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Finding solutions for marital captivity

Report[1]
Committee on Equality and Non-Discrimination
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Summary

Marital captivity occurs when a person having entered into a civil or religious marriage or who is living in a marital situation wishes to end it, but finds that they are unable to do so. Its causes may be multiple, including fear of violence; fear of losing custody of or contact with one's children; family or community pressure; or lack of financial autonomy. The phenomenon is little known but is estimated to affect tens of thousands of people – mostly women – in Europe every year.

Being trapped in a marriage can lead to a wide range of violations of rights protected under the European Convention on Human Rights as well as key provisions of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). The trapped spouse often cannot start a new relationship or remarry; they may be prevented from travelling; and they may encounter serious violence and threats, including so-called "honour"-based violence. There is a pressing need to tackle these issues effectively.

Many solutions to marital captivity are already being actively explored by civil society as well as by some States. Bearing in mind the human rights issues at stake, all States must intensify their efforts to raise awareness of this issue and take measures to prevent marital captivity and ensure that effective solutions are readily accessible to victims wherever it occurs.

1. Reference to committee: Doc. 15193, Reference 4554 of 25 January 2020.

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A. Draft resolution[2]

1. Marital captivity arises when a person having entered into a marriage wishes to end it, but finds that they are unable to do so, either legally or in the eyes of their community. It may concern cases where a marriage has been concluded and is recognised under the civil law in force in the country where the trapped spouse lives, as well as marital situations that are not recognised under the applicable civil law. The phenomenon is little known but is estimated to affect tens of thousands of people – mostly women – in Europe every year.

2. Situations of marital captivity violate the human rights of those that they affect. States therefore have a duty to combat this phenomenon actively.

3. Marital captivity is an infringement on the trapped spouse's personal autonomy, a basic principle of human rights law. Persons trapped in marital captivity lose their independence and their right to self-determination. They often cannot start a new relationship or remarry, especially where they may be considered by their community to have committed adultery or bigamy. They may be prevented from travelling, in particular if their marriage continues to have legal effect in a country where the husband's approval is necessary to renew the wife's passport. The impact on children can also be devastating, as they grow up in an unsafe and unstable environment. Moreover, a person who tries to put an end to this situation may find themselves alone and isolated from their own community, and may encounter serious violence and threats. These can include the risk of so-called "honour"-based violence, which is a particularly egregious offence and prohibited under international law.

4. The human rights issues at stake are wide-ranging. Marital captivity may for example violate Articles 5 (right to liberty and security of the person), 8 (right to private and family life), 12 (right to marry) and 14 (prohibition on discrimination) of the European Convention on Human Rights (ETS No. 5), as well as rights codified in the European Social Charter (Revised) (ETS No. 163) and in the United Nations International Covenant on Economic, Social and Cultural Rights.

5. Although it is not expressly prohibited under the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210, "Istanbul Convention"), marital captivity may also violate a wide range of provisions under this convention. Moreover, many of the measures that States are called upon to take under the Istanbul Convention in order to prevent, prosecute and provide protection from all forms of violence against women and domestic violence also provide highly effective means of combating marital captivity.

6. To tackle marital captivity effectively and put an end to the human rights violations that it causes, States must address the full scope of situations potentially concerned. These include cases where one party to a civil marriage is unable to put an end to it, for example due to obstacles to obtaining a civil law divorce, because of a conflict of laws between countries or risk of losing residency status in the country where they live, or because of coercion (notably psychological, physical or economic) exerted by the other party. They may also include cases where a religious or customary marriage has been concluded (with or without a civil marriage), which one party is unable to end due to religious or customary law or practices.

7. The Parliamentary Assembly welcomes the fact that some States have begun to take measures to strengthen their legislation in this field, and that many measures taken to implement the Istanbul Convention may also provide solutions to some aspects of cases of marital captivity. Civil society organisations, notably women's rights organisations, organisations working with migrant women and feminist religious organisations, have also identified effective strategies for preventing marital captivity and means of responding to the needs of women unable to leave their marriage or marital situation.

8. Awareness of these important human rights issues remains too low, however, and there is a pressing need to take measures to prevent marital captivity and ensure that effective solutions are readily accessible to victims wherever it occurs.

9. In the light of these considerations, the Assembly invites Council of Europe member States as well as observer States and States whose parliaments enjoy observer or partner for democracy status with the Assembly:

9.1. as regards strengthening the law in this area and its implementation, to:

9.1.1. ratify and implement the Istanbul Convention, if they have not yet done so;

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2. Draft resolution adopted unanimously by the committee on 13 October 2022.

9.1.2. refrain from depositing reservations to Article 59 of the Istanbul Convention, and withdraw any reservations already deposited;

9.1.3. ensure that putting an end to a situation of marital captivity will not cause the trapped spouse to lose their residency status;

9.1.4. step up their efforts and diplomacy to prevent transnational situations of marital captivity from arising due to inconsistencies between laws;

9.1.5. strengthen wherever necessary the criminal law provisions applicable to coercive or controlling behaviour, as well as those applicable to other forms of psychological, economic and physical coercion, in order to ensure that they effectively apply to all cases of marital captivity, whether or not there is a legally recognised marriage and including where the spouses no longer live together;

9.1.6. train police and legal professionals to recognise situations of marital captivity and to use these provisions effectively;

9.1.7. ensure that perpetrators of forms of marital captivity covered by criminal law are prosecuted, in order to put an end to impunity in this area;

9.1.8. ensure that no-fault civil divorce is available to everyone and that civil divorce proceedings are accessible to everyone, including by making legal aid available to all persons in situations of marital captivity, regardless of their residency status;

9.1.9. explore means of using the legal system to combine civil divorce proceedings with an obligation to co-operate with religious divorce proceedings, without placing the trapped spouse at risk of criminal proceedings if they seek to use these provisions;

