Cf. traditional courtrooms – formalised and legalistic accounts offered by lawyers on victim's behalf under clearly articulated rules.

<sup>392</sup> K. Smith (2006), Dissolving the Divide: Cross-Racial Communication in the Restorative Justice Process, *Dalhousie Journal of Legal Studies* 15 168-203, 186.

<sup>393</sup> S.Gov (2014b), 134.

<sup>394</sup> Bano (2011), 195; Goel (2005), 660-661.

<sup>395</sup> Goel (2005), 659.

<sup>396</sup> Ibid., 657. See RJ's consistency with the Qur'an and Islamic law – Islam et al. (2018), 283-284.

<sup>397</sup> Goel (2005), 659; Shariff (2012), 561.



presumes are entirely absent for [South Asian] victims'.<sup>398</sup> The vocal autonomy that many models assume is inconsistent with the 'silent suffering' of cultural stability.<sup>399</sup> Values of consensus, connectedness, and cooperation may further encourage victims to accede to cultural ideals of self-sacrifice at the expense of their own interests and safety.<sup>400</sup> This 'certainty of the power to silence'<sup>401</sup> presumes that women cannot advocate for themselves which – as demonstrated in *AB* – is not always the case.<sup>402</sup> To suggest all victims possess similar fortitude would be disingenuous.

Much of the criticism is levelled at a symbolic level but also practical elements of seemingly more traditional models.<sup>403</sup> A vital strand of feminist engagement has discounted undifferentiated approaches, considering the ways in which competing interests are shaped by different behaviours, contexts, and meanings.<sup>404</sup> Walkate challenges the presumption of the 'structurally neutral victim' within RJM's typical focus on 'bringing the two parties to the event together in the sense of an equal relationship, to make repairs for what has happened'.<sup>405</sup> The incident-based conference model is insufficiently equipped to address family abuse and any alternative requires a sophisticated understanding of surrounding dynamics, more time, preparation, and resources, and stringent safety measures.<sup>406</sup> The expressive responsibility placed on victims means 'justice should require that outcomes are grounded in a dialogue that recognises and takes account of underlying inequalities and injustices'.<sup>407</sup>

For many, the counterbalance lies in procedure and active control of the negotiation process by facilitators.<sup>408</sup> Crawford obliges professionals to regulate participation by mitigating power differences, challenging arbitrary outcomes, and 'rendering procedures open, accountable, and contestable under the rule of law'.<sup>409</sup> Facilitators have a responsibility to create an environment in which both sides wish to participate and guarantee that they do

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<sup>398</sup> Goel (2005), 658.

<sup>399</sup> Ibid., 660; Haj-Yahia & Sadan (2008), 7-8.

<sup>400</sup> Goel (2005) 659; Bano (2011), 193; Haj-Yahia & Sadan (2008), 5.

<sup>401</sup> Grauwiler & Mills (2004), 62.

<sup>402</sup> See discussion at (5.3).

<sup>403</sup> Bano (2011), 193; S.Gov (2014b), 13.

<sup>404</sup> Stubbs (2010), 974; Coker (2002), 143-145; Behrens (2005), 223-224.

<sup>405</sup> S. Walkate (2006), 'Changing Boundaries of the "Victim" in Restorative Justice: So Who is the Victim Now?' in D. Sullivan & L. Tiffit (eds), *Handbook of Restorative Justice: A Global Perspective* (Routledge), 279.

<sup>406</sup> Vidal (2019); Stubbs (2010), 983; K. Daly & H. Nancarrow (2010), 'Restorative Justice and Youth Violence Against Parents' in Ptacek (2010), 170.

<sup>407</sup> A. Crawford (2002), 'The State, community and restorative justice: heresy, nostalgia and butterfly collecting' in L. Walgrave (ed), *Restorative Justice and the Law* (Willan Publishing), 123.

<sup>408</sup> Morris (2002), 608; Hudson (2003), 183.

<sup>409</sup> Crawford (2002), 125. See similarly Morris (2002), 608; Morris & Gelsthorpe (2004), 417.

so.<sup>410</sup> Whilst RJM is not a fact-finding forum in a courtroom sense, it is necessary to give meaning to the stories presented.<sup>411</sup> Extensive evidence-gathering, planning, and enforcement are needed to empower the victim, sufficiently denounce abuse, and shape safe and effective outcomes.<sup>412</sup>

The difficult expectation placed on victims to advocate for themselves has been assessed and challenged. Stubbs notes the potential in allowing participation other than by personal attendance.<sup>413</sup> The Scottish Government acknowledges shuttle dialogue wherein victims and perpetrators do not meet but communicate through professionals.<sup>414</sup> However, if the given aim is reconciliation, victims may eventually face their abusers and procedural nuances will have to be adopted for such cases. The novelty of the Danish approach is that facilitators replace the victim during the negotiation stage, the latter afforded power to influence from the safety of indirect participation.<sup>415</sup> Professionals become party to the case, acting not as a go-between but an active agent for the victim (a conferencing-shuttle dialogue hybrid), alleviating concerns of perpetrators using the forum to exercise further subordination or abuse and the inability of victims to speak out.<sup>416</sup> This presupposes a less impartial role for facilitators than traditional RJM mechanisms.<sup>417</sup>

## **5.5. – Anti-Subordination, Mutuality, & Respect**

Power hierarchies are so ingrained that procedural changes are not necessarily enough.<sup>418</sup> Adequate appreciation of victims' interests should be met with 'an explicit normative commitment to challenging subordination'.<sup>419</sup> Several scholars have advocated processes or techniques expressly designed to rebalance power, informed by feminist values relevant to the particular context.<sup>420</sup> 'Anti-subordination' acts as an overarching guiding principle and the umbrella term given to processes aimed at redressing power imbalances in abusive

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<sup>410</sup> Morris (2002), 608; Morris & Gelsthorpe (2004), 417; Grauwiler & Mills (2004), 66.

<sup>411</sup> Stubbs (2010), 980.

<sup>412</sup> *Ibid.*; Coker (2002), 148.

<sup>413</sup> Stubbs (2010), 985.

<sup>414</sup> S.Gov (2017), 6; S.Gov (2019b), 4.

<sup>415</sup> Nielsen (2014), 241; Vidal (2019); Danna & Cavenaghi (2011), 51.

<sup>416</sup> *Ibid.*

<sup>417</sup> Stubbs (2007), 180-181; Coker (2002), 148; Behrens (2005), 225. This raises questions under Art.6 ECHR outwith this research.

<sup>418</sup> Goel (2005), 643.

<sup>419</sup> Stubbs (2010), 982.

<sup>420</sup> Behrens (2005), 223; Irving & Benjamin (1995), 216; Stubbs (2007), 181. Grauwiler & Mills expect practices be rooted in principles of mainstream feminism – victim safety, victim choice, offender and system accountability – (2004), 64.

relationships.<sup>421</sup> The latter exist either as a pre-condition to participation in RJM or within conferences themselves – or perhaps both. Some approaches require perpetrators’ prior participation in programmes aimed at changing attitudes to gender and abuse.<sup>422</sup> Other models, such as CCTM, deploy family therapy techniques throughout the process itself.<sup>423</sup> These practices have both a reactive element in the initial steps taken for immediate safety and lengthier processes which recognise one-off restorative meetings as insufficient to tackle long-term processes of abuse.<sup>424</sup> In this regard, RJM has capacity to be both problem and solutions-based.<sup>425</sup>

The traditional focus on symbolic reparation is misplaced and ‘reintegration’ of the perpetrator does not require that victims forgive nor reconcile but does not foreclose the possibility.<sup>426</sup> What it necessitates is enabling perpetrators to understand responsibility for their conduct and its position within surrounding hierarchies.<sup>427</sup> RJM can recognise how oppressive systems in both victims’ and perpetrators’ lives relate to, but do not excuse, the abuse. Initiatives centred around empowerment provide victims time and space to define their history, views, and problems, whilst raising their own consciousness of gender and cultural issues.<sup>428</sup> Whilst RJM offers victims the chance to make clear the effects of abuse, perpetrators may offer insight into their reasoning.<sup>429</sup> There is desirability in RJM’s capacity ‘to respond more fully to the offender, their history and their context, including the possibility that they too have been victims of crime, of marginalisation and other ills’.<sup>430</sup> For FM, this includes perpetrators’ cultural, religious, and gendered histories, and recognition of their own continual marginalisation within their families and communities.<sup>431</sup> Acknowledging the likelihood that perpetrators – particularly mothers and other female relatives – have too been subject to similar subordination, marital pressures, abuse, and potentially FM itself provides a crucial starting point for seeking to eliminate such practices.

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<sup>421</sup> Coker (2002), 145; Stubbs (2010), 986; D. Coker (1999), *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, *UCLA Law Review* 47(1) 1-112, 14.

<sup>422</sup> Behrens (2005), 230; Liebmann (2007), 285.

<sup>423</sup> Nielsen (2014), 240; Vidal (2017); Coker (1999), 14.

<sup>424</sup> Nielsen (2014), 241; Vidal (2017); Morris & Gelsthorpe (2004), 417. Behrens advocates for a series of conferences monitoring progress over time – Behrens (2005), 227.

<sup>425</sup> Common depictions tend to focus on the latter – see discussion at (1.2).

<sup>426</sup> Coker (2002), 148; Nielsen (2014), 240.

<sup>427</sup> See various international programs in M. Kim, ‘Alternative Interventions to Intimate Violence’ in Ptacek (2009), 213-214; Nielsen (2014), 239; Coker (2002), 145.

<sup>428</sup> Nielsen (2014), 242-243.

<sup>429</sup> Morris (2002), 608.

<sup>430</sup> Stubbs (2010), 974.

<sup>431</sup> Aplin (2017), 1-4; Mirza (2017), 397-400; Chantler & McCarry (2020), 95-97.

