

# The injustice of marital captivity

Report of the public hearing in the European Parliament on 25 June 2018



In collaboration with ALDE/ Renew Europe



Femmes for Freedom

# Colophon

April 2019

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# Introduction

ALDE<sup>1</sup> organised a public hearing on 25 June 2018 entitled *The injustice of marital captivity* (Het onrecht van huwelijksgevangenschap) in cooperation with Femmes for Freedom (FFF) from the Netherlands. ALDE, Alliance of Liberals and Democrats, is a faction in the European Parliament in which from The Netherlands D66 and the VVD participate. ALDE published a brief [English language report](https://medium.com/@ALDEgroup/injustice-of-marital-captivity-3161c80a73d5) about this hearing<sup>2</sup>.

Marital captivity is defined as a situation in which women cannot dissolve their marriage completely. The court is authorised to dissolve civil marriages but it cannot dissolve religious marriages. If an (ex) spouse or a religious court is unwilling to cooperate towards a divorce a woman remains married under religious law and in some cases under the family law of the country where the marriage was concluded, often in the country of origin of at least one of the married partners. These women are prisoners in such a marriage and they are not free to act and to move how and where they want. They are discriminated against, repressed and restricted in their social participation. The reverse situation, in which a woman keeps her (ex) husband 'captive' by refusing a divorce is rare and at any rate does not have the same social and legal repercussions for the man involved. In the patriarchal religious laws and the family law based on religion, divorce is a male privilege.

In Europe marital captivity occurs in Islamic, Jewish and Hindu communities and until recently in countries in which family law is inspired on the Catholic faith, such as Poland, Malta and Ireland. As long as divorce is not universally recognised and therefore legal everywhere, it remains of importance to enter into dialogue with countries with family legislation that makes marital captivity possible. With 28 member states the European Union can play an important role in this dialogue.

A wide range of activists, academics, experts, politicians and EU officials participated in the public hearing. They outlined examples from different countries and different religious communities, as well as successful strategies to address marital captivity as a specific form of gender discrimination and violence.

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1 ALDE has continued under the name Renew Europe since 2019

2 <https://medium.com/@ALDEgroup/injustice-of-marital-captivity-3161c80a73d5>

# Table of contents

<b>Introduction</b>	<b>3</b>
<b>Table of contents</b>	<b>4</b>
<b>Opening remarks by ALDE parliamentarians</b>	<b>5</b>
<i>Hilde Vautmans</i> (Open VLD, Belgium)	5
<i>Sophie in 't Veld</i> (D66, The Netherlands)	5
<i>Marietje Schaake</i> (D66, The Netherlands)	6
<b>Interview with experience expert</b>	<b>7</b>
<b>Panel 1: Explanation of the phenomenon of marital captivity in various religious communities</b>	<b>7</b>
<i>Professor Ruth Halperin-Kaddari</i> (Bar-Ilan University, Ramat Gan, Israel; vice-president CEDAW, supervisory Committee UN convention on women's rights: Marital captivity under Jewish law: the agunah problem in Israel and the Jewish world)	7
<i>Mahmoud Jaraba</i> ( investigator Max Planck Institute for Social Anthropology - Germany)	8
<i>Anita Nanhoe</i> (researcher municipality of Rotterdam): Marital captivity among Hindu women	9
<i>Anu Sivaganesan</i> (researcher University of Zurich, chairman Centre of Competence against forced marriage (CoC), Zurich, Switzerland)	11
<i>Shirin Musa</i> (director and founder Femmes for Freedom)	12
<b>Panel 2: How to proceed: visions of the European Committee and the European Parliament</b>	<b>14</b>
<i>Maria Vilar</i> (employed with the European Committee, DG Justice, department private law, former lawyer in Spain and Brussels)	14
<i>Charles Goerens</i> (member Euro-parliament ALDE, rapporteur EU-strategy against early and forced marriages)	15
<i>Assita Kanko</i> (former council member Elsene Brussels, writer, activist)	16
Discussion	17
<b>Panel 3: Towards viable solutions</b>	<b>17</b>
<i>Professor Ruth Halperin-Kaddari</i> (Bar-Ilan University, Ramat Gan, Israel, vice-president CEDAW, supervisory Committee UN Women's Treaty)	17
<i>Frans van der Velden</i> (expert international civil law)	18
<i>Pooyan Tamimi Arab</i> (anthropologist employed by Utrecht University)	19
<i>Leontine Bijleveld</i> (president Association for Women and Law ('Clara Wichmann'))	20
Conclusions and recommendations	21
<b>Appendix - Relevant Treaty articles</b>	<b>22</b>

# Opening remarks by ALDE parliamentarians

## Hilde Vautmans (Open VLD, Belgium)

In most cases people associate marriage with love and happiness but this does not always apply. Some women are forced to marry someone they have never seen before or someone who had been chosen by their family. For other women love was involved but this did not last. Some women fall victim to violence, abuse and repression in their marriage. In all these cases a woman can develop a wish to divorce at a certain moment in time. According to Vautmans in most cases the dissolution of a civil marriage in Europe is not a problem – a lot needs to be arranged but in many cases this can be achieved within a reasonable period of time. In the case of a religious marriage all of this is considerably more complicated because it requires the cooperation of both partners and husbands frequently refuse. This often impacts women from migrant or refugee backgrounds. If women in this situation still want to persevere towards a divorce this often results in isolation, violence and sometimes even in honour crimes.



