

HONOR OVER JUSTICE:

HOW KUWAIT'S PENAL CODE IS FAILING TO PROTECT THE HUMAN RIGHTS OF WOMEN & GIRLS

States have a responsibility to promote and protect women's and girls' rights and ensure that perpetrators of gender-based and sexual violence are brought to justice. To accomplish this, legislation on violence against women and girls must be in line with international human rights standards and States' international obligations. Although Kuwait ratified the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1994, the Convention on the Rights of the Child in 1991, and other international human rights instruments, its legal provisions remain inadequate in the prevention of violence against women and girls and protection of survivors of sexual violence.

Even though equality under the law is ensured under Article 29 of the Constitution of Kuwait, which states that "people are peers in human dignity and have, in the eyes of the Law, equal public rights and obligations", provisions are in place in the Penal Code which provide impunity for perpetrators of gender-based violence.

This document aims to provide an analysis of the domestic provisions with regard to international human rights standards that Kuwait should be adhering to and recommendations for amendments to strengthen its legislative provisions in order to ensure greater protection to survivors of sexual violence.

1. Defining rape as a crime against honor

Laws framed in terms of morality rather than bodily integrity perpetuate the cycle of violence and discrimination

Sexual violence, including rape, is one of the most heinous crimes committed in society. It is clearly a violation of the bodily integrity of women and girls. Rape is addressed under Chapter 2 of the Kuwaiti Criminal Code as a crime 'against reputation and honor'. This effectively situates sexual violence as a moral crime and as a threat to one's honor, reputation, and morality, rather than as a crime against the individual or as a violation of the complainant/survivor's human rights.¹ Addressing these crimes in this way, rather than focusing on the violation of an individual's bodily integrity and sexual autonomy, positions women and girls as the "repository of the so-called honor of her community rather than putting the opprobrium squarely where it should lie - on the perpetrator".²

Recommendation

Reframe the categorization of the law to ensure that sexual assault, including rape, is characterized as a crime against a person's right to personal security, physical, sexual, and bodily integrity rather than in terms of morality, in accordance with the CEDAW's General Recommendation No. 35.³

¹ UN Handbook for Legislation on Violence against Women, page 26:

² Equality Now, *The World's Shame: The Global Rape Epidemic - How laws around the world are failing to protect women and girls from sexual violence*; page 21:

³ CEDAW, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19

2. Definition of rape

Article 186 of the Kuwaiti Penal Code stipulates that:

“Anyone having sexual intercourse with a female without her consent through the use of force, threats or deception shall be punished by imprisonment for a period not exceeding fifteen years, and a fine might be added not exceeding fifteen thousand Rupees.

If the offender is an ascendant of the victim or one of the persons entrusted with her upbringing or welfare or vested with authority over her, or a servant or a servant of any of the above-mentioned persons, the punishment shall be life imprisonment.”

a. Ensure the definition of rape is based on consent and a wide range of coercive circumstances, and not reliant on the use of force, threats, or deception

According to CEDAW’s jurisprudence and legislative recommendations by the UN⁴, States should remove any requirement that sexual assault be committed by violence, force and threats, as well as any requirement of proof of penetration, from the definition of rape and instead, enact a definition which minimizes secondary victimization of the complainant/survivor in proceedings by enacting a definition of sexual assault that either:

- ⁴ requires the existence of “unequivocal and voluntary agreement” and requiring proof by the accused of steps taken to ascertain whether the complainant/survivor was consenting;
- ⁵ requires that the act take place in “coercive circumstances” and includes a broad range of coercive circumstances.⁵

This approach is substantiated by CEDAW’s General Recommendation 35 on gender-based violence against women⁶ which requires States to ensure that the definition of sexual crimes, including marital and acquaintance/date rape, is based on lack of freely given consent, and takes into account coercive circumstances.

The Council of Europe adopted the Istanbul Convention⁷

which provides a comprehensive framework for preventing and combatting violence against women and domestic violence. It is informed by existing international human rights standards and makes reference to the jurisprudence of the European Court of Human Rights.⁸ Whilst it is primarily targeted at Council of Europe States to sign and ratify, it is also available for non-members to sign and who wish to ensure a range of comprehensive rights to their citizens.

Article 36(1) of the Istanbul Convention covers all forms of sexual acts which are performed on another person without her/his freely given consent and which are carried out intentionally.

Kuwait should ensure that consent must be given voluntarily as a result of the person’s free will which is assessed in the context of the surrounding circumstances.⁹ It is important to provide for a broad range of circumstances in which consent is immaterial, such as where there has been an abuse of an individual’s position of authority (e.g., in a correctional facility or school setting) or abuse of power by an individual in certain professional relationships to the survivor (e.g., doctor-patient relationship), as well as including a range of coercive circumstances around consent such as intimidation, fraud or coercive control in a domestic relationship.¹⁰

It is important to ensure that there is a context-sensitive assessment of the evidence in order to establish, on a case-by-case basis, whether the victim has freely consented to the sexual act. The assessment must also recognize the wide range of behavioral responses to sexual violence and rape which victims exhibit and should not be based on assumptions of typical behavior in such situations.¹¹ Moreover, it is vital to ensure that the interpretations of provisions on sexual violence are not influenced by gender stereotypes or myths about male and female behavior and sexuality.

Recommendation

⁴ [United Nations, Handbook for Legislation on Violence against Women, pg 26:](#)

⁵ Karen Tayag Vertido v. The Philippines, CEDAW, Communication No.18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010), ¶ 8.9(b)(ii)

⁶ [CEDAW, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19](#)

⁷ [Council of Europe Convention on preventing and combating violence against women and domestic violence](#)

⁸ In particular the ECtHR judgment of M.C. v Bulgaria (No. 39272/98)

⁹ Istanbul Convention, Article 36.2.