9.2. as regards preventive measures, to:

9.2.1. work together with religious and other communities, using a bottom-up, internormative approach and involving interdisciplinary networks of experts as well as activists already working within these communities to combat marital captivity, in order to overcome religious attitudes and customary practices that favour marital captivity;

9.2.2. actively support the efforts of religious communities and organisations seeking to promote the use of prenuptial contracts to prevent situations of marital captivity from arising;

9.2.3. ensure that women migrating to a country to accompany their husband or in order to marry are fully informed, before they leave their country of origin and in their own language, as to their rights in the destination country and about how to seek support if necessary;

9.2.4. support the activities of civil society organisations working to reach out to and empower women most at risk of marital captivity, notably women who may be living in isolation from the broader community and migrant women whose residency status may be at risk if they put an end to their marriage;

9.2.5. run awareness-raising campaigns on marital captivity and make information readily accessible in all necessary languages about what marital captivity is and the solutions that exist;

9.3. as regards measures to protect victims, to ensure that the full range of support measures set out in the Istanbul Convention is available to persons seeking to escape situations of marital captivity, and in this context, to ensure in particular that:

9.3.1. adequate structures are in place to assist victims of marital captivity, including telephone helplines for urgent calls and accommodation and shelters for women and girls who have had to leave their home;

9.3.2. support provided to victims of marital captivity effectively guarantees their financial security and independence;

9.3.3. victims of marital captivity do not lose their residency status but are granted autonomous residency permits;

9.4. as regards broader policy measures, to:

9.4.1. include the fight against marital captivity in their national policies and practices to prevent and combat violence against women and girls and domestic violence;

9.4.2. collect accurate and comparable data on marital captivity, broken down by gender and age, and carry out detailed studies on the causes and frequency of these practices and on the associated risk factors.

10. The Assembly expresses its support for civil society organisations working to raise awareness of and combat marital captivity and calls for these organisations to be given stable and long-term backing, including financial resources.

B. Explanatory memorandum by Ms Margreet De Boer, rapporteur

1. Introduction

1. What happens when a person who had entered willingly into a marriage wishes to end it, but finds that they are unable to do so either legally or in the eyes of their community? Even though civil divorce is provided for by law in all Council of Europe member States, in many of them, women – and sometimes men – may experience such a situation, known as marital captivity.

2. Marital captivity is an infringement on the trapped spouse's personal autonomy, a basic principle of human rights law. Persons (most frequently women) trapped in marital captivity lose their independence and their right to self-determination. They often cannot start a new relationship or remarry, as they may be considered by their community to have committed adultery or bigamy, which may attract drastic consequences for them. The impact on children may also be devastating, as they grow up in an unsafe and unstable environment.[3]

3. A person who tries to put an end to this situation may find themselves alone and isolated from their own community, and may encounter serious violence and threats. These can include the risk of "honour"-based violence – which may constitute a major barrier to escaping a harmful marriage and seeking divorce. The fear, stress and social consequences caused by marital captivity prompt some women to attempt suicide, some resulting in fatal outcome.[4]

4. Marital captivity raises many issues under Articles 5 (right to liberty and security of the person), 8 (right to private and family life), 12 (right to marry) and 14 (prohibition on discrimination) of the European Convention on Human Rights (ETS No. 5), as well as rights codified in the European Social Charter (revised) (ETS No. 163) and in the United Nations International Covenant on Economic, Social and Cultural Rights.

5. Because there is as yet little awareness of this phenomenon, it is difficult to estimate its scale, as shown by a study carried out in 2014 which estimated that in the Netherlands, between 447 and 1 687 cases of marital captivity had occurred in the years 2011-2012.[5] This would be equivalent to anywhere between 18 000 and 68 000 cases of marital captivity occurring across Council of Europe member States each year[6] – together with all the human rights violations that such situations may entail.

6. These concerns prompted me to initiate the motion for a resolution which forms the basis of this report (Doc. 15193). In line with this motion, and following on from Resolution 2233 (2018) "Forced marriage in Europe" and Resolution 2395 (2021) "Strengthening the fight against so-called 'honour' crimes" of the Parliamentary Assembly, I aim through this report to bring to light the wide range of situations that can lead to marital captivity in Council of Europe member States, and to devise recommendations as to how to effectively address them.

7. As part of my work on this report, on 9-10 March 2022 I carried out a fact-finding visit to the Netherlands, which is (so far) one of the rare States in Europe where the authorities have begun to come to grips with the realities of marital captivity and to reflect on solutions. I would like to thank here the Dutch Parliament, institutions and authorities, as well as the academics and members of civil society whom I met during the visit, and who provided highly useful background to my work. In addition, on 1 July 2022, the Parliamentary Network Women Free from Violence held an important webinar entitled "Finding solutions to marital captivity". I would like to thank the speakers, whose contributions and different perspectives were invaluable to my work. I have integrated the key conclusions from the visit and the webinar throughout my report.[7]

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3. Rutten, S. & Kruiniger-van Maanen, P. (2018), Niet langer geketend aan het huwelijk*: Juridische instrumenten die huwelijkse gevangenschap kunnen voorkomen of oplossen* [No longer chained to marriage: Legal instruments that can prevent or resolve marital captivity], Maastricht University, Chapter 2.6, Consequences of marital captivity.
4. Renew Europe, "Injustice of marital captivity", 29 June 2018.
5. Eliane Smits van Waesberghe et al. (2014), *Zo zijn we niet getrouwd, Een onderzoek naar omvang en aard van huwelijksdwang, achterlating en huwelijkse gevangenschap* [That was not what we agreed on. An investigation into the scope and nature of forced marriage, abandonment and marital captivity], Utrecht: Verwey-Jonker Instituut, pp.7-9, cited in Netherlands Institute for Human Rights (2018), Written contribution to the Group of Experts on Action against Violence against Women and Domestic Violence, p. 24. www.unfpa.org/data/world-population-dashboard
6. Based on overall population figures for the European Union published by Eurostat on 11 July 2022 and, for non-EU Council of Europe member States as well as specifically for the Netherlands, on the UN World Population Dashboard.
7. The full programme of the fact-finding visit is available in document AS/Ega/Inf(2022)11. A summary of the webinar can be found in document AS/Ega/Inf(2022)23.