Vautmans pointed out that in the European Parliament child marriages and forced marriages are often discussed as well as finding solutions for this kind of gross violation of human rights. However, marital captivity is hardly discussed. Although it is not simple to find solutions for this type of discrimination on a European level, gender equality and empowerment of women have been core principles of the European Union from the outset. Therefore it is, according to Vautmans, a solemn duty to speak up on a European level – marital captivity must be recognised as violence against women and as discrimination of women and it should be combated in every possible way.



## Sophie in 't Veld (D66, The Netherlands)

Everyone should be free to choose whom they marry and whom they divorce, men and women. According to In 't Veld it is important to raise the issue of marital captivity from different viewpoints that are based on rights: in the context of women's rights, of human rights but also from the viewpoint of the rule of law. In a constitutional state religious law should be subordinate to civil law.

In 't Veld points out that in Europe there is some kind of alliance of populists, nationalists, deeply religious Christian parties who combat Islam and who want nothing to do with women's rights. They have a secret manifesto entitled: Restoration of the natural order [Herstel van de natuurlijke orde]. According to In 't Veld the fight against marital captivity is too important to have it being bogged down in party politics – on the contrary this subject should be raised above this. She makes an appeal to form an alliance against marital captivity.

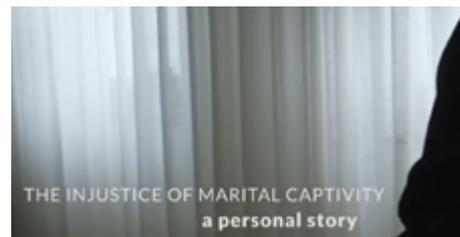
### Marietje Schaake (D66, The Netherlands)

In a video message Schaake emphasised the urgency and the importance of the subject. More awareness concerning the problems of marital captivity should be generated. Academics, legal experts, activists and politicians should join forces and address the problem together with victims. Schaake also highlighted the problem of religious marriages that are concluded outside of the law, for example at a young age, long before a civil marriage is allowed. She pointed out that Femmes for Freedom in The Netherlands has succeeded in placing marital captivity under the legal definition of forced marriages, which has turned marital captivity into a criminal offence. This does not solve all problems, but it is welcome progress. Schaake hoped that the public hearing will generate solutions and thanked Shirin Musa for this initiative. It is high time that marital captivity is recognised by the international community as a form of violence against women and as discrimination.



# Interview with experience expert

A brief Dutch-language film by FFF with English subtitles provides a poignant insight into the phenomenon of marital captivity: the husband as well as his family kept the wife in the film captive.<sup>1</sup>



## Panel 1: Explanation of the phenomenon of marital captivity in various religious communities

Professor Ruth Halperin-Kaddari (Bar-Ilan University, Ramat Gan, Israel; vice-president CEDAW, supervisory Committee UN convention on women's rights: Marital captivity under Jewish law: the agunah problem in Israel and the Jewish world



There is no civil family law in Israel. Marriage and divorce are part of religious legislation. As opposed to most systems for family legislation marriage under Jewish law is considered to be a mutual transaction between spouses, in which nobody can intervene. This means that there are no possibilities for external interventions, for example in the form of a divorce pronounced by the court or of a civil registration of marriages and divorces.

Marriage is in fact a unilateral transaction – in accordance with Jewish law it is the man who enters into a marriage with a woman and not the other way round. Therefore the marriage can only be ended by him. Only the wife has marital duties. The unilateral marriage can also be interpreted as unilateral 'acquisition' of a woman by a man. She is exclusively committed to him with exclusion of all others but he is not exclusively dedicated to her.

Divorce is only possible by obtaining a *gett* – without a *gett* a divorce is not valid, although men in some situations can

remarry without a *gett*. This option does not exist for women. If a woman without a *gett* bears children from another man, these children are considered *mamzerim* (bastards) who cannot marry in accordance with Jewish law, except with other *mamzerim*. This rule does not apply to the children a man without a *gett* has with another woman.

For men and women the grounds for divorce are completely different. In fact men have absolute power where obtaining a *gett* is concerned. In principle rabbinical courts can force spouses to supply a *gett* but they are reluctant to do so because there is doubt as to the value of a *gett* obtained under enforced conditions. Therefore they prefer to issue a recommendation for a divorce and to encourage the spouses to negotiate the conditions under which the husband wants to supply a *gett*. In most cases this results in a situation in which women virtually buy the divorce by refraining – fully or partly – from her part in property rights, child alimony and so on.

<sup>1</sup> <https://www.youtube.com/watch?v=MBIttoCMQIBM&t=11s>

Studies in 2013 and 2017 have shown that in over one third of Jewish divorces there is abuse of *gett*, which results in a partition of the estate that is detrimental to the woman. In the case of orthodox Jewish women this is the case in even half of the divorces. Since 1953 rabbinical courts are legally authorised to impose a prison sentence without a time limit on men who refuse to divorce. However, this has to be confirmed by the regular court. In 1995 the range of sanctions was extended – ranging from suspension of the driving licence or passport, freezing of bank balances to imprisonment with a maximum of ten years. Halperin-Kaddari concluded her introduction by describing developments in jurisprudence concerning

reluctance of men to agree with a divorce. For example imprisonment of the husband, based on contempt of the civil law has been extended by the highest court. Another example concerned the imprisonment of the father of the husband who was held responsible for the refusal to execute the order of the rabbinical court to provide a *gett*. Admittedly the highest court declared this imprisonment null and void, but instead this court withdrew the passport. Rabbinical courts allow ‘naming and shaming’ of reluctant husbands. With respect to recognition of divorces pronounced in other countries some progress has been made.

