



Femmes for Freedom

Defending Girls and Women's Rights

To the direction of Legislation and Legal Matters of the Ministry of Justice and Security to the attention of J. van der Hoeven

PO Box 20301
2500 EH The Hague
Date: The Hague, 9 August 2021

Subject: Response FFF to the legislative proposal Discouraging Marital Captivity

Dear Ms Kiersch,

Thank you for sending the legislative proposal Discouraging Marital Captivity and the preliminary report of the Permanent Committee for Justice and Security of the Senate. We gladly accept your invitation to respond to the request made by the Dutch Senate to comment on Article IIIa. At the same time, we have taken the liberty to comment on other parts of the legislative proposal as well. For purposes of clarity, we respond to the headings as phrased in the Parliamentary Paper¹.

Summary

● **FFF commends the intention of the government to discourage marital captivity. The present legislative proposal is a huge step forward, insofar as the partner in a religious marriage is forced to cooperate towards the termination of this marriage if the other partner wishes to do so. At the same time the addition to Article 68 second paragraph thereof 'unless this, in view of *compelling interests*, cannot reasonably be required' renders discouraging marital captivity more difficult, while no motivation is given as to why this addition would be required. Therefore, FFF proposes to abolish this addition.**

● **Article IIIa: The proposed change of Article 449 of the Dutch Criminal Code renders the victim punishable as well and therefore would be contrary to the objective of the legislative amendment - discouraging marital captivity. The amendment has not been adequately considered and leaves many questions unanswered (for example the question why victims of marital captivity and forced marriages would be considered to have committed a criminal offence. In our view this amendment contravenes existing agreements. Therefore, the amendment is not advisable.**

¹ Dutch Senate, Parliamentary year 2020-2021, parliamentary paper 35, 348, B, viewed on https://www.eerstekamer.nl/behandeling/20210302/voorlopig_verslag_2/document3/f=/vlgsp54q45zm_opge_maakt.pdf



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● The legislative proposal in question is an important step, but discouraging forced marriages and marital captivity requires a more extensive policy. FFF observes that a column by Hanneke Gelderblom² has shown that the Jewish rabbinate has been consulted whereas the target group had not. In FFF's view it is of crucial importance to involve the target group in the development of further policy. Although FFF - who was at the inception of all the initiatives for the discouragement of marital captivity in the Netherlands - in spite of a motion³ in the House of Representatives - was systematically not involved in this policy development by the Ministry of Justice and Security, we announce our willingness to provide ideas and advice concerning further policy.

Article IIIA

Criminalisation marriage partners when they conclude a religious marriage before the civil marriage

Third Book. Offences

Title IV. Offences concerning the civil status Article 449 of the Dutch Criminal Code

1. The religious officiant who effects a religious ceremony to conclude a marriage when parties have not yet shown him that their marriage has been concluded before the civil registrar will be punished with a financial penalty of the second category.
2. If this criminal offence has been committed earlier than two years since an earlier conviction of the guilty party for a similar criminal offence has become irrevocable, a punishment of imprisonment for at most two months (***will become six months***) or a financial penalty of the second category (***will become third category***) can be imposed.

Amended as follows: Article 449 Dutch Criminal Code

1. A financial penalty of the second category is imposed on:
 - * the religious officiant who, when parties have not yet shown him that their marriage had been concluded before a civil registrar, performs any kind of religious ceremony to this purpose;
 - * he who of his own volition is party at any religious ceremony as mentioned under 1 when his marriage before the civil registrar has not yet been concluded.

Paragraph 2 see above italic

Paragraph 3 added, with the following content:

2 Gelderblom,H., 18 June 2021, "Woke zijn' is de nieuwe leer' Dutch column at:

<https://jonet.nl/woke-zijn-is-de-nieuwe-leer-column-hanneke-gelderblom/>

3 House of Representatives, 12 November 2020, Motion by member of Parliament Peters

² Gelderblom,H., 18 June 2021, "Woke zijn'is de nieuwe leer' viewed on <https://jonet.nl/woke-zijn-is-de-nieuwe-leer-column-hanneke-gelderblom/>

³ 3 House of Representatives, 12 November 2020, Motion of the member of Parliament Peters about consulting Femmes for Freedom, viewed on

<https://www.tweedekamer.nl/kamerstukken/detail?id=2020Z21410&did=2020D45676>



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about consulting *Femmes for Freedom*, at:

<https://www.tweedekamer.nl/kamerstukken/detail?id=2020Z21410&did=2020D45676>

Not punishable is he who has asked another party to cooperate as referred to in Article 1:68, second paragraph Dutch Civil Code.