2. Marital captivity and forced marriage: links and differences

8. Forced marriage, defined by the Assembly as "the union of two persons, at least one of whom has not given their full and free consent to the marriage", has long been recognised as a breach of human rights. The Assembly also considers child marriage, or "the union of two persons, at least one of whom is under 18 years of age", to be a form of forced marriage, as a child cannot be considered to have expressed full, free and informed consent to a marriage.[8] These definitions, which are in keeping with understandings of forced marriage in international law, focus on the lack of consent of at least one of the parties at the time at which they enter into a marriage.

9. Assembly Resolution 2233 (2018) noted that a marriage in which at least one of the parties is not free to put an end to the marriage or to leave their spouse could be considered to be a forced marriage – and thus, also, a form of violence against women – but did not explore in depth the legal or human rights ramifications of this reality. Yet, as already mentioned, marital captivity can give rise to many serious human rights violations.

10. Article 37 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210, "Istanbul Convention") requires States to make forced marriage a criminal offence. It defines forced marriage as "the intentional conduct of forcing an adult or a child to enter into a marriage". The extent to which this and other provisions of the Istanbul Convention may provide solutions to marital captivity – including, *inter alia*, its Article 42, which covers so-called "honour"-related crimes – is examined in more depth in chapter 7 below.

3. Situations that can give rise to marital captivity

11. Research conducted in, *inter alia*, the Netherlands and the United Kingdom indicates that there is a wide variety of situations of marital captivity. Some of these may involve intentional conduct on the part of the other party to the marriage or of other family members, and could be considered as forms of forced marriage, as noted in Resolution 2233 (2018). Other situations of marital captivity may result simply from inadequate legal provisions, or inconsistencies between different national legal systems.

12. To tackle marital captivity effectively, it is essential to capture the full scope of situations that may be concerned. Dutch researchers Susan Rutten and Pauline Kruiniger have conducted a systematic analysis of these situations from the perspective of the law, identifying two main forms of marital captivity, with in each case two sub-forms as outlined in chapters 3.1 and 3.2 below.[9]

13. In all cases, marital captivity can have severe detrimental consequences for the trapped spouse, violating a broad spectrum of human rights. First and foremost, a partner who refuses to release their spouse from a marital situation often does so as a means of controlling their spouse. Practical support measures are crucial to enable the trapped spouse to regain their autonomy, and may be similar across a variety of circumstances. These are discussed in chapter 8.4. However, different legal situations may require different avenues of legal redress. I examine these issues in chapter 8.3.

3.1. Trapped in a legally recognised marriage

14. In the first main form of marital captivity, the person concerned is trapped in a legally valid marriage. This form of marital captivity has two sub-forms:

– first, the person may be trapped in a civil marriage that they are entitled by law to terminate (by divorcing or having the marriage annulled by a civil court), but they find themselves unable to do so in practice, for example because they face pressure, coercion or exclusion from their family or community. There is no legal impediment to civil divorce in such a case, but the person is unable to benefit from the laws permitting it;

– second, international private law issues may come into play. For example, the person may have been married abroad (country A) and had their marriage subsequently recognised in another country, where they live (country B). They may later divorce under the law of country B, but find that the divorce is not recognised in country A. They thus remain married according to the law of country A. In such a case,

8. Resolution 2233 (2018) "Forced marriage in Europe", paragraph 3.
9. See Rutten, S. & Kruiniger-van Maanen, P. (2018), Chapter 2.4, Forms of marital captivity.

the trapped spouse may face specific additional human rights violations: for example, a wife may find herself unable to exercise her freedom of movement because her husband under the law of the country of origin (country A) refuses to give his permission for her to renew the passport issued by that country.

3.2. Trapped in a marital situation not recognised by law

15. In the second main form of marital captivity, the person is trapped in a marital situation that is not recognised by law but which is (still) considered valid within their community and which affects many rights and aspects of their daily life. This notably concerns religious and customary marriages, and can *inter alia* affect the possibility of remarrying under religious law. Again, two sub-forms can be identified:

– in the first case, the person's religious or customary marriage was never legally recognised. This may be because they did not also conclude a civil marriage or registered partnership (in a State where this is required)[10] or because their religious or customary marriage was never officially registered (for example, in a State where civil marriage is not compulsory but religious marriages must be registered in accordance with the law in order to have legal effect);[11]

– in the second case, the person did enter into a civil marriage and later divorced under civil law, but the religious or customary marriage continues to be considered to exist and to produce effects in their private life. This could for example be the case for a person married according to Roman Catholic or Jewish Orthodox rites as well as in accordance with civil law, and later divorced under civil law.

16. The above analysis shows the complexity of the situations that States must address in order to prevent and tackle marital captivity comprehensively and effectively, and put an end to the human rights violations that it entails.

4. Religion and marital captivity

17. As was stressed by Shirin Musa, Director of Femmes for Freedom, at our webinar of 1 July 2022, religion continues to strongly influence attitudes to divorce. Some situations of marital captivity are closely related to notions of religious marriage: certain interpretations of religious laws or texts do not allow for divorce, or they require the permission of the other (usually male) partner. There may also be rules in place that limit a spouse's (and in particular a wife's) capacity to seek divorce. I have dealt briefly with some examples below.