### Mahmoud Jaraba (investigator Max Planck Institute for Social Anthropology – Germany)



Jaraba began his presentation by stating explicitly that he is not an activist but a scientist who investigates unregistered marriages in Germany. He does not specifically discuss marriage and divorce in Islamic countries in general but he focuses on these problems in the German Muslim communities. In Germany the phenomenon occurs that women who are married in accordance with one legal system cannot divorce in another legal system, for example in a religious setting.

In Islam there are three types of divorce:

1. The first, *Data*, is a divorce initiated by the husband who refunds the woman (a part of) the *Maher*, the dowry or provides alimony during a certain period of time (in most cases a couple of months).
2. The second is *Faksh* or *Fassr* – a divorce of one of both spouses by which the marriage or marriage contract is annulled. This has to be pronounced by a court. Both the husband and the wife can submit the request but a valid reason has to be provided. This type of divorce does not occur in Germany.
3. The third is *Khul*: this is a type of divorce applied for by the wife who pays her husband compensation for the divorce. This can be the dowry (the *Maher*) or more. A condition is that the husband agrees with the divorce and with the compensation. This is based on a traditional interpretation of the Quran, which requires mutual agreement with the divorce. Such a divorce can bring women in financial problems because some men demand a high price. In fact this is similar to the situation in Jewish communities.

The fact that divorce is easier to obtain for men than for women can be called discrimination, but according to Jaraba this is not the most important problem because many women are prepared to pay to get out of the marriage. Much more important is the problem that it is virtually impossible for Islamic women to obtain a divorce if their husband does not cooperate. For his study he interviewed a huge number of imams. Most of them act from a conservative interpretation of Islam and require the husband's consent before they are prepared to pronounce a divorce. A small group of imams attempt to reinterpret the Quran in order to enhance the discussion about divorce so that a way out for these women is created but not a lot of progress has been made yet. Jaraba gives an example from his study – this concerns a religious marriage between second-generation 'migrants', even without

any form of civil marriage. Although the wife and her family tried to negotiate a divorce and sought the assistance of imams the woman remained captive in this marriage - at the time of the interview over 3.5 years! In his study he investigated documents concerning 267 informal divorces of unregistered marriages; in 94 cases (35% of the cases) the divorce was initiated by women who were faced with high costs in most cases. In the cases where the husband initiated the divorce the costs for the man were considerably lower.

According to Jaraba the solution has to be found in the Muslim communities themselves. The discussion should be started there. He does not see an important role for the German authorities.

### Anita Nanhoe [researcher municipality of Rotterdam]: Marital captivity among Hindu women



The largest group of Indian people migrated after the abolition of slavery in Suriname to this West-Indian colony between 1873 and 1917. Most of them came to Europe between 1975 and 1980. Many first-generation Hindu women in The Netherlands married young, particularly those who came from the Surinamese countryside. Their parents arranged their marriage that was concluded on the basis of their religion, in most cases Hinduism or Islam. These marriages were registered in marriage registers from the authorities at the age when marrying was allowed - at the time thirteen years old for girls and fifteen for boys; later sixteen and seventeen, respectively. After arriving in The Netherlands this tradition was continued with a minimum marriageable age of eighteen years. Although arranged marriages are still frequent, nowadays this occurs

with the agreement of both prospective partners. The traditional marriage rituals still play an important role. For Muslims this means a Nikah and for Hindus (by far the largest group) a traditional Hindu wedding, often, but not always, preceded by the conclusion of a civil marriage.

Different mechanisms play a part in marital captivity in these communities. Education and socialisation occur in accordance with the traditional gender role patterns. Girls should become good wives and mothers. It is the parents' task to guide their children towards marriage – only when the daughters are married have the parents completed their parental task, while the state of being married increases the status of women.

A divorce of a daughter means loss of honour for herself, but also for the parents, while it diminishes the chances of marriage of younger daughters (sisters). This is why many parents try to prevent or discourage divorce as long as they have unmarried children. The whole community marginalises single and divorced women who often lose contact with family and friends in the case of a divorce.

Islam knows a ritual for divorce. This is not the case in the Hindu religion – marriages remain intact during seven lives and cannot be undone. Even if a Hindu couple is divorced in accordance

with Dutch law, they are often still considered to be married, which diminishes their chances of a new marriage. This does not hold true for men, for they are allowed a second, third or even a fourth marriage. A divorced woman can be rehabilitated by remarrying her ex-husband and sometimes by marrying another Hindu man, but in the latter case her identity will be associated with this second husband. This places her in an even more vulnerable situation, because a second divorce will damage her honour irreparably. This renders divorced Hindu women and their children susceptible to abuse.

Nanhoe concluded her presentation by reading out loud a number of instructions from an important Hindu scripture from 1250 BC – the Manu Smriti. This text comprises over 2600 duties, rules, regulations and laws for men and women from all castes. The majority of Hindus will not read this, but Nanhoe wonders whether the Hindu community may have internalised these regulations subconsciously. She gave a number of examples:

**5/151** Girls should come under the authority of their father when they are children; women under the authority of their husband and if they are widowed under the authority of their sons.