Gendered perceptions of appropriate conduct may find support in abusers' wider culture and micro-cultures.<sup>432</sup> Addressing various interacting origins of behaviour compels a multi-dimensional response not viable in either incident-based theorisations of RJM or traditional legal punitivism.<sup>433</sup> Anti-subordination processes 'aspire to meet the transformative goals of redefining gender expectations and norms and building more just communities to support these changes'.<sup>434</sup> Reliance is placed not on existing community norms but on building communities that support autonomy within, as an alternative to separation-focused interventions.<sup>435</sup> Therapeutic techniques engender self-reflection, linking abusers' decisions and their impact to their own experiences of subordination whilst maintaining their conduct is inexcusable.<sup>436</sup> The benefits of repudiation and declaration of responsibility inherent to formal adjudication are maintained whilst scope is offered to address the structural inequalities that frame abusive conduct.<sup>437</sup> Perpetrators are encouraged to redefine perceptions of egalitarianism and subordination through various lenses of social, racial, class, gender, and economic injustice, holding them accountable in ways not realisable through mere punishment.<sup>438</sup> These processes incorporate strong emphases on corrective justice articulated more easily through 'treatment' rather than law, although they remain justice-making processes.<sup>439</sup>

In this respect, the psychology of RJM for family abuse may be more pronounced than in general restorative theory.<sup>440</sup> Women's RJ advocates build on Braithwaite's theory of reintegrative shaming – founded on strengthening the moral bond between offender and the community when denouncing criminal conduct – as a means of aiding the rebalance of power in DA cases.<sup>441</sup> This relies on condemning behaviour in the presence of offenders' 'community of care', composed of close family and friends, as the principal method for evoking remorse and change.<sup>442</sup> Such reliance on family and friendship is already contested in the context of intimate partner abuse, nonetheless futile in the FM context where the family *is* the source of abuse and extended family a probable unit of collusion and

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<sup>432</sup> Pearce & Gill (2012), 538; Chantler & McCarry (2020), 95-97; Mirza (2017), 398-400.

<sup>433</sup> Coker (2002), 142; Shariff (2012), 550; Phillips & Dustin (2009), 545.

<sup>434</sup> Coker (2002), 145; Kim (2009), 214.

<sup>435</sup> Coker (2002), 143, 148; Vidal (2019); Nielsen (2014), 240-241.

<sup>436</sup> Coker (2002), 145-146; Nielsen (2019), 241; Vidal (2017).

<sup>437</sup> Coker (2002), 148.

<sup>438</sup> Coker cites examples of programmes in which traditional stories '[enlisting] the language of cultural and political sovereignty' are used to conceptualise gender identity in egalitarian formulations – (2002), 146.

<sup>439</sup> *Ibid.*, 147; Nielsen (2014), 235.

<sup>440</sup> It might also posit a role for family psychologists, therapists, or sponsors within the RJ process and wider team of professionals – Coker (2002), 146; Islam et al. (2018), 291.

<sup>441</sup> Braithwaite (1989), 55; Morris & Gelsthorpe (2004), 417; Behrens (2005), 227.

<sup>442</sup> *Ibid.*

concealment.<sup>443</sup> A victim's close connections may be unwilling to denounce the abuse and powerless to speak out against other family and community members (including in-laws).<sup>444</sup> The 'supportive chorus for the victim's voice'<sup>445</sup> might be built around a more active facilitatory role and inclusion of other support persons such as social workers or third sector representatives with whom the victim has pre-established relationships.<sup>446</sup>

Less conventional approaches re-evaluate perspectives of shaming, acknowledging that neither reintegrative shaming nor the disintegrative shaming (stigmatisation) of traditional legal routes are necessarily pertinent. In Denmark, the negotiation process is founded on principles of mutuality and respect, feeding into wider opinions on how perpetrators of crime are viewed.<sup>447</sup> CCTM operates under the assumption that perpetrators' perspectives are vital and should be empowered prior to any negotiations focused on the victim's desires. Some empathy is required for opening dialogue with families, to be kept in a delicate balance with acting for the victim.<sup>448</sup> Elements of process can be incorporated to show dignity, creating an environment in which families wish to collaborate.<sup>449</sup> Families are thereafter 'guided, coached, and encouraged' to create new models of care, replacing inappropriate parenting tools with more sustainable means.<sup>450</sup> Therapeutic techniques are built in to assess cross-generational parenting styles and instil more progressive approaches.<sup>451</sup> Similar to anti-subordination processes, respect is afforded to the contexts in which abuse takes place – perpetrators are neither inherently bad nor 'criminal' but behaving in poor ways which might ultimately be performed out of love within their specific contexts.<sup>452</sup> The goal is to harbour partnership and conclude on mutually agreed terms, working with people rather than against them as the most realistic way of achieving self-reflection and effecting change.<sup>453</sup> Notions of emotional shaming are replaced with emotional growth within a process of anti-subordination *through* mutuality and respect.

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<sup>443</sup> Coker (2002), 139-140. See Islam et al.'s rejection of reintegrative shaming in Islamic contexts – (2018), 287-288. See discussion at (4.1).

<sup>444</sup> Goel (2005), 650-651; Chantler & McCarry (2020), 95-97; Mirza (2017), 398-400.

<sup>445</sup> Goel (2005), 651.

<sup>446</sup> Behrens (2005), 232.

<sup>447</sup> Vidal (2019); Nielsen (2014), 241; Danna & Cavenaghi (2011), 56.

<sup>448</sup> Danna & Cavenaghi (2011), 56.

<sup>449</sup> E.g., initial meetings organised by LOKK for purposes of creating a friendly atmosphere and inviting families to explain their feelings – Ibid., 52.

<sup>450</sup> TF website, 'Family work'.

<sup>451</sup> TF website; Vidal (2019).

<sup>452</sup> Vidal (2019).

<sup>453</sup> Vidal (2017); Grillo (2015), 257.

This softer approach is not universally accepted, many taking issue with the prospects of affording perpetrators some form of victim status.<sup>454</sup> The portrayal of wrongdoing as ‘conflicts’, suggestive of an equal contest between victims and perpetrators, detracts from universal denunciation of abuse.<sup>455</sup> The under-theorising of harm as a ‘eruption that follows conflict’ rather than a prolonged and recurrent process of controlling behaviour is a significant theoretical weakness of RJM and risks disempowerment, revictimization, and minimisation.<sup>456</sup> Those in favour of restorative approaches emphasise the treatment of family abuse cases through a strictly justice framework rather than dispute resolution, the latter obscuring the struggle for control and gendered systems which create the context of the supposed ‘conflict’.<sup>457</sup>

Marital processes, and young minorities’ attempts to navigate and influence, may position FM more so within a ‘conflict’-based idea than standard depictions of abusive behaviour.<sup>458</sup> The negotiations taking place under the push for marital consensus allows FM cases to be more easily conceived within a dispute resolution framework (more common to civil law diversion) than other forms of family abuse.<sup>459</sup> Just as FM transcends criminal and civil law boundaries, its incorporation within their respective diversionary processes denotes a balance to be struck between their normative aims – direct accountability for harm caused by one to another (RJ) and the overcoming of differences between two equal sides of a private dispute (ADR).<sup>460</sup> The empowerment ‘which comes from the acknowledgement by both the system and the perpetrator that wrongs have been done’<sup>461</sup> (via anti-subordination) can coincide with respect for the ‘distribution of power and familial and community involvement in contemporary marriage decisions’<sup>462</sup> (via mutuality and respect). Respectful treatment does not equate to condonation of abuse but involves taking a firm stand against it.<sup>463</sup> The principal point of departure from traditional mediation should be that problems faced by the victim take precedence over those of the perpetrator.<sup>464</sup> Whilst families should be provided space to redefine their own behaviour, and although there might be differing

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<sup>454</sup> Stubbs (2010), 974; Behrens (2005), 222, 225.

<sup>455</sup> *Ibid.* See discussion at (4.3).

<sup>456</sup> Coker (2002), 141; Stubbs (2010), 979.

<sup>457</sup> Behrens (2005), 215, 222-225; Coker (2002), 141.

<sup>458</sup> Nielsen (2014), 234. See discussion at (5.3). See also: Muslim conflict resolution styles which focus on marriage and abuse as private matters – Islam et al. (2018), 281; and emphasis on family privacy in collectivist societies – Haj-Yahia & Sadan (2008), 10.

<sup>459</sup> Shariff (2012), 561.

<sup>460</sup> See discussion at (1.4).

<sup>461</sup> Behrens (2005), 225.

<sup>462</sup> Shariff (2012), 562.

<sup>463</sup> Behrens (2012), 228; Coker (2002), 146.

<sup>464</sup> Nielsen (2014), 240.

views on ‘what happened’, professionals should remain firm that oppressive practices are non-negotiable.<sup>465</sup> The language often rejected by women’s advocates does not equate with a disregard for victims’ human rights. Terms such as compromise and dialogue, by definition, are not one-side and where, for instance, an individual wishes to remain unmarried or marry in their own time, or requests later parental involvement, families would be expected to relinquish authority.<sup>466</sup> What is being negotiated, therefore, is not the abuse but the outcome of the case. Those sought are not apology nor forgiveness<sup>467</sup> (although neither are necessarily precluded) but anti-subordination through mutual understanding and prolonged safety.

## 5.6 – Instilling Safety

The consensus amongst those advocating a restorative approach to FM is that processes are not appropriate for all cases.<sup>468</sup> Of those currently offering services in Scotland, providers stress unwillingness to employ these methods in high-risk cases absent some certainty that risk is manageable.<sup>469</sup> How such risk is to be discerned and managed remains unanswered. The concept of screening-out is discussed at length within RJ discourse, many suggesting a need to ‘weed-out’ unsuitable cases.<sup>470</sup> The criteria by which to do so has been queried.<sup>471</sup> Appropriateness may lie not with the position of power nor the offending behaviour but the victim’s ability to escape the relationship or fundamentally alter it – factors impossible to assess beforehand.<sup>472</sup> Our ability to predict violence is questionable.<sup>473</sup> For FM, the clearest indicator is previous conduct, either directly of the perpetrator or within the extended family or community.<sup>474</sup> Nielsen suggests even the most serious of cases can be transformed through negotiations but where violence exhibits a particularly gross quality, permanent flight should be discussed with the victim.<sup>475</sup> Initial screening-out is limited to cases where communication is impossible by means of mental disorder, alcohol or substance abuse.<sup>476</sup>

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<sup>465</sup> Ibid., 241; Danna & Cavenaghi (2011), 55.