18. It is of course crucial to emphasise here that religious laws and practices may be applied in different ways across different communities within a single religion. The broad outlines given below should not be understood as a definitive statement about practices in any of the religions mentioned. Rather, they aim to give an indication of some of the situations in which marital captivity can arise.

4.1. Christian marriages

19. The Roman Catholic Church does not recognise divorce. A couple married in the Roman Catholic Church and in accordance with civil law may obtain a civil divorce, but neither partner will be allowed to remarry in that church unless their first marriage has been declared null and void.

20. During my fact-finding visit to the Netherlands, a number of my interlocutors also mentioned Christian religious communities in the Dutch Bible Belt as places where marital captivity may arise. Isolated, closed or inward-looking religious communities create a context where women may find themselves under considerable pressure to remain in their marriage, even if it is abusive. Leaving their marriage may thus also mean renouncing their religious community. This can create a strong impediment to leaving, which will be even stronger if they have little access to information about their rights or about support available to them.

4.2. Jewish marriages and the "get"

21. Under Jewish law, a religious divorce can only be finalised if the husband gives his wife a document called a "get". This gives the husband the power to prevent the religious divorce, maintaining power and control over his wife even if a civil divorce has been decreed. The term "agunah", or "chained wife", is often used to refer to a woman whose husband refuses to give her the get. A wife may also refuse to accept a get,

10. Such as the Netherlands.
11. Such as the United Kingdom.

but only in a very limited set of circumstances. In an acrimonious divorce, the balance of power therefore strongly favours the husband, who may prevent the religious divorce altogether or delay it for long periods, demanding high sums of money in exchange for giving the get, or using custody arrangements as leverage, for example.[12]

22. Keshet Starr, executive director for the Organization for the Resolution of Agunot, a New-York based NGO that seeks to eliminate abuse from the Jewish divorce process,[13] says with respect to such cases, "When people first hear about this issue, they think, well why doesn't the woman just walk away? After all, if she's already divorced in secular court, there's nothing stopping her from legally remarrying. But leaving a religious community is a bigger deal than people think: it's giving up your entire way of looking at the world, your systems of meaning, your social and professional networks, your family relationships. It's an enormous cost. For someone to be faced with the options of either having this untenable situation [of remaining in an unwanted and/or harmful marital situation] or walking away from [their] community, those are pretty terrible options."[14]

4.3. Islamic marriages

23. Under Islamic law, a man can unilaterally repudiate his wife (*talaq*), with or without her consent and without needing to provide valid reasons. Divorce can also be obtained by mutual consent (*khul*), namely the offer and acceptance of divorce. This often involves compensation, such as repayment of a dowry, payment of some other financial sum, or waiving custodial rights or remuneration for childcare. Where the husband is not willing to proceed via *talaq* or *khul*, the wife may petition an Islamic court or Sharia council for divorce (*tatliq*) or annulment (*faskh*) of the marriage. There is a significant power imbalance between men and women: a husband can freely repudiate his wife whereas a wife needs her husband's co-operation to obtain divorce by mutual consent or may have to engage in costly proceedings in order to procure a divorce – which may only be available to her on limited grounds, depending on the school of Islam followed.[15]

24. As noted earlier, where the marriage has been concluded in a country where Sharia is integrated in the legal system, a secular divorce obtained in another country may not be recognised in the country of origin, meaning that the partners will continue to be considered as married there. But even without any transnational aspects, in communities where high importance is accorded to religious practices, a civil divorce may not be recognised by a religious community as having dissolved a religious marriage.[16] As was pointed out during my fact-finding visit, a woman whose Islamic marriage has not been dissolved and who has entered into a new relationship may be perceived as adulterous and may be at risk of harm if she travels to certain countries, for example to visit family members. This risk was also emphasised during the webinar of 1 July 2022 by Kim Lecoyer, researcher and lecturer at the Centre for Family Studies of Odisee University of Applied Sciences, post-doctoral researcher at the Human Rights Centre, University of Ghent, and Chair of KARAMAH EU: Muslim Women Lawyers for Human Rights, who presented the outcomes of the social and legal research that she has conducted into the family life of Belgian Muslim women, using an intersectional perspective.

25. An independent review of Sharia councils in England and Wales found in 2018 that over 90% of people turning to these councils were women seeking an Islamic divorce. In many cases this was because the couple had only married religiously. Their marriage had never been civilly registered and therefore the woman could not seek a civil divorce.[17] Sharia councils have no legal status and no binding authority under civil law in the United Kingdom but they may constitute the only avenue for women who are seeking to put an end to their Islamic marriage in the eyes of their religious community, and whose husband is unco-operative. The review found that discriminatory practices (against women) existed in some of these councils. At the same time, it considered that such councils should not be banned, as they were fulfilling a need in some Muslim communities. It recommended a number of actions that should be taken to align Islamic marriage with Christian and Jewish marriage in UK law and to raise awareness and promote cultural change within the communities concerned about women's rights and civil law, especially in the field of marriage and divorce.

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12. Chesler C., "'Unchain your wife': the Orthodox women shining a light on 'get' refusal", *The Guardian*, 4 June 2021; see also Jewish Orthodox Feminist Alliance, "Guide to Jewish Divorce and the Beit Din System", 2022 version.
13. www.getora.org/about-us.
14. "'Unchain your wife': the Orthodox women shining a light on 'get' refusal", op. cit.
15. Rutten, S. & Kruiniger-van Maanen, P. (2018), Chapter 2.5, Causes of marital captivity; Deogratias B. (2020), *Trapped in a Religious Marriage: A human rights perspective on the phenomenon of marital captivity*, Cambridge, Intersentia, Chapter 2.3.1.
16. Deogratias B. (2020), op. cit., Chapter 2.3.2.
17. Independent Review into the application of Sharia Law in England and Wales, February 2018, p. 12, cited in Fairbairne C., Islamic marriage and divorce in England and Wales, House of Commons Library Briefing Paper no. 08747, 18 February 2020, p. 10. See also pp. 4-6 of the Independent Review.