Notes by FFF

• FFF has major concerns about the criminalisation of marriage partners who only have concluded a religious marriage. This proposal may be well-intended but the consequences have not been given sufficient consideration. The objective of the legislative proposal is protecting the partner (in casu the woman) who remains captive against her will in a religious marriage; as becomes clear from the explanation of the amendment that led to this legislative proposal, however, the emphasis is placed on illegal marriages⁴ rather than on discouraging marital captivity. In order to better prevent marital captivity, the proposals to amend Article 1:68 of the Dutch Civil Code and Article 827 of the Dutch Civil Procedures Code suffice. These legislative proposals are an appropriate addition to the recognition of marital captivity under the general compulsory article 284 of the Dutch Criminal Code. The person who proposed the amendment and the government could not motivate adequately how this proposal contributes towards the prevention of forced marriages and of marital captivity. The proposed criminalisation contravenes the objective pursued; if someone voluntarily entered into a religious marriage and is confronted with marital captivity, she has to contact the Civil Court for the dissolution of her religious marriage. In case she goes to Court, she also notifies them of the fact that she has committed a punishable offence because she entered into a religious marriage of her own free will. Does the government assume that this legislative proposal will enable women to terminate their marital captivity? Adding paragraph 2 to Article 449 of the Dutch Criminal Code will in fact perpetuate marital captivity and the proposed amendment of Article 1:68 of the Dutch Civil Code loses much of its relevance. This situation is only in part remedied by the addition of paragraph 3 because this does not apply to the person who, for whatever reason, does not apply for the dissolution of the religious marriage. This could have the unintentional consequence that discussions may arise as to whether people who have a happy religious marriage are punishable as well. This may result in unnecessary strain on the Prosecution Service and the Judicial Authority. This addition can also cause parties to claim to cooperate towards the dissolution of the religious marriage to escape criminal prosecution.

In addition to the above FFF notes that this amendment - beside the questions posed by GroenLinks, D66 and PvdA with respect to the criminalisation of marital partners who only concluded a religious marriage - leaves other questions unanswered:

- • What will this amendment mean for religious marriages that have been or will be concluded abroad? In Israel and in all Muslim countries with the exception of Turkey

⁴ House of Representatives, Parliamentary year 2020-2021, parliamentary paper 35, 348 nr 11, viewed on <https://zoek.officielebekendmakingen.nl/kst-35348-11.pdf>



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a religious marriage is the only form of marriage. Does the proposal in paragraph 2 also apply to religious marriages concluded abroad? Will there be sanctions for people who failed to have their marriage recognised in the Netherlands?

- • The text states: '**On the proviso** they entered into the marriage of their own volition.' What does the government mean by 'of their own volition'? If the woman was forced to enter into the marriage, how can she prove she was forced to do so?

In conclusion: the purpose of this legislative proposal is improving the position of victims. However, this part of the legislative proposal has a negative effect on their position. FFF is of the opinion that this part of the legislative proposal will make it more difficult for victims to go to court now that they become punishable themselves; this contravenes ECRH, CEDAW, and the treaty of Istanbul and it will not be upheld if it is challenged in the Dutch Court.

Civil law measures to prevent marital captivity

Book 1. Persons and family law

Title 5. Marriage

Section 4. Concluding the marriage

Article 68 No religious ceremonies are allowed to have taken place before parties will have proven to the officiant of the religious ceremony that the marriage before the civil registrar has been concluded.