<sup>466</sup> CCTM refuses to compromise on victim’s desires – Ibid.

<sup>467</sup> The success of RJ should not be judged against subjective standards of potentially forged remorse – Coker (2002), 148; Stubbs (2007), 175-178.

<sup>468</sup> Askola (2018), 1000; Vidal (2017); Nielsen (2014), 234; Danna & Cavenaghi (2011), 48, 55.

<sup>469</sup> Chantler et al. (2017), 26.

<sup>470</sup> Stubbs (2007), 172; Ptacek (2010), 284; Liebmann (2007), 293; L. Presser & C.T. Lowenkamp (1999), *Restorative Justice and Offender Screening*, *Journal of Criminal Justice* 27(4) 333-343.

<sup>471</sup> Presser & Lowenkamp (1999), 335; Stubbs (2010), 984-985.

<sup>472</sup> Stubbs (2010), 984-985.

<sup>473</sup> Stubbs (2007), 172; McFarlane (2012), 46.

<sup>474</sup> As relied on in *CoEC v S*, [7].

<sup>475</sup> Danna & Cavenaghi (2011), 51.

<sup>476</sup> Ibid., 48.

Whilst much can be gleaned from existing, observable risk factors, little is said of cases where violence has never transpired but the risk nonetheless persists.

The novelty of CCTM's staged model is that screening is considered a through-process, emphasising risk assessment at every opportunity.<sup>477</sup> Each stage, designed specifically to counter FM nuances, involves continuous safety planning, evaluating whether dialogue will be effective before proceeding to the next step.<sup>478</sup> The process begins with an in-depth, psycho-social assessment of the victim's situation and mindset.<sup>479</sup> Professionals are tasked with extracting the information needed to address all case-specific safety concerns, not simply those raised by the victim; serious health problems such as PTSD or 'other psychiatric/somatic complications' which have a bearing on the conflict may not have been self-recognised.<sup>480</sup> Safety is not solely a matter of protection from abuse but from the victim's own personal trauma and health concerns. Where the situation is considered particularly volatile, the interview timeframe is reduced.<sup>481</sup> This dialogue may result in screening by reference to the victim's conduct rather than the family's; Nielsen emphasises rejection of cases where victims are prepared to compromise their own human rights, citing a case she refused where the victim insisted on marrying a violent partner.<sup>482</sup>

For cases considered suitable, a professional team is deployed in accordance with a set plan, devised and executed across multiple sectors.<sup>483</sup> This typically commences with extrication of the victim to a safe place whilst the process is ongoing, avoiding immediate backlash once the family are aware of outside disclosure.<sup>484</sup> No direct contact with the family is attempted as the dialogue phase unfolds, negotiations conducted by facilitators, ensuring potentially negative consequences of face-to-face mediation are avoided.<sup>485</sup> The aim is an agreement to refrain from the disputed conduct, stipulated in a safety contract signed by all parties.<sup>486</sup> A decision as to reconciliation is determined on the outcome of negotiations, attempted only upon the victim's wishes and existence of a written agreement.<sup>487</sup> The ideological aim is not

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<sup>477</sup> Vidal (2017); Nielsen (2014), 240.

<sup>478</sup> Ibid.

<sup>479</sup> Vidal (2019); Nielsen (2014), 241.

<sup>480</sup> Nielsen (2014), 240-241.

<sup>481</sup> Ibid., 242.

<sup>482</sup> It is presumed Nielsen refers to rights less open to interpretation, e.g., right to life and prohibition from torture, reflected in CCTM's wider intolerance to violence – Nielsen (2014), 240; Danna & Cavenaghi (2011), 55.

<sup>483</sup> Nielsen (2014), 240-241; Danna & Cavenaghi (2011), 51; Vidal (2017).

<sup>484</sup> Danna & Cavenaghi (2011), 51, 54; S.Gov (2014b), 134.

<sup>485</sup> Vidal (2019); Nielsen (2014), 241-242.

<sup>486</sup> Nielsen (2014), 241.

<sup>487</sup> Vidal (2019).



restoration of the family unit but safety, whilst acknowledging the inherent value of reconciliation for individual wellbeing.<sup>488</sup>

The risk is that the framework may provide a level of protection not extended to the family context once the victim has returned.<sup>489</sup> Promises made may be disregarded or may have been inauthentic or strategic from the outset.<sup>490</sup> The Danish approach anticipates extensive and ongoing monitoring to ensure conditions are upheld, identifying difficulties the family face in doing so and addressing warning signs as soon as they present.<sup>491</sup> The safety contract itself contains guidance for follow-up processes such as the frequency of progress check-ins and ways in which victims might seek to contact support when needed.<sup>492</sup> Victims are provided with a trusted contact person, although monitoring is discharged across social services, the police, and other sectors.<sup>493</sup> Professionals should ‘evaluate the whole process of multi-organisational efforts’, adjusting solutions by reference to evolving circumstances.<sup>494</sup> This may involve temporary re-extrication of the victim, the reinstatement of dialogue, or forfeiture of the process in favour of conventional legal proceedings or support for permanent separation.<sup>495</sup> For an overarching structure of this framework see Diagram 1.

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<sup>488</sup> Danna & Cavenaghi (2011), 59.

<sup>489</sup> *Ibid.*, 57; Bano (2011), 194.

<sup>490</sup> Askola (2018), 1000; Stubbs (2010), 982; Stubbs (2007), 177.

<sup>491</sup> Vidal (2019); Vidal (2017).

<sup>492</sup> Danna & Cavenaghi (2011), 51. Morris & Gelsthopre suggest contact plans, personal alarms, and future extrication agreements – (2000), 416.

<sup>493</sup> TF website, ‘Mentor and Contact Person for the Families’; Danna & Cavenaghi (2011), 48; Vidal (2019).

<sup>494</sup> Nielsen (2014), 240.

<sup>495</sup> Vidal (2019).

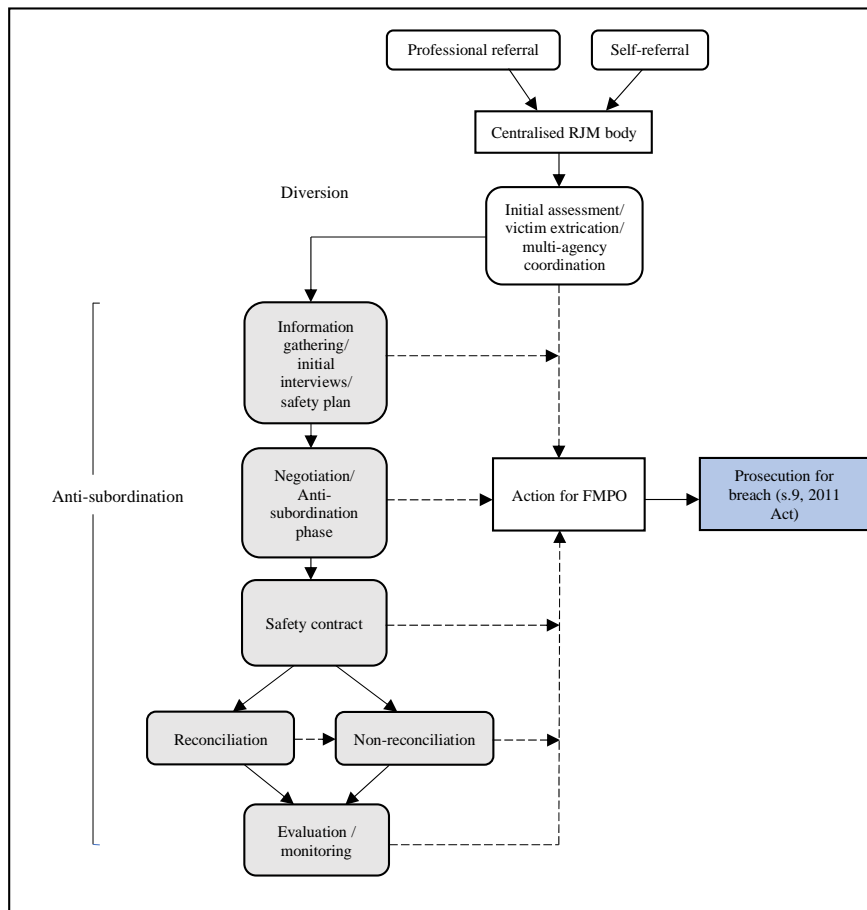


Diagram 1.

In contrasting this model with literature emphasising the family’s role as a source of ongoing monitoring,<sup>496</sup> the need for a more rigorous professional response to FM is even more overt. Whilst Danish authorities are braced to follow a stringent, protective regime, this commitment does not extend to a British context where follow-up processes are rare.<sup>497</sup> To position this against the inadequacy of Scotland’s existing professional response encourages re-evaluation. This is offered throughout the final chapter of this thesis, accounting for the specifics of FM – necessary for the possibilities presented by this penultimate chapter to be realised.

<sup>496</sup> Morris & Gelsthorpe (2000), 420; Behrens (2005), 227.

<sup>497</sup> Danna & Cavenaghi (2011), 58. HOFCE (2012), *Report on the Implementation of the Multi-Agency Statutory Guidance for Dealing with Forced Marriage (2008)*, (Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/136371/Guidance\\_for\\_dealing\\_with\\_forced\\_marriage\\_A4\\_v1.6\\_WEB.PDF](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136371/Guidance_for_dealing_with_forced_marriage_A4_v1.6_WEB.PDF)), 24-25. See onus on victim to re-report/incite prosecution following breach of FMPO – Chantler et al. (2017), 41. Cf. operations of ME victims’ organisations – Saheliya (2012), 11-12.

## CHAPTER SIX

### A RE-IMAGINED PROFESSIONAL RESPONSE

A nationally adopted RJM framework offers potential to instil a fresh-start professionalism for tackling FM, addressing the particularities of the problem itself and the fundamental misapprehensions and structural concerns currently failing intervention. This final chapter offers suggestions for re-structuring existing operations, reframing the approach to cultural sensitivity and engagement with minority households through RJM. Discussion concludes with consideration of how a values conception of RJM might allow its relationship with FM cases to be developed within the existing court system, diverging from the emphasis on diversion outlined at the outset of this thesis. The aim is to demonstrate the prospect of constructing stronger relationships between professionals, the structures they operate under, and those they seek to assist.