4.4. Hindu marriages

26. Because marriage is a sacrament in Hinduism and is considered to bring about spiritual, physical and social transformation of the spouses, it is often said to be indissoluble. Divorce does occur within some Hindu communities, although again, women may invoke fewer grounds for divorce or separation than men. The general understanding of Hindu marriage as indissoluble, and in some cases the lack of divorce rites, may however create situations of marital captivity, either because a couple that obtains a civil divorce is not considered to have been released from their religious marriage, or because the view that Hindu marriage cannot be undone leads the couple not to pursue a civil divorce at all.[18]

5. Marital captivity arising outside the religious sphere

27. As many of my interlocutors during my fact-finding visit to the Netherlands were at pains to emphasise, marital captivity may have many causes besides religion. For example, as noted above, different laws applicable to marriages in different countries may prevent a partner to a binational marriage, or who has moved from one country to another, from divorcing.

28. Marital captivity can also occur where there are high social costs of separation or divorce, without any relation to religion. In addition to strong social stigma, a lack of financial autonomy, emotional pressure, fear or dependency can all be impediments to divorce. Family pressure is often combined with isolation and the lack of an independent social safety net. Other factors include domestic violence or threats of violence or so-called "honour" killings; fear for the safety or well-being of children; fear of losing custody of or contact with children; lack of financial autonomy, sometimes connected to a low level of education; fear of losing a residence permit that depends on the continuance of the relationship with the spouse; language barriers, resulting in a lack of access to information about support services for victims; as well as health problems or a disability.[19]

29. Many of the elements mentioned above are similar to those that may contribute to forced marriages and to so-called "honour" crimes, and which have previously been explored by the Assembly through the excellent work of our colleague Béatrice Fresko-Rolfo in her reports entitled "Forced marriage in Europe" (Doc. 14574) and "Strengthening the fight against so-called "honour" crimes" (Doc. 15347).[20] And here too, just as with forced marriage and so-called "honour" crimes, when a spouse withholds their agreement to end a marriage, it is very often a way of maintaining control. There is frequently a considerable prior history of domestic abuse; trapping their spouse in the marriage is rarely the first abusive act by the partner concerned.[21]

6. Human rights impact on victims

30. As mentioned before (paragraph 2), marital captivity is an infringement on the trapped spouse's personal autonomy, a basic principle of human rights law. It may attract drastic consequences for them as well as for their children. Their family may also be pressured, whether in the country of residence or abroad, to persuade the "disobedient" woman to conform to the expectations of the community or her husband's family. The impact on children may also be devastating, as they grow up in an unsafe and unstable environment. A person who tries to put an end to this situation may find themselves alone and isolated from their own community, and may encounter serious violence and threats. These can include the risk of "honour"-based violence – which may constitute a major barrier to escaping a harmful marriage and seeking divorce. The fear, stress and social consequences caused by marital captivity prompt some women to attempt suicide, some resulting in fatal outcome.[22]

31. Marital captivity thus raises many issues under Articles 5 (right to liberty and security of the person), 8 (right to private and family life), 12 (right to marry) and 14 (prohibition on discrimination) of the European Convention on Human Rights, as well as rights codified in the European Social Charter (revised) and in the United Nations International Covenant on Economic, Social and Cultural Rights.

18. Deogratias B. (2020), op. cit., Chapter 2.2.
19. Rutten, S. & Kruiniger-van Maanen, P. (2018), Chapter 2.5, Causes of marital captivity.
20. These led to the adoption by the Assembly of Resolution 2233 (2018) and Resolution 2395 (2021) respectively.
21. "'Unchain your wife': the Orthodox women shining a light on 'get' refusal", op. cit.
22. Renew Europe, "Injustice of marital captivity", 29 June 2018.

7. Marital captivity and the Istanbul Convention

32. The Istanbul Convention does not include a specific provision expressly prohibiting marital captivity. However, as pointed out in paragraph 10 above, a number of its provisions may be relevant to such cases. I would like to thank Francesca Montagna, Adminstrator, Secretariat of the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), who explored these issues together with us during the webinar held on 1 July 2022. Her analysis was invaluable to my understanding of these issues. Of course, the views expressed below are my own, and should not be interpreted as reflecting an official stance of the GREVIO secretariat.

33. A first, crucial point is that Article 37 of the Convention, on forced marriage, specifies that "the intentional conduct of forcing an adult or a child to enter into a marriage" and "the intentional conduct of luring an adult or a child to the territory of a Party or State other than the one she or he resides in with the purpose of forcing this adult or child to enter into a marriage" should be made criminal offences by all States Parties. These definitions focus on coercion in the lead-up to and at the moment at which the person enters into the marriage. They do not require States Parties to criminalise all forms of marital captivity as such. Article 37 can only apply to some cases of marital captivity – specifically, those that arise due to a continuing situation of forced marriage (to which the spouse concerned never consented from the outset). Moreover, it applies to the lead-up to and the conclusion of the marriage – not to the continuing situation of marital captivity as such.

34. Other provisions of the Istanbul Convention may be relevant to a wider variety of cases, and may be highly important in protecting a victim of marital captivity from being forced to remain in a harmful relationship. Cases involving psychological or physical violence may for example be covered, respectively, under Articles 33 and 35 of the Convention. Likewise, where a husband repeatedly engages in threatening conduct against his wife in a situation of marital captivity, this could fall within the ambit of Article 34, on stalking.

35. Article 42 of the Istanbul Convention, on unacceptable justifications for crimes, including crimes committed in the name of so-called "honour", requires States to ensure that in criminal proceedings, it is not possible to rely on claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour to justify acts of violence against women or domestic violence. This provision would also apply in cases of so-called "honour" crimes committed against women who had sought to leave situations of marital captivity.