**5/157** Men are allowed to be without virtue, be sexually perverted, immoral and without any quality – still women have to honour and serve their husband without respite.

**5/158** Women have no divine right to perform any religious ritual, nor are they allowed to take a pledge or too fast. Her only duty is to obey her husband and to please him and for this reason alone she will be allowed into heaven.

**5/160** Let the women after her husband's death have her body emaciate slowly by living from pure flowers and the roots of vegetables and fruit. After her husband's death she is not allowed to mention any man's name.

**9/3** Because women are not able to live independently as children they should be under the authority of their fathers, as women under the authority of their husbands and as widows under the authority of their sons.

**9/6** It is the husband's duty to exert total control over his spouse. Even physically weak husbands should seek to achieve this.



She pointed out that married women are stigmatised by focusing on marriage as the norm. In particular this is the case in Asian diaspora communities in Europe.

In different stages there are different types of force and serfdom around marriage:

- A. Before the marriage – prohibition on love, pressure to marry, pressure to marry inside the own community, cult of virginity, heteronormativity, ideal of monogamy, conflicts with family members and relatives.
- B. The marriage itself: forced marriage, religious marriage ...
- C. After the marriage: force to have (male) children, force to have sex, marital captivity ...

Apart from The Netherlands so far few countries recognise the problem of marital captivity. Still, being forced to marry or to remain married should be considered to be a violation of human rights.

According to Sivaganesan marriage as such is highly influenced by social norms and values, by expectations from the family and

by ideas concerning the lifestyle that is appropriate. Several of these forced situations are interrelated. In Switzerland there are two legal ways to dissolve a marriage, each of which results in a different social status:

1. Cancelling (negating) - afterwards spouses are considered unmarried – no social stigma is attached to this form of divorce. This type of divorce applies where child marriages or forced marriages are concerned.
2. Divorce – the marital status of the ex-spouses is 'divorced'; this is possible after a joint request, on request of one of the partners after a period of legal separation and in case of an intolerable marriage (for example when there is domestic violence or sexual coercion). Afterwards (former) marriage partners are registered as divorced but they can still be captive in a religious marriage.

Sivaganesan concluded her presentation with the image of a ring that according to her depicts the essence of married life: this is not a romantic commitment, but the reality of being married – no exit! This results in radical viewpoints on marriage – against!

### Shirin Musa (director and founder Femmes for Freedom)



Until the beginning of the seventies of the last century in The Netherlands married couples could only divorce if one partner accused the other partner of adultery. In many cases this was not an option, because adultery was also considered a criminal offence. Therefore many Dutch citizens lived in a situation of marital captivity until the legislative amendment of 1971, which included into legislation irretrievable breakdown of the marriage

as a ground for divorce. A lot has changed since then. Europe has become multicultural, multi-ethnic and prosperous; millions of migrants have contributed to this change. Musa's relatives belonged to this group – she was six months old when they arrived in The Netherlands. When Musa was young she aspired a career as a judge or a diplomat. She married voluntarily and could never have thought it possible that she, having grown up

and living in The Netherlands, could fall victim to marital captivity. After the civil divorce her (ex) husband refused an Islamic sharia divorce and none of the religious authorities, legal experts and lawyers whom she consulted was able to help. Subsequently she started studying law and exploring the jurisprudence. As an example she discovered a ruling from the Supreme Court from 1982 which helped a Jewish woman succeed in terminating her marital captivity - the husband's refusal to divorce was an unlawful act<sup>1</sup>. This was the way to escape her own marital captivity: a civil case against her ex-husband. **The court ruled** that he had to cooperate towards a religious divorce under penalty of a penalty payment for each day that he refused to do so<sup>2</sup>. The court also honoured the appeal to the European Convention for Human Rights - refusal to cooperate towards a religious divorce is a violation of human rights.

Her own case was simple, Musa says in retrospect. Moreover, she had the support of her parents and this is not always the case. She referred to the woman in the **film**. The transnational problems of the different conflicting systems for (family) law are highly complicated as becomes clear from the example of a thirteen-year-old girl from Sudanese origin. Grown up in The Netherlands she was brought to Sudan and forced to marry, which is in accordance with Sudanese law. If she were to ask for assistance at the Dutch embassy, they could not help her because she married under Sudanese law. Moreover, in accordance with Dutch law, minors are not allowed to apply for a passport of their own - they are under the authority of one or both parents. The girl should have to have a lawyer submit an application from Sudan at a Dutch court to withdraw parental authority from the parents so that she herself can apply for travel documents. For a thirteen-year-old this is almost impossible to organise. If this girl yet succeeds in escaping to The Netherlands, she will remain a captive in this marriage although The Netherlands does not recognise child marriages. Dissolution of the marriage is only possible in Sudan and it is hardly achievable there. Therefore migrant girls and women find themselves in some kind of no man's land where their internationally recognised human rights are concerned. Migrant women who were forced to marry elsewhere and who end up in Europe have similar problems caused by conflicting legal systems. Fortunately the embassies of Norway and the United Kingdom offer help to women who have been married off abroad. Currently Dutch embassies are attempting to follow this example.