#### 6.1 – Cross-Cultural Communication

For any worthwhile dialogic process, communication between professionals and minority participants should be more heavily centred upon understanding cultural identity than current FM initiatives.<sup>498</sup> Cultural diversity throughout the discourse is subsumed within an ‘us’ versus ‘them’ dichotomy, fuelling the phenomenon of race anxiety and resulting in inaccurate and harmful depictions of FM as attributable to a single group – typically South Asians of Islamic faith.<sup>499</sup> This survives despite growing data depicting varied geographical and religious boundaries,<sup>500</sup> and secures the portrayal of certain cultures as ‘pernicious and inherently uncivilised’.<sup>501</sup>

To downplay the impact of cultural influence would be disingenuous, further distancing survivors from support. Minority communities are rarely recognised as heterogenous but are influenced by an extensive list of characteristics and ‘matrix’ of overlapping subcultures

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<sup>498</sup> Shah-Kazemi (2000), 305.

<sup>499</sup> Gill & Brah (2014), 74-75; Chantler et al. (2022), 834; Sabbe et al. (2014), 182-183; Enright (2009), 337.

<sup>500</sup> Chantler et al. (2017), 20. See overview of data within white European, Christian, Jewish, Chinese, Hispanic, American Indian, and Mormon communities in M.M. Leonard (2020), Not ‘them’, ‘us’: The necessity of recognising ‘harmful traditional practices’ in all communities, *HARM Network* (UCL), (Available at:

[https://www5.uclan.ac.uk/sites/ImageBank/Marketing\\_Image\\_Library/Mariel\\_McKone\\_Leonard\\_Nazir\\_Afzal\\_Essay\\_Competition\\_2020.pdf](https://www5.uclan.ac.uk/sites/ImageBank/Marketing_Image_Library/Mariel_McKone_Leonard_Nazir_Afzal_Essay_Competition_2020.pdf)).

<sup>501</sup> Gill & Brah (2014), 75; Sabbe et al. (2014), 182-183.

which have a bearing on marriage individually and simultaneously.<sup>502</sup> The perpetration of FM cannot be presumed as homogenous across cultural divides nor that a particular response is suitable across all cases.<sup>503</sup> The interaction and collision between modernity and tradition follow distinct patterns across minority communities, resulting in a ‘patchwork of disagreements and conflicts’ between sexes and generations.<sup>504</sup> The Scottish Government’s limited emphasis on diversity within RJ policy, and commitment to ‘[RJ] for all’, presumes a unified society for which one-size should fit all.<sup>505</sup> Similarly, civil mediation is often considered ‘a rational and linear decision-making process’, inadequately accounting for cultural influences.<sup>506</sup> Negotiations should be assessed within the normative framework of participants’ cultural demographics.<sup>507</sup>

A re-interpretation posits ‘differences’ as vehicles through which to disarm FM, acknowledging for example that religious schooling has significant bearing on marital conflicts.<sup>508</sup> Previous attempts at striking a balance are discernible in Scottish policy documents emphasising condemnation across religions,<sup>509</sup> co-existing with public statements from community leaders, in the interest of influencing decision-making within discrete communities.<sup>510</sup> RJM facilitators should be aware of the cultural expectations of the family, developed or influenced within traditional surroundings, but also the potential to utilise these conditions to benefit negotiations.<sup>511</sup> One respondent to the 2017 study discusses how constructing dialogue through participants’ religion points to greater success, where compelling families to question their actions under their own beliefs may allow them to better understand their children’s stance on marriage.<sup>512</sup> This ability to highlight and

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<sup>502</sup> This includes nationality, race, religion, gender, age, sexuality, ability/disability, community, class, lineage, education, country of origin or residence, assimilation, and employment – Gill & Brah (2014), 74; A. Barsky et al. (1996), Cultural Competence in Family Mediation, *Mediation Quarterly* 13(3) 167-178, 169.

<sup>503</sup> Gill & Brah (2014), 73.

<sup>504</sup> Nielsen (2014), 239.

<sup>505</sup> S.Gov (2019a); S.Gov (2019b).

<sup>506</sup> Albrecht (2010), 18.

<sup>507</sup> Shah-Kazemi (2000), 311; Gavrielides (2014), 222; J. Barkai (2008), What’s a Cross-Cultural Mediator to Do? A Low-Context Solution for a High-Context Problem, *Cardozo Journal of Conflict Resolution* 10 43-89, 45-46; L. Charkoudian & E.K. Wayne (2010), Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants’ Perception of Mediation, *Conflict Resolution Quarterly* 28(1) 23-52, 30.

<sup>508</sup> Shariff (2012), 560; Saheliya (2012), 24.

<sup>509</sup> S.Gov (2014b), 33; S.Gov (2008), 2. See also discussion of the Qur’an – Islam et al. (2018), 280.

<sup>510</sup> Scottish Government (2015), *Imams against forced marriage statement*, (Available at: <https://www.gov.scot/publications/imams-against-forced-marriage-statement-2015/>); Muslim Council of Scotland (2010), *Written Submission to SPEOC* (Available at: <https://archive.parliament.scot/s3/committees/equal/inquiries/documents/FM9MuslimCouncilofScotland.pdf>) ; Scottish Council of Jewish Communities (2010), *Written Submission to SPEOC*, (Available at: <https://archive.parliament.scot/s3/committees/equal/inquiries/documents/FM1SCoJeCFMBill.pdf>).

<sup>511</sup> Barsky et al. (1996), 174; Shariff (2012), 560.

<sup>512</sup> The instance referred to saw evidence of what constitutes a valid Islamic marriage deployed to relay the victim’s feelings to her family – Chantler et al. (2017), 26.

negotiate with misunderstood norms rests upon extensive knowledge and a willingness to embrace the cultural affiliations of those seeking assistance.<sup>513</sup>

Overcoming Scotland's narrow approach to culture means tackling the biases that currently discriminate and limit intervention. In strengthening existing initiatives, Chantler et al. require enhanced professional understanding of 'what causes and constitutes [FM] and what aspects of its presentations might be occluded in service contact through social processes such as normalisation or fear of stigmatisation'.<sup>514</sup> Such knowledge predicates a grasp of wider interactions between gender, culture, and structure within minority families.<sup>515</sup> Distinct from Chantler et al.'s 'sound understanding' as centred on drawing a clear distinction with AM,<sup>516</sup> RJM offers scope to influence the grey areas between the strict existence or absence of consent. This requires acceptance of the negotiation process as impossible to situate within a 'cultural or normative vacuum'<sup>517</sup> and goes beyond sensitising practitioners to a process conceptualisation of FM and potential overlap with AM.

Cultural contexts require appreciation of their impact on the parenting decisions that continue to generate significant numbers of cases.<sup>518</sup> As Shah-Kazemi notes, 'disputants' view of the world, their cultural identities, and their universe of meaning invariably and indelibly shapes the dispute management process'.<sup>519</sup> This points to knowledge of discrete cultural facets in individual cases and how these influence conflict and communication styles, and participants' perceived legitimacy of resolution styles.<sup>520</sup> Facilitators require capacity to relate to participants on a particularly elevated level, to gain an understanding of the disputants' own views and reasoning and identify opportunities to influence change. Beyond the basic communication skills necessary for successful facilitation,<sup>521</sup> sensitivity towards varying values of communication promotes a fluid response to cultural differences, necessary for accurate interpretation.<sup>522</sup>

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<sup>513</sup> Vidal (2017); Nielsen (2014), 236-238; L.N. Mahan & J.M. Mahuna (2017), Bridging the Divide: Cross-Cultural Mediation, *International Research & Review* 7(1) 11-22, 15.

<sup>514</sup> Chantler et al. (2021), 842-843.

<sup>515</sup> *Ibid.*, 843.

<sup>516</sup> *Ibid.*

<sup>517</sup> Shah-Kazemi (2000), 303.

<sup>518</sup> Chantler & McCarry (2020), 95-97; Mirza (2017), 402-403.

<sup>519</sup> Shah-Kazemi (2000), 303.

<sup>520</sup> *Ibid.*, 307; Barkai (2008), 44; Mahan & Mahuna (2017), 11-13. See discussion of Relationships Scotland's African Hairdressers Listening Project which offered bespoke training on culture, communication styles, and gender roles for African hairdressers to support clients facing family problems – Cubitt (2019), 330.

<sup>521</sup> S.Gov (2017), 13; Barsky et al. (1996), 170.

<sup>522</sup> Gavrielides (2014), 240. See distinctions between low- and high-context communication styles in Barkai (2008), 56-57; Mahan & Mahuna (2017), 12-13, 15. For more objective issues related to language barriers see Albrecht (2010), 9-10.

Reliance on extensive dialogue, bringing issues into the open and dealing with them head on, is complicated by rules of communication within the high-context subculture of the family.<sup>523</sup> Marital negotiations ‘assume particular complexity as the dynamics of both gender and identity-defining normative ethics shape the setting in which the negotiations take place’.<sup>524</sup>

For many cultures, open conflict between older and younger relatives – often the essence of FM cases – is disapproved of, with individuals avoiding outward or public displays of emotion.<sup>525</sup> Individualism is more easily equated with Western communicators, influenced by gender-specific roles attributed within the family.<sup>526</sup> The meaning and importance of the family unit may blur parties’ perceptions of their situations and their capacity to speak for themselves and can directly impact the range of options either side might consider.<sup>527</sup> The victim’s sexuality, for example, has been suggested as a point of conflict around which there may be limited space for negotiation.<sup>528</sup> Facilitators as outsiders should be aware of the context within which information lies, and the risks of failing to understand key issues simply because they are inexplicit.<sup>529</sup> The difficulty lies in accurately assessing conflict levels and aiding parties to explore their roles and conduct without imposing facilitators’ own values.<sup>530</sup> There is potential for minority parents to feel deep embarrassment in failing to live up to cultural ideals, including failure to maintain gender and community norms, or of their child to obey or marry within an adequate time frame.<sup>531</sup> As a result, the particular style adopted or questions posed may be open to contempt, disregard, or cause undue upset.<sup>532</sup>

Practice should first aim to capture a holistic picture of the family and the ‘characteristics and decision-making systems which in turn influence their understanding of the conditions and rules of conduct’.<sup>533</sup> Dialogue should be approached from a position of understanding rather than judgement, avoiding condemnation of cultural values; beliefs as to good or bad parenting, for example, should be set aside.<sup>534</sup> Equally, so-called traditional values are not

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<sup>523</sup> Barksy et al. (1996), 172-175; Goel (2015); Barkai (2008), 57.