36. Of particular relevance in marital captivity cases involving transnational marriages, Article 59 of the Istanbul Convention guarantees victims of violence against women or domestic violence the right to request an autonomous residence permit in the case of the dissolution of their relationship or marriage. This is crucial, as I shall discuss further in chapter 8.4 below, and it highlights the importance for all States Parties of ratifying the Istanbul Convention without making reservations regarding this provision.

37. More generally, the provisions of the Convention on support, prevention and protection could apply in any situations of marital captivity involving forms of violence against women or domestic violence recognised by the Convention. Preventive measures may be especially important, in particular through education, as foreseen under Article 14 of the Convention.

8. Solutions to marital captivity

38. When I began working on this report, the sheer scope and scale of the issues and human rights at stake led me to wonder whether it was realistic to claim that we could find solutions to marital captivity, or whether the problems were so wide-ranging and so deep as to be intractable. But my research and, in particular, the input from many inspiring interlocutors during my work on this report, have shown that many legal and practical solutions are already available – we just need to be aware of the issues at stake and alert to the possibility of applying these solutions. Our aim must be to ensure that anyone in a situation of marital captivity is able to put an end to it – simply, and safely.

8.1. Prevention

39. Of course, the best solution to marital captivity is prevention. Many of my interlocutors in the Netherlands mentioned the importance of raising awareness within society about the risks of marital captivity, and of educating women (especially young women) about their rights in this field. Finding ways to reach women in isolated communities, including Bible Belt communities, can represent a major challenge here. Outreach to migrant women can also be very difficult, especially when they have arrived in the Netherlands through marriage, with little or no knowledge about their rights, and where there is a need to overcome language and sometimes also cultural barriers.

40. As was underlined by Meltem Weiland, Director of the Nationwide Coordination Centre against Abduction and Forced Marriage, Vienna, during our webinar of 1 July 2022, families often provide inaccurate or incorrectly translated information to women who move to another country to marry. Migrant women need to receive information (independently of any information that may be provided by their families) in their mother tongue, before leaving their country of origin, about the country where they will live, in particular about labour and human rights. This would help to prevent marital captivity. I believe that the consular services should be made aware of this issue and should provide such information to spouses moving to their country.

8.2. Positive peer pressure through (religious) communities

41. As we have seen above, pressure to conform to religious norms, tradition or custom can be a strong factor trapping women in harmful marital situations. Changing mindsets within communities can therefore be a powerful tool for overcoming marital captivity. Making clear that religion, tradition or custom can never serve as an excuse for committing abuse against individuals – and that such abuse is resolutely condemned by the community concerned – can also be a highly persuasive factor in ending marital captivity.

42. Jewish Orthodox communities in many countries, in particular those communities also having strong feminist movements, have explored ways of persuading get abusers to give the get without having to resort to legal proceedings. Campaigns to publicly expose authors of get abuse have been used in some cases to generate peer pressure on the husband from within his religious community to give the get. Such campaigns were previously conducted by publishing classified advertisements or picketing the husband's place of residence, but now take place increasingly on social media. The latter can be particularly effective in cases where community pressure cannot be applied in person, for example because the husband and wife no longer frequent the same religious community or live in the same city or country, or where the husband is imprisoned (sometimes for domestic violence committed against his wife). Of course, such public shaming, whether online or offline, must never itself cross the line into abuse.

43. Religious law may itself provide effective avenues of redress. Again within Jewish communities, possibilities explored notably by the London Beit Din in recent years include refusing to grant honours in a synagogue to a get-abusing husband, or the withdrawal of burial rites. Faced with consequences such as these from within his own religious community, the husband is likely to grant the get. In Israeli jurisdictions, a husband can moreover have his driver's licence withdrawn or even be imprisoned for get refusal.[23]

8.3. Using the legal system to overcome religious forms of marital captivity

44. As the examples below show, civil and criminal law penalties can also provide powerful lines of action for ending situations of marital captivity. I believe that these avenues are worth exploring further, and that States should ensure that they are readily accessible to victims of marital captivity.

8.3.1. No-fault divorce

45. I am concerned that the legal provisions governing divorce may themselves constitute a barrier to ending a harmful marriage, notably where they are unnecessarily complex or costly to negotiate. I therefore consider it crucial that no-fault divorce – that is, divorce without the need to prove misconduct by one of the parties to the marriage – be available and easily accessible in every country. This includes ensuring access to legal aid for all victims of marital captivity who need it, regardless of their residency status.

46. A further question worthy of deeper reflexion in future is whether our legal systems should recognise a human right to divorce (namely a right not to remain in a marriage to which at least one party no longer consents), and what would be the legal consequences of recognising such a right.

8.3.2. Using the law of contracts to prevent marital captivity

47. In the Jewish Orthodox community, notably in the United States of America, some NGOs are working together with rabbis to promote the conclusion of pre-nuptial contracts to prevent situations of marital captivity arising later. Under such contracts, the future husband freely agrees to pay a substantial financial penalty to his wife for each day that he fails to give the get, should the couple subsequently divorce under civil law. Such contracts are enforceable before the civil courts, providing a powerful incentive to husbands not to delay

23. Joanne Greenaway, Chief Executive, London School of Jewish Studies, presentation to online seminar on Coercive Control and Get Abuse in the United Kingdom, organised by the Boston Agunah Task Force, the Hadassah-Brandeis Institute at Brandeis University, the Jewish Orthodox Feminist Alliance and Cheirut, 22 March 2022.

giving the get. It should be noted that Jewish law requires that the get be given of the husband's own free will. It is therefore important to ensure that there is no element of duress in the conclusion or execution of such contracts (which might invalidate them in contract law as well).[24]