Musa pleads for international coalitions among authorities, organisations of lawyers, human rights activists and so on to help migrant girls and women to exercise their internationally recognised human rights. Musa sketched the origin of the international legal system of human rights treaties, beginning with the Universal Declaration of Human Rights in 1945. Although this has developed in a slightly different way from what was hoped at the time, the way in which human rights are entrenched in international law, to be enforced with the assistance of national and sometimes international courts and tribunals has surpassed expectations. Has the time not come to take the next step and bring international private law in line with the internationally recognised human rights, Musa wonders. Particularly with respect to marriage, divorce and right of self-determination? Women's rights organisations sometimes advocate that the battle should be fought in the international political arena. Both governments and women's rights organisations are somewhat reluctant – they do not want to jeopardise the results achieved in the area of human rights and international law. Musa argues that it should be investigated whether international private law can be utilised as a vehicle for change that subsequently can have a positive influence on the development of international legislation. In order to realise this we need coalitions. The importance of this for coming generations of girls and women cannot be overestimated. Let us make a first step here today by widening the definition of forced marriage in such a way that it also encompasses the coercion into the continuation of a marriage – marital captivity. As a second step we can advocate that the EU raises this subject of the violation of human rights in the dialogue with third countries.

1 'Gett' ruling Supreme Court 22 January 1982 NJ 1982, 489 [Gett'arrest HR 22 januari 1982 NJ 1982, 489]

2 <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2010:BP8396&showbutton=true>

## Panel 2: How to proceed: visions of the European Committee and the European Parliament

Maria Vilar (employed with the European Committee, DG Justice, department private law, former lawyer in Spain and Brussels)



The European Committee (EC) actively contributes towards enhancing women's rights and combating discrimination. Forced marriages, child marriages and marital captivity are diametrically opposed to principles of human rights and women's rights that underpin the European Union. Where family law, including marriage and divorce, is concerned the role of the European Union is restricted, because family law comes under the authority of the member states themselves. The European Committee can attempt to influence public opinion and thus convey the viewpoint that forced marriages and marital captivity are incompatible with the fundamental principles on which the EU is based. As for prospective European legislation in this area neither the European Committee nor the European Parliament are authorised, only the European Council and this organisation has to decide unanimously.

Vilar makes a distinction between material legislation (substantive law) on the one hand and private international law on the other. In the area of material law the EU has not a lot to offer. Where international private law is concerned the EC has an advisory task for citizens and courts of EU countries:

in which country should disputes be settled, which law from which country is applicable etc. The EC also informs citizens on request about the applicability of family legislation from certain countries in other EU countries. Two decrees are relevant in this respect (decree Brussels II Bis and decree Rome II). The decree Brussels II bis defines which law is applicable and which court is authorised. Based on this in the case of divorce (ex) spouses are allowed to apply for divorce either in the country of residence or in the country of nationality and to have the divorce pronounced in this country. However, this only concerns divorces in accordance with civil law and therefore the rule does not apply to religious or informal marriages.

In December 2017 the European Court of Justice gave a ruling about a divorce where both partners had the German as well as the Syrian nationalities. This ruling confirmed that the scope of both regulations is equal and that they are therefore not applicable to informal and religious marriages.

Charles Goerens (member Euro-parliament ALDE, rapporteur EU-strategy against early and forced marriages)



On 4 July 2018 the European Parliament adopted a resolution entitled 'Naar een externe EU-strategie tegen huwelijken op jonge leeftijd en gedwongen huwelijken' (**Rapport- Goerens**)<sup>1</sup> ['Towards an external EU strategy against marriage at a young age and forced marriages'].

The report and the motion were initiated by the Committee of Foreign Affairs (subcommittee human rights), where this motion was adopted with a majority vote. Charles Goerens of the ALDE faction was the rapporteur. At the hearing about marital captivity Goerens gave a brief summary of the content of the report. He pointed out that the reason was the global rise of the number of child marriages, also in countries where the marriageable age is 18 years. According to the resolution the EU should encourage third countries to adjust and subsequently implement and enforce their legislation. Development aid should in part be allowed to be made contingent upon the willingness to combat child marriages and forced marriages.

Initially the report focused on the foreign and development policies of the EU and on third countries. In April in an advisory opinion with a great majority of votes the committee Women's Rights and Gender Equality had recommended to extend or specify the motion for a resolution. In EU countries child marriages and forced marriages are a big problem as well, while it is not prohibited as such in a sufficient number of countries. The Committee Women's Rights also wanted more specification of the rules with respect to safe assistance with abortions, inclusion of forced marriages in the definition of human trafficking in EU Directive 2011/36/EU. This turned out to go too far. Neither the advisory opinion nor the motion or the final resolution contained the concept of marital captivity. In the resolution that was passed a number of references to forced marriage were included as a ground for protection in relation to asylum and the protection of women who had been married off.

When asked Goerens confirmed to be prepared to include recommendations from the hearing (in part) in his notes to the motion in the plenary session of the European Parliament.

1 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2018-0292+0+DOC+PDF+V0//NL>



In 2015 Kanko published the book *La deuxième moitié – Plaidoyer pour un nouveau féminisme* [The second half - plea for a new feminism]. This book contains a chapter about marital captivity with an interview with Shirin Musa and with the girl she helped escape from Somalia (from a forced marriage). This proves Kanko's interest in the subject of the hearing.