Amended as follows:

- • (Paragraph) 1 added before text
- • Paragraph 2 added, reading: A party in a religious partnership or a partnership on ideological grounds

is obliged to **cooperate** towards the dissolution of said partnership if another party requests this **unless** this, in view of **compelling interests**, cannot reasonably be required

Comment by FFF

The request posed by GroenLinks to include in a second paragraph of Article 1:68 of the Dutch Civil Code an obligation to dissolve a religious marriage at the same time when a civil marriage is dissolved as a mirror image of the first section to comply with the basic principle 'no religious marriage without a civil marriage' only provides a remedy for women who have concluded a civil marriage as well as a religious marriage. Many women who suffer from marital captivity have only concluded a religious marriage. In conversations with the legislative lawyer of the Ministry of Justice and Security in 2012⁵, 2013 and 2014⁶ and with members of the House of Representatives, in writing and orally communicated, in the trade journal *Migratie en Recht* [Migration and Law] in 2014⁷, as well as in the internet

⁵ House of Representatives, 5 June 2012, Parliamentary paper 32175 nr 13, viewed on <https://zoek.officielebekendmakingen.nl/kst-32175-31.html>

⁶ House of Representatives, 16 May 2014, Minutes 2013-2015 nr 65 item 4, viewed on <https://zoek.officielebekendmakingen.nl/h-tk-20132014-65-4.html>

⁷ *Migratie en Recht* [Migration and Law], 2014, Shirin Musa: 'Vraag het de migrantenvrouwen!' [Ask migrant women], viewed on <https://www.femmesforfreedom.com/wp-content/uploads/2019/12/AMR-Shirin-Musa.pdf>



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consultation of 13 November 2018⁸ FFF has advocated the introduction of a counterpart of Article 1:68 of the Dutch Civil Code in which a paragraph is added that stipulates that parties must cooperate towards the dissolution of the religious marriage at the same time the civil marriage is dissolved in order to prevent all variants of marital captivity as well and in cases where parties only concluded a religious marriage if one of the parties wishes to do so. This explains that the House of Representatives has opted for this in order to implement a solution for all cases of marital captivity, because the amendment of Article 827 paragraph 1 sub e only provides a solution for an order to cooperate towards the dissolution of the religious marriage of persons who have also concluded a civil marriage. The present addition of paragraph 2 to Article 1:68 of the Dutch Civil Code does distinguish between persons who concluded a civil as well as a religious marriage and those who only concluded a religious marriage and who end up in marital captivity as opposed to the question posed by GroenLinks to include in paragraph 2 also the obligation to dissolve the religious marriage at the same time the civil marriage is dissolved.

The addition '*unless* this in view of *compelling interests* cannot reasonably be required' leads to unclarity (for the parties involved as well as for the Court) and will detract from the purpose of this Article, the prevention of marital captivity. When this legislative proposal was discussed, no clarity was provided as to the necessity of this addition. FFF cannot envisage which compelling interests could be at stake here. Can the government clarify? Or does the government want the Court to interpret this themselves? Is it not strange that the government legitimises or allows the human rights of the person who is kept in marital captivity to be violated?

As becomes clear from Hanneke Gelderblom's column, cited by D66, there are many questions about the way in which marital captivity in the Jewish community should be discouraged. FFF notes that this also applies to other religious communities such as the Muslim community, even though the questions, situations and consequences may differ. Recognition of marital captivity in the law offers no guarantee for prevention and for justice for victims if no further policy is drawn up. FFF likes to refer to the editorial article in *Trouw* of 29 March 2018⁹ and to a letter¹⁰ to the House of Representatives in response to the letter by Minister Sander Dekker, in which FFF explains what this further policy could entail.

⁸ Femmes for Freedom, 14 November 2018, Reactie consultatie Wet tegengaan huwelijkse gevangenschap [Response consultation Law discouraging marital captivity], viewed at <https://www.internetconsultatie.nl/huwelijksegevangenschaptegengaan/reactie/4b364bf4-3352-4462-8c1b-f1c d7d7be3ed>

⁹ *Trouw*, 29 March 2018, 'Huwelijkse gevangenschap voorkomen, dat kan wél', [Preventing marital captivity is possible], viewed at <https://www.trouw.nl/nieuws/huwelijkse-gevangenschap-voorkomen-dat-kan-wel~b0dce9dc/>