8.3.3. Combining civil divorce with an obligation to co-operate with a religious divorce

48. As the Dutch Minister for Legal Protection has stated, "Everyone should have the freedom to obtain a divorce and continue their lives separately. This applies to a civil marriage as well as to a religious marriage, regardless of whether the latter is in addition to a civil marriage. It should not be possible for one spouse to limit their partner's freedom in this regard."[25]

49. In the Netherlands, a new law was proposed in 2019 so as to enable procedures for finalising both a civil-law divorce and the dissolution of a religious marriage to be combined in a single set of proceedings. This means a party trapped in a marriage will no longer have to take separate action to obtain a court order requiring the other party to co-operate with the dissolution of a religious marriage. The legislative proposal also codifies the obligation on parties to a religious marriage to co-operate with a religious divorce.[26]

50. During my fact-finding visit to the Netherlands, I had the opportunity to discuss progress on this text with a representative of the Ministry for Justice and Security. An amendment introduced in the lower house of parliament, which sought to make both partners criminally liable if they entered into a religious marriage without having first contracted a civil marriage, had created difficulties. While the aim was to ensure that all spouses married civilly and could benefit from the provisions governing civil divorce, the impact would be to make it impossible for either partner to denounce such a situation as they would expose themselves to criminal prosecution. The Senate was working to resolve these issues.

8.3.4. Using criminal law provisions prohibiting psychological violence to end situations of marital captivity: the example of get refusal

51. Where marital captivity forms part of a broader pattern of abuse or domestic violence, a husband may exercise various (other) forms of coercion or control over his wife – for example, he may exercise financial control over his wife, cut her off from her friends or family, deliberately undermine her self-confidence, or engage in other forms of psychological or physical abuse. Such behaviour may come within the ambit of provisions prohibiting psychological violence or physical violence, which States Parties to the Istanbul Convention are required to introduce in line with its Articles 33 and 35.

52. In the United Kingdom, lawyers and activists seeking to combat severe cases of get abuse have recently begun seeking out cases for strategic litigation and bringing private prosecutions under the criminal law provisions prohibiting controlling or coercive behaviour in an intimate or family relationship. Such behaviour has been expressly prohibited since 2015 under Section 76 of the Serious Crime Act 2015 (subsequently amended by Section 68 of the Domestic Abuse Act 2021). I would like to draw attention at this stage to the following elements that may be worth bearing in mind in other jurisdictions or in other cases where the cause of marital captivity is the behaviour of one of the partners:

– private prosecutions require the victim to meet all the evidentiary requirements that would be imposed on the public prosecution service if the latter were bringing the proceedings, but give the victim far greater control over the running of the case;

– private prosecutions may be costly to bring, which may be a barrier for victims. However, if the judge finds that it was reasonable for the complainant to bring the prosecution, they may order the prosecution's costs to be covered by the State;

– under the above United Kingdom legislation, four elements must be met in order for an offence of controlling or coercive behaviour in an intimate or family relationship to be committed: first, the behaviour that is controlling or coercive must be engaged in repeatedly or continuously; second, there must be a personal connection between the perpetrator and the victim; third, the behaviour must have a serious effect on the victim; and fourth, it is necessary that the perpetrator knows or ought to know that the behaviour will have a serious effect.[27]

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24. "'Unchain your wife': the Orthodox women shining a light on 'get' refusal", op. cit.
25. Dutch Ministry of Justice and Security, "Quicker end to marital captivity", News Item, 29 November 2019.
26. Idem.
27. Anthony Metzer QC, presentation to online seminar on Coercive Control and Get Abuse in the United Kingdom, 22 March 2022.

53. To date, four such cases have been brought in the United Kingdom. In the first two cases, the husband decided to give the get before the criminal trial began, and the wife then discontinued the criminal proceedings. In the third case, the husband pleaded guilty of coercive and controlling behaviour just before the criminal trial was due to begin, but did not at the same time give the get. The sentencing hearing was set for a later date. He risked up to 12 months of immediate imprisonment. The private prosecutors (acting on behalf of the wife) considered that, if the husband gave the get prior to sentencing, this should be considered a mitigating circumstance, which could justify a suspended sentence rather than immediate incarceration. In the fourth case, the defendant contested the existence of an intimate relationship with his wife, as they no longer lived together. He argued that this would make the original wording of Section 76 of the Serious Crime Act inapplicable. The trial in this case was due to begin in April 2022.[28] All four of the above cases are based on the specific provisions of UK law prohibiting controlling or coercive behaviour in an intimate or family relationship. However, they may provide useful indications as to strategies that could be applied in other jurisdictions, too.

8.4. Support for victims

54. A wide range of support measures are essential to ensuring that victims of marital captivity are able to break out of this situation. I would like to pay tribute to the many organisations that I met during my fact-finding visit and online during our webinar who are already providing extensive support to women in situations of marital captivity, forced marriage or abandonment.

55. First and foremost, information about rights and about where to seek help is crucial. Such information must be readily accessible and available in a variety of languages. One interesting example is the leaflet “Information about religious marriages: Marriage, divorce and marital captivity” published by the Dutch Ministry of Justice and Security in March 2021.[29]

56. As Meltem Weiland pointed out during our webinar, transparent, clear information about support services must be readily accessible to migrant women, in their mother tongue and without barriers, so that they understand and can use it. Achieving this can be challenging, because control exercised by the community often obstructs women’s access to information about their rights and, ultimately, isolates them. A number of interlocutors during my fact-finding visit to the Netherlands also emphasised this challenge, and sought ways to use other activities designed for migrant women (such as language classes or activities run by associations) as a channel for sharing such information.

57. Cases of marital captivity can raise highly complex legal issues, especially where they require knowledge of the legal systems of other countries. Easily accessible legal advice is thus also crucial.