She started telling about her own childhood in Burkina Faso where her father was deputy director of the high school. The staff room was one of the most beautiful rooms of the building. You only saw men there. Just like other people Kanko thought this was completely normal until one time she saw a woman there in traditional African clothes. This turned out to be the new English teacher. She became a role model for Kanko and her female friends until she spoiled everything by getting married, because the girls were convinced that they would never get married – why would you voluntarily work for free for someone else and in fact be a daily slave? It took a while before Kanko realised that it was not the marriage itself that was the issue but power. If the teacher herself could decide to marry and whom she would marry, if she could decide how many children she wanted, which contraceptives to use and so on, it became a different story. Kanko used this and other examples to show how difficult it is to change your mindset, even if you long for freedom. In order to do this you have to exchange experiences. Then you gradually discover that it is not in order what is happening in your life in accordance with other people's plans: circumcision, forced marriage, having to accept a second wife, that your daughters cannot inherit, that you cannot own a house, even if you have your own income.

The next step is to fight together to share power, at home, over our own bodies. Sharing power by recognising that we do not know that we deny so much freedom – you could call it the school for freedom. The French writer Benoîte Groult phrases it as follows: you cannot take freedom, you can only learn it – each day anew, step by step and in most cases with a lot of pain. Women such as Shirin Musa and I have a lot of pain, but from this pain we also derive the strength to fight for change. The hearing today is an important moment. The first part of the dream that Shirin told me about years ago has come true. Let us proceed together and investigate what the mindset is of women who experience the problems that we are discussing today and how they can overcome their internal barriers.

## Discussion

From the room **Benedicta Deogratias**, who studies the problems of marital captivity, pointed out that in 2002 during the long run-up to the realisation of the Istanbul Convention the Council of **Ministers of the Council of Europe made a recommendation to the member states about the protection of women against violence**. She asked Maria Vilar whether a similar form of 'soft law' could be used to render the definition of forced marriage and of violence against women applicable to marital captivity as well.

**Maria Vilar** thinks it is worthwhile to investigate this further, even though it comes under the responsibility of a different department of the Directorate Justice of the European Committee. Perhaps even the Council of Ministers of the EU could issue such a statement or recommendation.

**Asita Kanko** calls on ALDE to address the subject of marital captivity more widely in the European Parliament, particularly with other groups and factions, as a problem that surpasses the parties and should be approached collectively.

## Panel 3: Towards viable solutions

### Professor Ruth Halperin-Kaddari (Bar-Ilan University, Ramat Gan, Israel, vice-president CEDAW, supervisory Committee UN Women's Treaty)

Marital captivity is a violation of human rights. Because most countries have ratified the major human rights treaties they are obliged to address the problem of marital captivity. NGOs can play a part by raising these problems with the supervisory committees. This is a form of 'soft law' as well. In the dialogue of the CEDAW Committee with the states that ratified the UN Women's treaty discrimination of women in family law is always addressed. Halperin-Kaddari often poses critical questions about this topic, but also gives compliments when progress has been made. For example she complimented the Dutch government in 2016 when she learned that refusing a religious divorce or marital captivity is punishable in The Netherlands under the same law as forced marriages. At this occasion she also met Shirin Musa of Femmes for Freedom. NGOs also have to inform other members of the CEDAW Committee about these problems.



According to van der Velden previous speakers have shown how states by means of the appropriate preventative and repressive measures can decrease the number of women in marital captivity. Because of the European rules about subsidiarity and proportionality the EU cannot do a lot with respect to prevention and repression but there is another way in which the EU can contribute towards a solution to the problem or at least towards ameliorating the consequences.

Van der Velden indicated the additional problems for divorced women that arise if another country does not recognise her divorce that was pronounced in the country where she lives. In that second country a second divorce is required which in most cases is impossible without the cooperation of the (ex) husband. This is because in many cases family law in those countries is based on religion. If the second divorce has not been obtained divorced women can be faced with unpleasant situations if she visits such a country – she can be forced to return to her ex-husband or his relatives, she can be prosecuted because of abandonment if she refuses to return and if she remarries she can be faced with a court case because of adultery.

Van der Velden reminded us that this was the reason that approximately 25 years ago many divorced Dutch women of Moroccan origin did not dare to visit their Moroccan relatives. In regular consultation among the Ministries of Justice of both countries several practical solutions have been drawn up to improve the position of these women and to simplify the mutual recognition of marriage and divorce. The Netherlands has frequently pointed out to Morocco that solving these problems concerning human rights would bring political, social

and economic advantages. Other EU countries had a similar approach as well, while organisations for women's rights in Morocco themselves advocated legal equality. To the surprise of many in 2004 new family law was adopted in Morocco which gave men and women equal rights and which provides for simple procedures for mutual recognition of marriage and divorce. One of the members of the Moroccan Codification Commission later clarified that the new family law should be regarded as a response to all the criticism. According to van der Velden the lesson that can be learnt from the Moroccan example is that states that allow marital captivity and other forms of discrimination of women should continually be reminded of this fact. On the one hand the EU and EU countries should draw attention to the inconsistency with human rights treaties and on the other hand to the political, social and economic advantages that changes in family law will bring. It will take a lot of time before this strategy will lead to results, but with courage and patience the EU and EU member states will succeed, according to the conviction of van der Velden.