¹⁰ Femmes for Freedom, 13 November 2018, 'Reactie Femmes for Freedom op het conceptwetsvoorstel dat ziet op het tegengaan van huwelijkse gevangenschap', [Response Femmes for Freedom to the concept legislative proposal that pertains to discouraging marital captivity] viewed on <https://www.internetconsultatie.nl/huwelijksegevangenschaptegengaan/reactie/107429/bestand>



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Viability and enforceability of the rules concerning marital captivity

In practice FFF experienced that in spite of the current penal provisions of Article 449 of the Dutch Criminal Code the rules are not enforced when the police are confronted with a woman who wants to report her marital captivity on the basis of the general compulsory article 284 of the Dutch Criminal Code. A second problem that FFF has found is that a lawyer who works for a client on the basis of the assignment of legal assistance is only remunerated for 10 hours by the *Raad voor de Rechtsbijstand* [Council for Legal Aid], while cases concerning marital captivity require many more hours of work. Because of the cutbacks on legal aid fewer lawyers tend to take on these complex, time-consuming cases and the group of lawyers who are willing to help victims is getting smaller and smaller. FFF also received women who were referred by imams who were informed of the provision of 449 of the Dutch Criminal Code but still concluded a religious marriage. The current provisions in the law cannot be enforced, not because the Dutch Prosecution Service is unwilling to do so but because of the cutbacks of recent years and a huge shortage of capacity. FFF fears that the amendment of 449 of the Dutch Criminal Code will only have negative effects and cannot be implemented and enforced as we argued earlier in this letter. According to the people who tabled the amendment: *'This amendment will therefore increase the number of options to prevent and discourage forced marriages and marital captivity in the Netherlands.'* As has been argued above this is incorrect. According to FFF other things are required such as investing in the emancipation of women and men from patriarchal communities, making legal aid accessible, dialogue with countries that do not recognise our divorce decrees, raising the issue of marital captivity on the international human rights agenda, investing in legal and consular legal aid in the case of women in Muslim countries who need to end their marital captivity as well as including in the school curricula of future aid workers and appropriate information of newcomers other harmful traditional practices. And last but not least: encouraging innovative and fair ways of thinking about the way in which we can realise gender equality of Jewish and Muslim women in family law. These women are discriminated against by religious privileges. This means that the Jewish laws and the sharia unconditionally apply in marital and divorce law¹¹. This renders Jewish and Muslim women legally incapacitated in 2021. Therefore, FFF has advocated rendering marital captivity a priority for the task force women's rights of the Ministry of Foreign Affairs. This has the aim of supporting foreign organisations of Jewish and Muslim women who fight for equal rights in family law because this helps the women in the various countries as well as Dutch women with a migration background.

In conclusion we would like to point out that the authorities will have to include this problem in her policy development if the government in fact seriously wants to discourage forced marriages and marital captivity. In our view it is of great importance that this policy

¹¹ Professor dr van der Velden, F.J.A., 2012, 'Religie als voorrangregel: Islam en IPR' [Religion as priority rule: Islam and private international law] in IPR in de spiegel by Paul Vlas, Kluwer-Deventer.



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development take place in consultation with the target group and not over their heads. FFF regrets that it has until now not been involved in policy development and advice, in spite of a motion in the House of Representatives by the Ministry of Justice and Security, but announce their willingness to contribute ideas and advice about this topic.

Kind regards,
Shirin Musa
Director Femmes for Freedom

Enclosures:

1. Femmes for Freedom, 13 November 2018, 'Reactie Femmes for Freedom op het conceptwetsvoorstel dat ziet op het tegengaan van huwelijkse gevangenschap'. [Response Femmes for Freedom to the concept legislative proposal that pertains to discouraging marital captivity]
2. Femmes for Freedom, 14 May 2018, 'Reactie van Femmes for Freedom op de brief van minister Dekker en het onderzoek van de Universiteit van Maastricht' [Response Femmes for Freedom to the letter by Minister Dekker and the study by the University of Maastricht]
3. Prof. dr. van der Velden, F.J.A., 2012, 'Religie als voorrangsregel: Islam en IPR' in IPR in de spiegel van Paul Vlas, Kluwer-Deventer [Religion as priority rule: Islam and private international law]