58. Victims of marital captivity who are at risk of physical harm from their spouse need shelter, together with their children. Such shelter must be provided in a location that is not known to their spouse or other potentially violent family members, in particular where there is a risk of so-called “honour”-based violence.

59. Persons in situations of marital captivity may also be financially dependent on their spouse – for example because the husband has convinced or coerced the wife to leave the workforce in order to take care of the home or raise children, or because the wife has never entered the workforce in her country of residence, or because she does not earn enough to be financially independent. Language classes, training, reskilling and/or financial support may be needed over an extended period in such cases.

60. During our webinar, Meltem Weiland pointed out that, given the opportunity, women will build an independent life and a future for themselves. However, the lack of regulations in this field results in structural violence against women. She emphasised that women need the system to grant them financial security and independence, including autonomous residence permits, in order to ensure a violence-free life. Otherwise, they will remain in unwanted and often harmful marriages, due to the lack of resources or to fear of losing their children or their residency.

61. Kim Lecoyer emphasised the need to use bottom-up approaches to human rights, taking into account intersectional and context-specific methods. This enables concrete internormative remedies to be developed, ensuring that human rights are fully respected while taking into account that religion plays a central role in many people’s lives.

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28. Idem.
29. Available on the website of the Government of the Netherlands in Dutch, English, Turkish, Arabic, Farsi, Tigrinya and Urdu at www.government.nl/documents/leaflets/2021/10/08/leaflet-information-about-marital-captivity-for-citizens.

62. In this context, Kim Lecoyer also underlined that it is crucial to break the "wall of separation" between disciplines. Networks of experts should be brought together to make access to religious divorce easier and to train the different actors involved (professional, legal and religious). Law and religion are not by definition opposed; working together can not only build trust but also help to identify more effective solutions.

63. Finally, as was emphasised by Jens van Tricht, Founder and Managing Director of Emancipator and Coordinator of the MenEngage Alliance, Amsterdam, marital captivity should be viewed in the light of gender-based violence in general. It is vital to engage men and boys in gender equality matters and gender justice, as they need to be part of the solution. These issues are being explored in more depth by our colleague Petra Stienen in her report entitled "The role of men and boys in stopping gender-based violence".[30]

9. Conclusions

64. Marital captivity can affect anyone. Sometimes it can result from the application of different legal provisions across different legal systems; sometimes it is due to more restrictive rules regarding religious divorce than civil divorce; very often, it involves manipulative or coercive behaviour on the part of one spouse who refuses to release the other from a marriage or marital situation to which they no longer consent. In the vast majority of cases – because some legal systems and many religious systems create a power imbalance in favour of the husband, and because marital captivity is also a manifestation of gender-based violence – the trapped spouse is the wife.

65. Persons in situations of marital captivity face a wide range of human rights violations. They lose their autonomy, they often have no financial independence, they cannot freely remarry, and they may not be able to travel freely either. They are frequently isolated, subjected to controlling behaviour and other forms of psychological harm by their spouse, and women in particular may be at risk of physical harm from their husband and from his family, or even their own family.

66. States have a clear duty to act to put an end to these human rights violations. Many actions taken as part of broader efforts to combat gender-based violence can also provide solutions to marital captivity. Other, more targeted actions may also be required, however.

67. I would like to emphasise in particular the following issues and recommendations. First, even though it does not expressly prohibit marital captivity, States must ratify the Istanbul Convention. Many of its provisions are clearly applicable to cases of marital captivity and can provide a powerful framework for tackling the human rights violations at stake.

68. In view of the particular vulnerability of migrant women in situations of marital captivity, who may be prevented from leaving a harmful marriage due to the risk of losing resident status, States should not deposit reservations to Article 59 of the Istanbul Convention, and those that have done so should withdraw them.

69. States should also ensure that no-fault divorce is available to everyone, and that divorce proceedings are accessible to all.

70. In addition, States should explore means of using their legal system to combine civil divorce with an obligation to co-operate with religious divorce proceedings, without placing trapped spouses at risk of criminal proceedings if they seek to use these provisions.

71. There is clear scope for using existing contract law, notably through the use of pre-nuptial agreements, to prevent situations of marital captivity from arising. This is especially so where religious law allows a husband to prevent or obstruct religious divorce proceedings. States could certainly do more to support the work of religious communities seeking to promote such practices.

72. Criminal law provisions prohibiting psychological harm, including provisions applicable to coercive or controlling behaviour, can also provide solutions. Legal professionals should be trained to recognise such situations and to use these provisions effectively.

73. Solutions also need to be found in international private law to prevent transnational situations of marital captivity from arising due to inconsistencies between laws. States should step up their efforts and diplomacy in this field. They should also ensure that women migrating to a country to accompany their husband or in order to marry are fully informed, before they leave their country of origin and in their own language, as to their rights in the destination country and about how to seek support if necessary.

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30. See Doc. 15678 "The role and responsibility of men and boys in stopping gender-based violence against women and girls".

74. As far as broader measures of prevention and protection are concerned, the authorities need to work together with religious communities to overcome religious attitudes and customary practices that favour marital captivity. This needs to be done using a bottom-up, internormative approach and involving interdisciplinary networks of experts as well as activists already working within these communities to combat marital captivity.

75. It is also essential that the full range of support measures set out in the Istanbul Convention be available to women seeking to escape situations of marital captivity, who need not only immediate shelter but also financial security and independence, including autonomous residence permits.

76. Finally, outreach is crucial as women in situations of marital captivity are often isolated and unaware of their rights. States should engage in efforts to raise awareness about marital captivity and actively support organisations working to reach out to women in this situation.

77. As I have emphasised through this report, we must put an end to marital captivity and to the serious human rights violations that it all too frequently entails. With awareness of the issues and of the many successful lines of action that are already being explored, and with concerted efforts to develop such actions further and put them in place throughout our member States, I believe that solutions to marital captivity are within our grasp.