<sup>524</sup> Shah-Kazemi (2000), 304.

<sup>525</sup> Barksy et al. (1996), 175; Goel (2015), 659-660; Shah-Kazemi (2000), 313; Haj-Yahia & Sadan (2008), 5.

<sup>526</sup> Barkai (2008), 57; Goel (2015), 649-653.

<sup>527</sup> Goel (2015), 649-653; Barksy et al. (1996), 171; Collet & Santelli (2011), 251-252.

<sup>528</sup> Shariff (2012), 561.

<sup>529</sup> Barkai (2008), 57; Chantler & McCarry (2020), 94.

<sup>530</sup> Vidal (2019).

<sup>531</sup> Barksy et al. (1996), 171-172; Samad & Eade (2002), 111; Chantler & McCarry (2020), 95-96.

<sup>532</sup> Barksy et al. (1996), 171.

<sup>533</sup> Nielsen (2014), 239.

<sup>534</sup> Vidal (2017); Barksy et al. (1996), 169.

static but remain in constant evolution.<sup>535</sup> Acculturation is commonplace across Scotland's minority communities and seemingly repressive ideals are not inherently pervasive therein.<sup>536</sup> This accords with wider acceptance throughout RJM literature of opportunities for participants to define their own culture, allowing facilitators to understand how participants view themselves, enhance negotiations, and promote the empowerment so often attributed to these processes.<sup>537</sup> Otherwise, broad discussions of cultural predisposition with persons who feel suitably integrated within Scottish civilisation may amount to irrelevance, unease, or positive discrimination.<sup>538</sup>

The desire for cultural self-determination flows from two value premises linked to the importance of professional self-reflection. First, in recognising heterogeneity within cultures as of equal importance to diversity between them, dignity and respect should stem from acceptance of participants as individuals within their respective communities.<sup>539</sup> Second, under the concept of cultural relativism, perceptions of culture are context-bound and no particular belief or attitude should be considered superior.<sup>540</sup> Barkai suggests that humans are programmed to interpret behaviours of those from other cultures as if they belonged to their own and consequently, differences are treated as intentional responses to personal behaviours or existence.<sup>541</sup> The pervasiveness of these value judgements is demonstrable throughout FM responses through race anxiety and the continued reference to individualism over the collectiveness of minority households.<sup>542</sup>

Overcoming these limitations requires acceptance by Scottish professionals that their own (white-centric) values will not always inform successful intervention. Whilst practitioners may verbally affirm these premises, practicality relies on self-awareness and acknowledgement of one's own stereotyping.<sup>543</sup> Cultural sensitivity and tolerance alone are insufficient; professionals should be placed in a position to fully embrace nuances and adapt their practices accordingly.<sup>544</sup> RJM's conversational nature affords professionals with continued opportunity to learn about individuals, their cultures, and backgrounds, and

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<sup>535</sup> Gill & Brah (2014), 76-79, 83.

<sup>536</sup> S. Bonino (2019), A New Muslim Community: Children of Islam and Scotland, *Religions* 10(3) 175-198.

<sup>537</sup> Nielsen (2014), 242. Barsky et al. (1996), 169.

<sup>538</sup> Albrecht (2010), 12.

<sup>539</sup> Barsky et al. (1996), 170.

<sup>540</sup> Ibid.

<sup>541</sup> Barkai (2008), 46.

<sup>542</sup> See discussions at (2.3)/(5.3).

<sup>543</sup> Barsky et al. (1996), 169; Vidal (2019).

<sup>544</sup> Ibid. See lack of cultural nuance in Scotland's existing family mediation services – McFarlane (2012), 34-35. No explicit reference to cultural knowledge is made for family mediator accreditation – LSS website, 'Accredited mediators'.

enhance their professionalism.<sup>545</sup> The subjectivity in allowing professionals and those they are helping to learn from each other promotes stronger connections between all actors of the justice system, alleviating the ‘us-them’ divide in favour of a collectiveness not visible in the rigid application of statutory processes.<sup>546</sup> Whilst the precise model remains under review, ‘the most promising direction may indeed be to focus our energies on crafting a replicable yet adaptive practice modality’.<sup>547</sup> Consequently, ‘the shortcomings of approaches of dos and don’ts for [facilitators] suggest that rigid practice models should be de-emphasised in favour of an integrative focus on assessing what type of approach may be suitable for each particular case’.<sup>548</sup>

## 6.2 – Facilitator Matching

Scotland’s FM professionals suggest their own whiteness and class preclude dialogue with ‘conservative’ minority families.<sup>549</sup> This exemplifies what Barkai terms ‘Popeye’s Problem’: ‘lacking the ability to be what you are not and consequently not being able to relate to people from other cultures as they might prefer to be related’.<sup>550</sup> Receptivity to outsiders, their status, and credibility in resolving disputes varies between ethnic communities and rests upon varying cultural factors.<sup>551</sup> The possibility that ‘majority’ facilitators might impose Western ideologies can be contrasted with minority professionals, better positioned to understand cultural variations.<sup>552</sup> This questions how Scotland’s RJM climate might present opportunities to increase professional diversity, harbouring stronger links with communities through those administering negotiations. Minority professionals within a wider pool of facilitators could enhance expertise throughout the system, allowing majority practitioners to strengthen their command of cultural conditions, particularly should the process involve more than one facilitator of whom only one has cultural knowledge appropriate to the case.<sup>553</sup>

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<sup>545</sup> This would include primary facilitators and other contributors (e.g., social workers, police officers, teachers).

<sup>546</sup> See widened applicability/inclusivity of RJ by virtue of process flexibility – Gavrielides (2014), 240.

<sup>547</sup> M. Davidheiser (2008), Race, Worldviews, and Conflict Mediation: Black and White Styles of Conflict Revisited, *Peace & Change* 33(1) 60-89, 79.

<sup>548</sup> Ibid.

<sup>549</sup> Chantler et al. (2017), 26.

<sup>550</sup> Barkai (2008), 49.

<sup>551</sup> Shah-Kazemi (2000), 307; Haj-Yahia & Sadan (2008), 8-9.

<sup>552</sup> Danna & Cavenaghi (2011), 51; V. Pankaj (2000), *Family Mediation Services for Minority Ethnic Families in Scotland*, Legal Studies Research Findings no.36 (Scottish Executive CRU), (Available at: <https://www.webarchive.org.uk/wayback/archive/3000/https://www.gov.scot/Resource/Doc/158076/0042757.pdf>), 2.

<sup>553</sup> Albrecht (2010), 14.



The practice of selecting professionals to ‘match’ participants’ demographics is contentious, raising practical and ethical questions beyond the scope of this research.<sup>554</sup> This includes the potential undermining of negotiations where families believe that minority professionals have rejected the community’s normative ethics in uniting with the majority or will feed information back to the community.<sup>555</sup> Others surround the dimensions by which to determine ‘difference’, minority access to (legal) education, and the need for enhanced Scottish research on the interplay between FM and variables of masculinity, sexuality, and disability.<sup>556</sup>

Existing Guidance obliges facilitators to appoint ‘co-facilitators’ where cases require specialist knowledge or the empowerment of ‘participants with different backgrounds or personal characteristics’.<sup>557</sup> Countries with established RJ systems incorporate cultural awareness and communication within general facilitator training, typically as brief introductions whilst serious cases usually require advanced qualifications.<sup>558</sup> Situated within Scotland’s prospective model, FM is not the only ‘offence’ requiring precise knowledgebases and ‘no form of training can impart a fully comprehensive understanding of the...whole gamut of situations that may arise’.<sup>559</sup> Nielsen’s focus is on incorporating lived reality; action plans are developed through personal narratives and dialogue aimed at cultural self-determination.<sup>560</sup> Much of TF’s work has centred on advisory courses and qualifications around cross-cultural competence, age and gender hierarchies, and social capital (trust, norms, and networks) within the family.<sup>561</sup> Increased support is integrated through professional mentors, selected by their linguistic and social capacity to put the particular family at ease.<sup>562</sup> More transformative initiatives might encourage victims to take on advisory roles within the system, either in facilitatory roles or as support persons for future victims.<sup>563</sup> On the presumption that a professional body from which unique personal

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<sup>554</sup> Gavrielides (2014), 226-227; Albrecht (2010), 14; Danna & Cavenaghi (2011), 51; Burman (2003), 296.

<sup>555</sup> Shah-Kazemi (2000), 320; Danna & Cavenaghi (2011), 51; Gavrielides (2014), 226. See evidence from Scottish Pakistani communities – Pankaj (2000), 2.

<sup>556</sup> Burman (2003), 296; Shah-Kazemi (2003), 319-320; Chantler et al. (2017), 15-16.

<sup>557</sup> S.Gov (2017), 18-19. See emphasis on crossing age lines in FM conflicts – Danna & Cavenaghi (2011), 51. See also female facilitation to counter power imbalances in Islamic contexts – Islam et al. (2018), 290-291.

<sup>558</sup> Albrecht (2010), 13; Keenan et al. (2016), 103-104; S.Gov (2019b), 11.

<sup>559</sup> Shah-Kazemi (2000), 320.

<sup>560</sup> Nielsen (2014), 242; TF website, ‘Cross-cultural conflict mediation’.

<sup>561</sup> TF website, ‘Advice & Guidance’.

<sup>562</sup> *Ibid.*, ‘Mentor and contact person for the families’.