## Pooyan Tamimi Arab (anthropologist employed by Utrecht University)



Solutions for the problems of marital captivity are not simple nor are they universally applicable because the legislative, religious and cultural contexts show considerable differences. According to Tamimi Arab it is therefore of importance to be clear about the principle that underlies the solutions that are sought. At the centre lies the interpretation of the concepts secular and secularism or libertinism, concepts that in themselves have no unambiguous definition and therefore are probably not or hardly at all used in legal and constitutional language. In the case of marital captivity it is inevitable to focus on the distinction secular-religious because governments in which there is a separation of church and state still have to decide to what extent they want to intervene in religious marriages.

Tamimi Arab proposes a working definition derived from the philosopher Akeel Bilgrami: in a religious, pluriform society secularism requires that every religion can be experienced in freedom and is treated equally, except when the practice of a religion is inconsistent with the prevailing ideals of the state or the society. In these cases the ideals should prevail over the religious practices. In many cases the ideals of a state or community are translated into practice in the form of fundamental human rights and constitutional obligations. This interpretation of secularism is not anti-religious but offers the option to correct those religious practices that are in conflict with human rights. In the year 2018 this certainly has to be realised with marital captivity.

In the view of Tamimi Arab it is important to emphasise the incompatibility of marital captivity with the universal ideals of the EU; he pointed out this incompatibility by emphasising the cultural sensitivities of majorities in the population. Particularly because we live in a time during which many Islamic practices are put up for open discussion, including the building of mosques, wearing veils, circumcision of boys and ritual slaughter. Therefore Tamimi Arab regrets the argumentation of the European Court of Human Rights for maintaining the prohibition of the face-covering veil in France. The objective of universal gender equality was explicitly rejected by the Court, but the wide margin of discretion to which the French state is entitled and the argument that the majority of the French population is uncomfortable with this practice of a minority were honoured.

Tamimi Arab thinks that a neutral viewpoint in the EU concerning marital captivity because of the xenophobic backlash is untenable because it does not reflect the extensive diversity among European Muslims and it ignores the universality of the ideals from the UN Women's Treaty. In view of the universal ideals Europe can legitimise the action against marital captivity outside of Europe, and in some cases where European citizens are concerned, Europe can enforce cooperation towards the termination of marital captivity.

## Leontine Bijleveld (president Association for Women and Law ('Clara Wichmann'))



The Association for Women and Law [Vrouw en Recht (VVR)] aims at improving the legal status of women and offers a network for legal experts and people who are interested in women and law. This is a very wide area which includes family law and international law as well. According to Bijleveld the Association for Women and Law only came into contact with the problem of marital captivity through the activities of one of her members, Shirin Musa. At that time the working group Personal Status Law and Family Law from the Association for Women and Law subsequently started addressing this subject. The Association for Women and Law wholeheartedly contributed towards the foundation of Femmes for Freedom.

The Association for Women and Law tries to contribute towards the NGO shadow reports for the UN human rights treaties, at any rate to those reports that concern the UN Women's Treaty. This resulted in further questions from the CEDAW Committee in the List of Issues & Questions about the government policy with respect to marital captivity. During the most recent reporting cycle the Association for Women and Law succeeded in having Musa from FFF, through a special scholarship, participate in the NGO activities during the CEDAW session where the Dutch governmental report was discussed with the CEDAW Committee. There Musa and Ms Halperin-Kaddari met for the first time. This also explains the presence of the latter here at this hearing.

If time permits – the Association for Women and Law is a voluntary organisation – we also try to address other human rights treaties. For example the Association for Women and Law presented the problems of marital captivity for the shadow report from the UN about the anti-torture treaty. So far this has not had a lot of result, but these matters require patience and perseverance in order to realise improvements for women through the UN Human Rights Committee. Results have been achieved in other areas – for example a complaint made by a female asylum seeker in The Netherlands who had fled because she feared female genital mutilation but still was denied a residence permit in our country was declared well-founded by the Committee against Torture. The Netherlands was obliged to grant her a residence permit. Recently a similar complaint was submitted at CEDAW. In this case the government issued a residence permit while the complaints procedure was still going on.

At this time the Association for Women and Law is involved in the shadow report concerning the Istanbul treaty. In cooperation with FFF the Association for Women and Law is drawing up texts and recommendations about the problems of marital captivity.

In the discussion that followed the final presentation various conclusions and recommendations were drawn up.