<sup>563</sup> Pranis (2002), 37. This accords with the full support package under Scotland’s existing RJ framework which includes employability – Maglione et al. (2020), 11.

characteristics can be selected for every case might never exist, emphasis can otherwise be placed on incorporating lived experience.<sup>564</sup>

### 6.3 – Engagement & Participation

The capacity to relate to parties frames their willingness to engage and participate in negotiations. Uncertainty remains as to how cross-cultural dialogue might be initiated to begin with. The sparsity of Scottish RJ has resulted in lack of awareness by prospective participants and primary referrers.<sup>565</sup> Demand for FM cases can only follow a structurally sound model, complete with appropriate safeguards, back-up and follow-up procedures, and a reformed professionalism. Reaching a level of participation to instil change in case numbers should rely on establishing broad referral routes, implemented across various sectors.<sup>566</sup> Awareness-raising in relevant communities might necessitate further outreach programs, revisiting communication with community representatives and generating stronger links to minority victims' organisations, particularly those with existing understandings of negotiation processes.<sup>567</sup>

Principles of transparency and honesty equate to some acceptance of blame by perpetrators prior to RJ proceedings.<sup>568</sup> Honesty is premised on the capacity of those who have harmed to acknowledge the basic facts of the case.<sup>569</sup> Whilst processes are not centred on establishing guilt in the traditional sense of reaching a verdict, some admission of guilt is an apparent pre-condition to participation. The Scottish policy context suggests that where one party disagrees as to the nature of the harm, the case will automatically be excluded.<sup>570</sup> This appears to contradict the Government's commitment to 'RJ for all', ostracising cases where the nature of the wrongdoing is the issue in dispute, perhaps premised on overemphasis of the therapeutic value in dealing with crimes already concluded (namely incident-based wrongs wherein immorality is easily identifiable).<sup>571</sup> In a system that has long excluded more process-oriented wrongdoing, this is expected. This inadequate account for gendered wrongs overlooks intimate relationships wherein the meaning of any given conflict is contextually

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<sup>564</sup> Nielsen discusses how her own lived experience displaces presumptions that women breaching honour codes are inevitably killed – Nielsen (2014), 237.

<sup>565</sup> See (3.2). See time accounted for overcoming existing obstacles before demand is generated, circumventing reduced credibility – Maglione et al. (2020), 19.

<sup>566</sup> See discussion of referral routes at (3.2).

<sup>567</sup> Grillo (2015), 254; S.Gov (2014b), 9; Shariff (2012), 550; Chantler et al. (2017), 26.

<sup>568</sup> Morris & Gelsthorpe (2000), 417; Stubbs (2007), 173.

<sup>569</sup> S.Gov (2017), 9.

<sup>570</sup> Maglione (2021), 756.

<sup>571</sup> See (1.2)-(1.3).

and historically bound by that relationship.<sup>572</sup> In high-context cases of FM, wherein families are subordinate to the preservation of cultural values, it cannot be assumed that perpetrators identify their behaviours as wrongful.<sup>573</sup> If RJM's primary purpose in these cases is to morph perspectives of norms and wrongdoing, exclusion of those who do not fully understand their actions is unjustified. Respect should include that for disparity in notions of right and wrong across cultural divides. The Danish approach appears to reflect this, the only pre-requisite being acceptance of an invitation to the process.<sup>574</sup>

Any respectable response to the question of engagement should start from an assumed benefit for both sides when contrasted with the conventional legal system. Cultural variants give rise to wide-ranging perceptions on how 'justice' should be approached.<sup>575</sup> Minority individuals without knowledge of Western structures encounter more acute difficulty in relating to the legal system.<sup>576</sup> From a structural perspective, RJM promotes accessibility as a less convoluted system of conflict resolution offering more flexible integration of cultural considerations.<sup>577</sup> Reconstructing the professional response towards constructive rather than penal solutions encourages increased disclosure where victims know that cases could be dealt with restoratively.<sup>578</sup> Those already inclined to come forward may opt to do so at earlier stages of their experiences.<sup>579</sup> Fears of penalising, abandoning, or ostracising, and related distresses, may be alleviated.<sup>580</sup> RJM offers the requisite privacy for both victims and perpetrators navigating internal family conflicts, providing reassurance that they do not have to share their suffering nor behaviour with the majority population.<sup>581</sup> Engaging with RJM allows perpetrators to avoid prospective civil or criminal liability. Less cynically, perpetrators can continue, strengthen, or re-establish relationships with their children whilst avoiding public condemnation and repercussions of community backlash. As with existing legal routes, a decision would have to be taken as to those encompassed within any process.<sup>582</sup> This circle should be wide enough to include those with direct influence on the case but narrow enough to avoid shaming within the extended family or community. In *AB*, had referral been made to RJM the legal response could have adopted a wider encirclement

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<sup>572</sup> Stubbs (2010), 981.

<sup>573</sup> Pearce & Gill (2012), 538; Vidal (2017).

<sup>574</sup> Danna & Cavenaghi (2011), 51.

<sup>575</sup> Charkoudian & Wayne (2010), 30; Mahan & Mahuna (2017), 11. See rejection of retributive strategies by Muslim religious and cultural beliefs – Islam et al. (2018), 292.

<sup>576</sup> Albrecht (2010), 15; Gavrielides (2014), 227-229.

<sup>577</sup> Ibid.

<sup>578</sup> Behrens (2005), 231.

<sup>579</sup> Morris & Gelsthorpe (2000), 422.

<sup>580</sup> Vidal (2019); Vidal (2017).

<sup>581</sup> Gavrielides (2014), 229.

<sup>582</sup> See discussion at (2.2).

of perpetrators to prompt wider change. The two extended relatives, who had partaken in the FM process but were dropped from the action for lack of a clear connection, could less controversially be drawn into a RJM process.<sup>583</sup> Questions of blameworthiness would be less sensitive, resting on a presumption that these family members could benefit from aspects of the process itself or offer emotional support to principal perpetrators. Regardless of how wide the ring is drawn, those falling within it would not face immediate legal action and consequently initial decisions as to who should fall within the justice system would be less strenuous.

More traditional family models provide a structure of protection that might tolerate certain forms of abuse therein.<sup>584</sup> Collectivism subordinates self-preservation to ideals of self-sacrifice, exerting immense pressure on individuals to accept ‘less-than-ideal solutions’.<sup>585</sup> Backed by extended relatives, families might take their chances under existing legal measures in the belief that culture comes first. Inherent to RJM theory, the principle of voluntariness allows either side to void proceedings at any point and seems set to survive in its rigidity across Scotland’s legal landscape.<sup>586</sup> The alternative, a form of compulsory RJM, is seen to dismantle the fundamental origins and philosophies that underpin diversionary procedures.<sup>587</sup> A more widely accepted proposition sees the coercive back-up of conventional justice mechanisms (particularly criminal law) as a means of ‘encouraging’ participation.<sup>588</sup> This doubts whether participation can truly be voluntary against the threat of legal procedures incited for failure to agree and risks unfavourable outcomes accepted to avoid formal action.<sup>589</sup> Where voluntariness is void by reason that one option is overtly favourable, the terminology of ‘informed consent’ might be more appropriate, effected through outlining the benefits of RJM and sufficient legal advice.<sup>590</sup>

The uncertainty is whether the law’s coerciveness is enough to motivate otherwise avoidant participation.<sup>591</sup> The threat may hinder communication where perpetrators are reluctant to

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<sup>583</sup> *AB*, 354-356.

<sup>584</sup> Chantler et al. (2020), 9-12; Mirza (2017), 398; Islam et al. (2018), 287; Haj-Yahia & Sadan (2008), 5.

<sup>585</sup> Goel (2005), 640; Haj-Yahia & Sadan (2008), 3-4.

<sup>586</sup> S.Gov (2019a), 5; SPJC (2018), 15-16. See rejection of voluntarism in Scots family mediation (note exception made for abuse cases) in McFarlane (2012), 45-46.

<sup>587</sup> SPJC (2018), 15-16; Ahmed (2020), 633; Clark & Dawson (2007), 244. Cf. McFarlane (2012), 46-47.

<sup>588</sup> Stubbs (2007), 181; Danna & Cavenaghi (2011), 48; Roche (2006), 235.

<sup>589</sup> Albrecht (2010), 15. It is unclear how the latter would translate to FM contexts where the outcome would likely be a safety plan, albeit tailored to the individual situation, and procedural safeguards regarding proportionality of restitution upheld by facilitators.

<sup>590</sup> S.Gov (2017), 9; Albrecht (2010), 15. This further adds to the argument for control of the process by lawyers.

<sup>591</sup> Reliance might have to be placed on stricter enforcement of existing FM initiatives, raising questions of proportionality under Art.6 ECHR.

share information to be used against them in subsequent legal action.<sup>592</sup> A difficult balance may have to be struck between participation via legal coercion and that through engendering trust. Synonymous with a virtuous cycle of race anxiety, a perceived lack of trust by minority communities is cited by Scottish professionals as a barrier to intervention.<sup>593</sup> How this dynamic can be overcome (and balanced with denunciation of abuse) has been considered throughout and further includes: demonstrating appropriate understanding of participants' background (to earn the right to discuss cultural matters); appreciation of the hardships faced in exposing conflict to outsiders; and variables in process aimed at preventing 'loss of face' to both sides.<sup>594</sup> Forging relationships of trust offers scope to rebuild legitimacy in the State through its professional services, reducing minority apprehensions towards the legal system and promoting societal integration.<sup>595</sup>

Behrens advocates expansion of a RJ response to family abuse cases which would not otherwise proceed to conventional legal proceedings for reasons of insufficient evidence, professional, or victim reluctance.<sup>596</sup> Innate to Scandinavian systems, Nielsen's model of CCTM is neither restricted by circumstances to be referred nor by whom, accounting for broader case intake.<sup>597</sup> Vidal observes that dialogue can be re-instated upon initial failure.<sup>598</sup> This might increase victims' willingness to seek help for repeated conduct, contrasting with Scotland's current approach where breach of a FMPO automatically proceeds to prosecution.<sup>599</sup> CCTM does not distinguish between civil and criminal cases, allowing for further reflection on RJM's position within existing frameworks. Roche warns of the potential to 'widen [the] nets of social control, drawing into them those people who may previously have remained outside and subjecting others to more intensive treatment than they would have otherwise received' but proceeds to reconsider this argument in a positive light for under-detected wrongs.<sup>600</sup> Extending a socio-legal model of justice to a greater percentage of FM cases than currently captured could markedly extend overall safety.