## Conclusions and recommendations

- The EU and its member states have to recognise marital captivity as a form of discrimination and of violence against women. The EU has to encourage its member states to include marital captivity in the definition of forced marriage and thus render it a criminal offence.
- EU member states have to exchange good experiences concerning the prevention of marital captivity, the protection of victims of marital captivity and ways to end religious marriages;
- The EU and its member states have to establish national steering groups who work for EU citizens who have fallen victim to forced marriages and marital captivity abroad; these steering groups can offer legal support, assistance to enhance honest proceedings, enter into a dialogue with relevant third countries and local organisations in these areas, such as 'She Decides Europe';
- The EU member states can enhance the scope of two EU regulations in such a way that they include religious marriages and marital captivity. On the one hand this concerns the regulation Brussels IIa concerning conflict in issues of family law among member states (specifically those concerning divorce, parental authority and international child abduction) and on the other hand the regulation Rome II concerning conflicting legislation about non-contractual obligations;
- The EU member states can start imposing fines for husbands who deny women the right to divorce and make it possible to prosecute husbands who keep refusing to cooperate;
- The EU can encourage member states to extend the jurisdiction to free women from the state of marital captivity caused by the reluctance of their (ex-) partner who lives abroad;
- The EU can encourage member states to have marital captivity included in the Recommendation of the Committee of Ministers of the Council of Europe concerning the protection of women from violence (Rec. 2002 5);
- NGOs have to utilise all the relevant Human Rights Treaties and their supervisory organisations to combat marital captivity;
- The EU and the European Parliament have to raise more awareness on the phenomenon of marital captivity and in reports and resolutions refer to the injustice of marital captivity;
- Religious communities should initiate internal discussions about marital captivity, discuss solutions to this problem and raise awareness among women about possible consequences of a religious marriage; women should expressly be involved in these discussions;
- EU member states should give a vote to women and girls who have fallen victim to the phenomenon of marital captivity and educate them from a young age about the prevention and possible consequences of a religious, foreign or unregistered marriage, for example by including this information in the school curriculum;
- At several occasions the European Parliament has called on the European Committee to initiate legislation concerning all forms of violence against women and against domestic violence; if the European Parliament makes similar appeals in future, marital captivity has to be included as a specific form of violence against women.

# Appendix – Relevant Treaty articles

## European Treaty for the protection of Human Rights and fundamental freedoms (ECHR, 1950):

- **Article 8 (1):** Everyone has the right to respect for his private and family life, his home and his correspondence.
- **Article 12:** Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

The ECHR has been incorporated in EU legislation by means of Article 6.3 of the Treaty concerning the European Union.

## Charter of the fundamental rights of the EU

- **Article 9:** The right to marry and the right to found a family.

## Treaty concerning the functioning of the European Union

- **Articles 81 and 83** – both from the chapter JUDICIAL COOPERATION IN CIVIL MATTERS

- **Article 81**

3 By way of derogation from section 2 measures concerning family law with cross-border consequences will be determined by the Council, which decides in accordance with a special legislative procedure. The Council decides with unanimity of votes, after consultation with the European Parliament.

On a proposal by the Committee the Council may decide concerning which aspects of family law with cross-border consequences actions may be determined in accordance with the customary legislative procedures. The Council decides with unanimity of votes, after consultation with the European Parliament.

- **Article 83**

1. The European Parliament and the Council can determine by decree in accordance with the customary legislative procedure minimum regulations concerning the determination of criminal offences and sanctions in relation to forms of particularly serious crime with a cross-border dimension that result from the nature or the consequences of these criminal offences or from a special necessity to combat these on a communal basis.

This concerns the following forms of crime: terrorism, human trafficking and sexual exploitation of women and children, illegal drugs trade, illegal arms trade, money laundering, corruption, forfeiting payment instruments, computer crime and organised crime.

Depending on the developments in crime the Council can adopt a decision determining which other forms of crime meet the criteria mentioned in this section. The Council decides with unanimity of votes after approval by the European Parliament.

2. If mutual adjustment of the legal and administrative provisions of the member states in the area of criminal law turns out to be necessary for an effective implementation of the policy of the Union in an area in which harmonisation measures have been determined, by decree minimum provisions can be determined with respect to the determination of criminal offences and the sanctions in the area concerned. Notwithstanding article 76 these directives are determined in accordance with customary or special legislative procedures that are the same as the procedures for the determination of the harmonisation measures concerned.

3. When a member of the Council is of the opinion that a directive, as referred to in the sections 1 and 2 would detract from fundamental aspects of its criminal law system, he can request that the draft be submitted to the European Council. In this case the customary legislative procedures are suspended. After discussion, and in case of consensus, the European Council sends the draft back to the Council within four months after that suspension; the Council then terminates the suspension of the customary legislative procedure.

Within the same term, in the case of a difference of opinion and if at least nine member states wish to enter into a closer cooperation on the basis of the draft directive concerned, they inform the European Parliament, the Council and the Commission of this. In this case the authorisation as referred to in the articles 20, section 2, of the Treaty concerning the European Union and 329, Section 1 of this Treaty is deemed to be granted and the provisions concerning closer cooperation apply.

## **Treaty of the Council of Europe concerning prevention of and the fight against violence against women and domestic violence (Istanbul Convention 2011)**

- **Article 37: Forced marriage**
  1. Parties take legislative or other measures that are required to guarantee that intentional behaviour to force an adult or a child to enter into a marriage will be made punishable.
  2. Parties take legislative or other measures that are required to guarantee that intentional behaviour to lure an adult or a child to the territory of a party or state not being the party or state where he or she lives with the intention to force this adult or this child to enter into a marriage will be made punishable.

## **Treaty concerning the eradication of all forms of discrimination of women (UN Women's treaty 1979)**

- **Article 16**
  1. The States that are party to this treaty take all the appropriate measures to eradicate discrimination of women in all affairs concerning marriage and family relations and insure in particular, based on the equality of man and wife:
    - (a) equal rights to enter into a marriage;
    - (b) equal rights to choose a partner in freedom and to only enter into a marriage with free and complete consent;
    - (c) equal rights and responsibilities during the marriage and at the dissolution thereof;
    - [d... up to and including h]
  2. Engagements and marriages of children cannot have legal consequences and all necessary measures including legislative measures should be taken to determine a minimum age for entering into a marriage and to make obligatory the registration of marriages in an official register.



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