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<sup>592</sup> This raises wider questions of confidentiality and evidence-sharing between RJM and traditional forums and how these might impact on relationships of trust between facilitators and families.

<sup>593</sup> Chantler et al. (2017), 33.

<sup>594</sup> See e.g., Barksy et al. (1996), 175-177; Danna & Cavenaghi (2011), 52; Albrecht (2010), 18; TF website.

<sup>595</sup> M. Jenkins (2006), Gullah Island Dispute Resolution. An example of Afrocentric Restorative Justice, *Journal of Black Studies* 37(2) 299-319, 304.

<sup>596</sup> Behrens (2005), 230.

<sup>597</sup> TF website.

<sup>598</sup> Vidal (2019).

<sup>599</sup> 2011 Act, s.9

<sup>600</sup> D. Roche (2003), *Accountability in Restorative Justice* (Oxford University Press), 39-40.

## 6.4 – A Whole System Approach

These opportunities will only follow a cohesive framework of multi-agency collaboration, and ‘a backbone of support that carries a level of seriousness and consequence should dialogue not go as planned’.<sup>601</sup> Safety is compromised absent a holistic system that incorporates all relevant agencies, each mandated with their own role.<sup>602</sup> The currently disintegrated approach to both RJ and FM services in Scotland highlights the pertinence of clearly defined roles for each sector.<sup>603</sup> Danish structures operate via a professional team composed of facilitators, social workers, welfare officers, police, lawyers, and other relevant persons.<sup>604</sup> Negotiations are conducted by a single facilitator with others present where appropriate.<sup>605</sup>

Stubbs distinguishes justice needs from survival needs; the latter often omitted by the RJ discourse.<sup>606</sup> Advocates typically honour RJ’s potential to meet the procedural and emotional rights overlooked in traditional court proceedings, including victims’ right to contribute to decisions and their need for validation and empowerment.<sup>607</sup> Survival needs – which alter capacity and timing for participation – should also be accounted for, including safety, healthcare, and economic concerns (access to bank accounts, housing, and education).<sup>608</sup> Scotland’s RJ provision is characterised by facilitators’ capacity to offer wider services as a fuller support package accounting for individual circumstances.<sup>609</sup> These needs are not currently negotiable through the legal system.<sup>610</sup> Fragmentation perpetuates disempowerment where crucial needs (protection, accountability, and survival) involve separate processes under different laws with varying purposes and underlying values.<sup>611</sup> For FM, this includes two legal routes and external reliance on a range of organisations. RJM as an integrated approach to service provision offers access to facilities ordinarily dealt with

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<sup>601</sup> Vidal (2017).

<sup>602</sup> Ibid.; Nielsen (2014), 240-241; Islam et al. (2018), 291.

<sup>603</sup> See discussions at (2.3)/(3.1).

<sup>604</sup> Danna & Cavenaghi (2011), 51.

<sup>605</sup> E.g., Danish police have initial role in communicating criminality of the family’s conduct – Ibid., 48. See also Carolina Dispute Settlement Scheme – Liebmann (2007), 294.

<sup>606</sup> Stubbs (2010), 980.

<sup>607</sup> Ibid.; S.Gov (2019a), 3.

<sup>608</sup> Stubbs (2010), 980.

<sup>609</sup> Maglione et al. (2020), 11.

<sup>610</sup> See, e.g., AB. The ‘system’ does not meaningfully operate as such but as ‘a set of different processes which are difficult to navigate for even the most empowered’ – Behrens (2005), 220.

<sup>611</sup> Behrens (2005), 218.

externally. Intake processes, for example, could identify needs and request participation of persons who might meet these at appropriate points of the process.<sup>612</sup>

Regulation, exit, and dialogue are not mutually exclusive in a less fragmented system.<sup>613</sup> Whilst exit strategies alone fail to meet long-term needs, they satisfy the urgency for initial safety with dialogue following once appropriate safeguards are in place.<sup>614</sup> Victims can be provided with a safe place prior to proceedings, with early stages occurring between professionals and families, absent the risks of immediate backlash.<sup>615</sup> Thus, any new model would not be at odds with the ‘one chance rule’ currently employed across mainstream organisations. Extrication may be victims’ desired outcome (as in *AB*) which, coupled with a dialogic process, can be negotiated with the family – to reduce unwanted intrusion in the victim’s healing process and aid families to move on from the trauma of loss.<sup>616</sup> Regulation remains relevant as coercive backbone to a dialogic forum, although priority should be afforded to the civil route upon failure of the RJM process. Criminal sanctions might thereafter follow breach of a FMPO under the 2011 Act, the 2014 Act left solely for denunciation.<sup>617</sup> Despite present emphasis on diversion, restorative processes internationally are initiated after traditional proceedings (regardless of outcome).<sup>618</sup> These structural relationships should constitute a well-established pathway for FM cases from reporting, early intervention, and suitability assessment, to conclusion of negotiations, follow-up procedures, and any deference to the courts. The distinctiveness of the Danish approach lies in existence of this full support framework, not discernible in other Western jurisdictions.<sup>619</sup>

## 6.5 – A Hybrid Model

An alternative is to disregard RJM as existing in any particular process, favouring a less linear interpretation in reforming existing justice mechanisms. This thesis has considered a national model as a specific diversionary process and accordingly has adopted a process-oriented conceptualisation. The ‘hybrid model’ of restorative scholarship most commonly

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<sup>612</sup> *Ibid.*, 231-232; Pankaj (2000), 1. E.g., a victim support worker who has provided initial emotional stability or financial adviser.

<sup>613</sup> Cf. Shariff (2012), 550; Saheliya (2012), 41; Phillips & Dustin (2009), 533.

<sup>614</sup> Phillips & Dustin (2009), 545; Vidal (2017).

<sup>615</sup> Vidal (2017).

<sup>616</sup> Nielsen (2014), 240.

<sup>617</sup> Legislation left unused is undesirable, yet the most logical structure would retain only one aspect of criminalisation. See disproportionality of two criminal routes – Idriss (2015), 699.

<sup>618</sup> Interesting questions might be raised re. *CoEC v S* as to whether a RJM process could be deployed upon failure of FMPO action.

<sup>619</sup> Vidal (2017). This is attributed to the resources customarily dedicated to therapeutic practice in Denmark – Danna & Cavenaghi (2011), 59.

refers to systems where RJ and CJ co-exist, as alternatives or two, separate but procedurally connected entities.<sup>620</sup> The position of FM within civil and criminal theory has meant a second hybridisation has been considered under 'RJM'. This final section considers a third hybrid, acknowledging systems which utilise 'restoration' as a way of 'doing' justice, informing how traditional forums might be administered rather than disregarded.

So-called speciality courts have only recently been identified as suitable replacements to adversarial trials, rather than diversionary or adjunctive bodies.<sup>621</sup> Brazil's Domestic Violence Courts (DVCs) operate as permanent first-instance courts incorporating therapeutic processes as the main forum through which significant case numbers pass through.<sup>622</sup> The courtroom remains the 'process' but the process therein is open to adaptation. Yet to be analysed in respect of FM, Brazil's DVCs have jurisdiction over all domestic crimes other than those against life (reserved for main trial courts).<sup>623</sup> The hybridised process departs from traditional procedure through constructive dialogue, denouncing wrongdoing and promoting conciliation, with emphases on the victim's views throughout (including any desired reconciliation).<sup>624</sup> Failure to comply with any order subjects the accused to admonishment processes which further involve the victim through consent and revised penalties or conditions for the accused.<sup>625</sup>

The Scottish Government has contemplated Integrated Domestic Abuse Courts (IDACs), where a single judge hears both criminal and civil issues relating to a single family, as part of growing concern over the compartmentalisation of legal routes for victims and reluctance of information-sharing between civil and criminal processes.<sup>626</sup> Given this lack of coordination, the addition of another process for family abuse cases under RJM might further obscure an already convoluted system. Alternatively, a Danish-oriented model of CCTM

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<sup>620</sup> McAlinden (2011), 384; Daly (2016), 18-20;

<sup>621</sup> T. Kirchengast et al. (2021), The mixed and hybrid criminal courts of Brazil: Mainstreaming restoration, rehabilitation and community justice in a human rights context, *International Review of Victimology* 27(1) 23-42, 27-28. See early signs of formal hybridisation in Canadian Sentencing Circles – MacKay (2003), 12.

<sup>622</sup> Kirchengast et al. (2021), 24.

<sup>623</sup> Ibid., 25.

<sup>624</sup> Ibid., 25-26.

<sup>625</sup> Ibid.

<sup>626</sup> Scottish Government (2019d), *Evidence on the Effectiveness of Integrated Domestic Abuse Courts* (3<sup>rd</sup> Sep), (Available at: <https://www.gov.scot/publications/evidence-effectiveness-integrated-domestic-abuse-courts/documents/>), 3-4, 7; G. Black (2017), *Consultation Submission*. Scottish Law Commission, (Available at: [https://www.scotlawcom.gov.uk/files/7815/0669/4097/20\\_Dr\\_Gillian\\_Black\\_School\\_of\\_Law\\_University\\_of\\_Edinburgh.pdf](https://www.scotlawcom.gov.uk/files/7815/0669/4097/20_Dr_Gillian_Black_School_of_Law_University_of_Edinburgh.pdf)), 3. Scottish Civil Justice Hub (2021), *Women in the Justice System – A Strategic Approach. Response from academics on the 'Domestic Abuse and Child Contact: The Interface Between Criminal and Civil Proceedings' project* (Available at: [https://scjh.org.uk/wp-content/uploads/2022/01/child\\_contact\\_and\\_domestic\\_abuse\\_women\\_and\\_the\\_justice\\_system\\_response.pdf](https://scjh.org.uk/wp-content/uploads/2022/01/child_contact_and_domestic_abuse_women_and_the_justice_system_response.pdf))



might inform a court structure tailored specifically to FM cases, allowing families to go through a single (albeit lengthy) process. A more legalistic model would ease concerns of initial participation by perpetrators, adopting some essence of compulsory RJM through the courts.

These models reflect an alternative whole system approach, forging relationships between traditional and non-traditional justice stakeholders as a central rather than optional justice route.<sup>627</sup> Primary control is afforded to the judiciary as central point for multi-actor collaboration and access to a package of services for victim protection and perpetrator rehabilitation.<sup>628</sup> Reminiscent of Danish facilitators, the remit of judges extends beyond conclusion of court settings to ongoing monitoring, supported by other officials.<sup>629</sup> Perceptions of the judiciary as impartial are replaced with those of instilling health and wellbeing through continuous treatment of the accused.<sup>630</sup> This might include prolonged evaluation of participation in rehabilitation programmes, imposed by judges prior to any decision as to further proceedings as part of a system of deferred sentencing.<sup>631</sup> Judicial powers might therefore be expanded to grant ancillary restorative measures tailored to FM, such as compulsory anti-subordination treatment. Existing IDAC models return breaches of an order to the same judge, who makes informed decisions upon pre-existing knowledge of the family.<sup>632</sup> Establishing a legal pathway for FM cases may be simpler and might follow an interim FMPO whilst proceedings are ongoing, followed by a process of RJM resulting in a form of agreed FMPO (including provisions linked to reconciliation), with criminal proceedings following under s.9 of the 2011 Act. For a potential court structure incorporating Nielsen's CCTM model see Diagram 2.

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<sup>627</sup> S.Gov (2019d), 9-10; Kirchengast et al. (2021), 25.

<sup>628</sup> S.Gov (2019d), 9.

<sup>629</sup> Ibid., 18.

<sup>630</sup> Kirchengast et al. (2021), 27.

<sup>631</sup> S.Gov (2019d), 15.

<sup>632</sup> Ibid., 18.

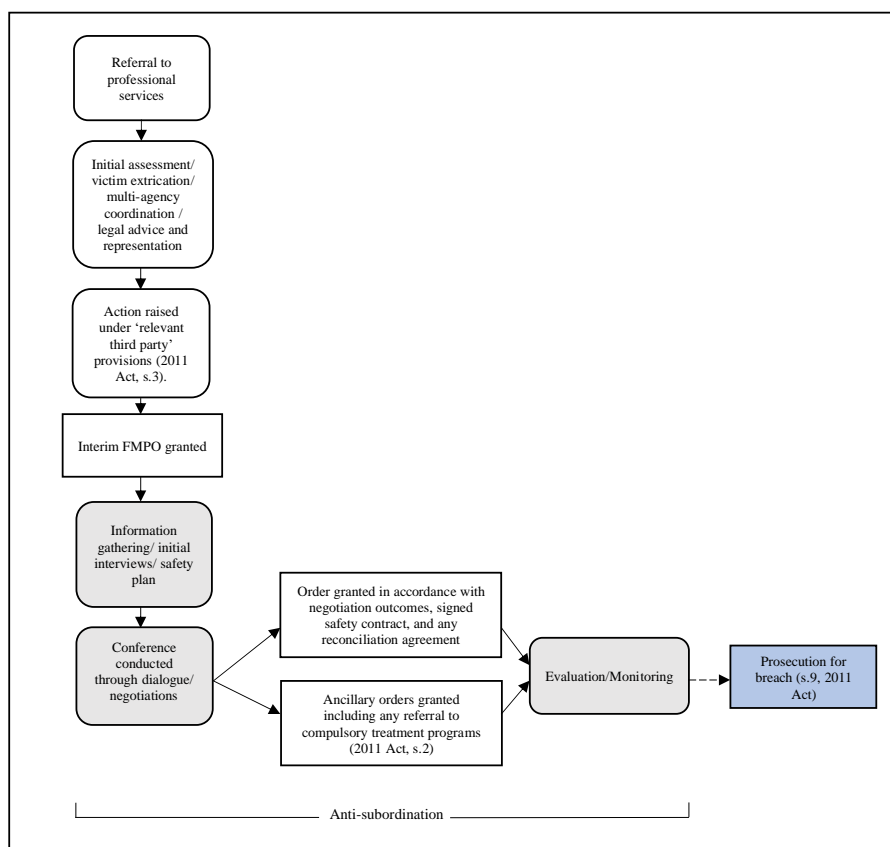


Diagram 2.

This model raises new structural and ethical concerns beyond the scope of this research.<sup>633</sup> The definitional concerns of FM, for example, question whether a specific civil or criminal matter would have to exist for entry or whether existence of a ‘family conflict’ would suffice.<sup>634</sup> A host of safeguards similar to those mentioned throughout would remain relevant.<sup>635</sup> The integration of inquisitorial and restorative process would necessitate a shift from the traditional focuses of Scotland’s legal system. Rather than ‘asking which system...is normatively superior, we should start by asking which principles and goals we value in the [legal] process and then discuss the best ways to implement those principles and goals in specific jurisdictions.’<sup>636</sup>

<sup>633</sup> S.Gov (2019d), 3.

<sup>634</sup> See ‘matching’ role of existing IDAC coordinators – Ibid., 17.

<sup>635</sup> See discussions on anti-subordination, cross-cultural communication, and safety.

<sup>636</sup> M. Langer (2014), ‘The Long Shadow of the Adversarial and Inquisitorial Challenges’ in M.D. Dubber & T. Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press), 911.

## CONCLUSION

FM emerges from the confrontation of intergenerational and intercultural value systems regarding marital preferences. This research has considered how these differing frames of reference can co-exist within a legal response that promotes agency without exiling women from their social and cultural networks. On the presumption that no system should seek to invalidate every marital decision arrived at under pressure, focus should be redirected to frameworks that view respect for cultural practices and the struggle for non-abusive relationships as not necessarily incompatible. Whilst power imbalances must be acknowledged, enhanced support is needed for victims 'who wish to express their subjectivity within the framework of the communities of which they fundamentally perceive themselves to be a part.'<sup>637</sup>

The extension of the RJM movement to family abuse cases is a sensitive proposition and the debate largely stagnates as either in favour or against. Feminist critique harbours a broad consensus that 'off-the-shelf' practices are ill-suited to dismantling familial power imbalances. Several 'core' principles require re-framing, loosening, or disposal; restoration, impartiality and neutrality, honesty, transparency, and voluntariness are not easily confined to current generalisations and rigidity in their application may be inappropriate. Significance has been afforded to anti-subordination as the superior guiding principle, enhanced by less conventional emphases on trust and dignity given the distinctness of FM. These insights are indispensable in navigating what could become an experimental extension of Scotland's RJM landscape to these cases.

The questions posed for the Scottish movement are ample. An attitudinal shift is paramount in lifting processes from weak connotations of justice, suitable only for antisocial behaviour of first-time youth offenders, discrete criminal acts, and low-level private disputes. For cases of FM, this includes reconstruction of the public and professional portrayal of cultural dynamics. Acknowledgment has been made of the international context and the options available for determining RJM's relationship with the conventional legal system. The Danish approach offers a convincing starting point from which to build context-specific processes for the inclusion of HBVA within a Scottish framework. It has been argued throughout that the law and its actors should remain central, integrated within a cohesive system of professionalism, affording roles to various sectors as the best way to alleviate resistance and

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<sup>637</sup> Anitha & Gill (2009), 180.

generate long-term protection of victims. This framework does not yet exist in Scotland and can only follow the elimination of various structural concerns.

The assumptions underlying a prospective FM model offer reflection on the normative and practical crossovers between civil and criminal diversionary mechanisms and the positioning of family abuse within their respective objectives. Contemplation of FM necessitates a realignment of negotiation dynamics and the origins of power, stretching beyond the need for more stringent practice guidelines and highly trained facilitators. Processes should allow perpetrators to reflect on the causes and consequences of abusive behaviour to promote sustainable change. The existence of a RJM process for FM, as an alternative to public shaming, recognises that perpetrators are marginalised, whilst the process should remain victim focused. Reconciliation can only follow open communication, offering some element of the empowerment so often promised but with the added protection that abusers have undergone a lengthy period of self-reflection. These strategies need not result in re-privatising abuse but offer an alternative perspective of system accountability.

Regulation and exit-centred strategies are typically reactive and provocative, failing to dissolve the pressures that generate concerning numbers of cases. The assumption that increased ‘Westernisation’ throughout generations means FM will eventually die out is founded on naivety. Despite some evidence of change in minority marital practices, parents seeking to frustrate Western corruption and increased unwillingness of ME youths to accept these efforts means FM will likely persist.<sup>638</sup> The current regulatory framework presumes legal remedies are best placed to educate perpetrators. The 2011 and 2014 Acts were enacted upon a symbolic basis that would reverberate intolerance throughout the population. Criminalisation was portrayed as an unequivocal message of severity, advanced on a deterrent value that would force perpetrators to reflect on their actions.<sup>639</sup> The limited and non-use of civil and criminal routes risks resigning them to ‘paper tigers’, testament to the underappreciation of the contexts which subordinate victim and perpetrator self-interest.

Educational efforts aimed at effecting change through softer, direct engagement with Scotland’s minority communities are time-honoured. Yet, education as a legitimate indicator of effective justice is rarely identified beyond references to recidivism as incidental. A national model of RJM offers an authoritative, legal platform for instilling change.

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<sup>638</sup> Phillips & Dustin (2009), 543.

<sup>639</sup> SPJC (2014), 6.

Engagement surpasses the ‘staggered unilateral exchange associated with ‘consultation with community’,<sup>640</sup> re-shaping traditional RJ theory to acknowledge the community as a potential source of wrongdoing. In facilitating the discovery of shared values, this engagement promotes social change for the betterment of gender equality, eliminating more extreme views perpetuated through subordination of power. This broader perspective acknowledges that cases are part of a wider problem within households and communities of potential victims.

Education should be framed not as an imposition of Western standards (having particular regard to the right to AM) but as effective engagement with communities wherein some of its own members seek change. RJM allows conversations to take place one family at a time, offering direct insight into the particularities of cases towards a more favourable professional response. Further research prior to, and following, the introduction of any model is necessary to allow Scotland’s legal system to better understand the ways in which families in conflict respond to certain interventions. The overarching objective should be to transform private relationships within subordinated communities, not through irreversible separation and punishment but providing space for individuals to reshape their own norms towards a deeper, more stable form of integration.

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<sup>640</sup> Shariff (2012), 551.

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