¹⁰ [UN Women Virtual Knowledge Centre to End Violence against Women and Girls, Core elements of legislations on sexual assault,](#)

¹¹ Explanatory Report to the Istanbul Convention

Remove any requirement in the definition of rape (Article 186 of the Kuwaiti Penal Code) that sexual assault must be committed by use of force, threats or deception as these are not the elements of the crime of rape. The definition should be amended to require the existence of “unequivocal and voluntary agreement” or lack of consent, and recognise a range of coercive circumstances. Consent must be voluntary, genuine and willing, and non-exploitative, and must be assessed in the context of the surrounding circumstances. The accused should be required to prove the steps that were taken to ascertain whether the complainant/survivor was consenting.

b. Provide for a range of aggravating circumstances

Article 186 of the Kuwaiti Penal Code identifies circumstances which warrant a higher penalty, such as if the offender is:

- ≈ *an ascendant of the victim; or*
- ≈ *one of the persons entrusted with her upbringing or welfare; or*
- ≈ *vested with authority over her, or*
- ≈ *a servant or a servant of any of the above-mentioned persons.*

According to international human rights standards, States should provide for aggravating circumstances including the age of the victim/survivor, the relationship between the perpetrator and survivor, the use of threat or violence, and whether there were multiple perpetrators. Article 46 of the Istanbul Convention¹² enumerates various aggravating circumstances which should not form part of the constituent elements of the crime but could be taken into consideration during the determination of the sentence.

Whilst Article 186 of the Kuwaiti Penal Code provides for an aggravated sentence¹³ for a perpetrator who has sexual intercourse without her consent through the use of force, threats, or deception if he is an ascendant of the victim or one of the persons entrusted with her upbringing or welfare or vested with authority over her, or a servant, it is important to ensure that this list is non-exhaustive and

that all types of relationships are covered.

Recommendation

Additional aggravating circumstances reflecting abuse of power in a relationship with effective, proportionate, and dissuasive criminal penalties should be considered.¹⁴

c. Ensure the definition of rape covers all forms of non-consensual sexual acts

Article 186 of the Kuwaiti Penal Code does not stipulate what sexual acts are covered by ‘sexual intercourse’. It has been interpreted in practice as solely focusing on vaginal penetration by a penis. International human rights standards, such as those provided for under Article 36(1)(a) of the Istanbul Convention, refer to *vaginal, anal and oral penetration of a sexual nature of another person's body with any bodily part or object which that person has not consented to*.

Recommendation

Ensure that all forms of non-consensual sexual acts are covered by the definition of sexual violence, as stipulated under international law, in order to ensure greater access to justice and protection for survivors of sexual violence.

d. Ensure that all types of sexual violence are criminalized, including marital rape

The non-criminalization of non-consensual sexual violence committed within the context of an intimate relationship remains highly problematic in many countries. While historically, rape and sexual violence committed within marriage and other intimate relationships were not criminalized, international human rights law has reaffirmed the importance of criminalizing such acts which have been committed against former or current spouses or partners. It is the right of every woman and girl to be free from sexual violence in both the public and private spheres, and the obligation is on the State to prevent as well as punish all forms of gender-based violence.¹⁵

Whilst Article 186 of the Kuwaiti Penal Code criminalizes

¹² Some examples include: that (a) the offence was committed against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority; (b) the offence or related offences were committed repeatedly; (c) the offence was committed against a person made vulnerable by particular circumstances.

¹³ Life imprisonment

¹⁴ [UN Women, Definition of sexual assault and other elements](#)

¹⁵ CEDAW General Recommendation 35 on gender-based violence against women

rape against women, it does not make explicit reference to whether wives are covered. In practice, it is commonly the case that a wife who does not consent to non-consensual sexual activity is not covered by this provision. The belief that women and girls 'belong' to men is strongly held and men are perceived to have the right to demand anything from their wives, including sex, in accordance with their marriage contract.

Treating women as the property of their husbands to do with as they wish sends the broader signal that women are subordinate to their husbands and sets the scene for further general legal and societal discrimination, positioning women, at best, as second class citizens without individual authority.¹⁶ Moreover, as sexual violence is a common form of exerting power and control, it is essential to ensure that there are no exceptions to the criminalization and prosecution of such acts when committed against a current or former spouse or partner.¹⁷

Recommendation

The definition of rape should be applicable to all non-consensual sexual acts irrespective of the relationship between the perpetrator and the victim. Marital rape should be expressly criminalized.

3. Criminalizing sexual violence against a minor

Article 188 of the Kuwaiti Penal Code stipulates:

"Anyone having sexual intercourse with a female without coercion, or threat or deception, and she was nine years old and not exceeding eighteen years old, shall be punished for a period not exceeding seven years, and a fine might be added not exceeding seven thousand rupees."

"If the offender is an ascendant of the victim or one of the persons entrusted with her upbringing or welfare or vested with authority over her, or a servant or a servant of any of the above-mentioned persons, the punishment shall be imprisonment for a period not exceeding ten years, and a fine might be added not exceeding ten thousand Rupees".

According to Article 188, sexual intercourse with a female between the ages of 9 and 18 shall be punishable with imprisonment of up to seven years and a fine might be added not exceeding seven thousand rupees. If the girl

is less than nine years old, the punishment is for a period not less than fifteen years and a fine might be added not exceeding fifteen thousand Rupees as stipulated in Article 187. Whilst international standards do not indicate what the minimum age of sexual consent should be, UNICEF explains that the purpose of explicitly stating a minimum age would be to protect children and adolescents from abuse and consequences they may not have fully appreciated. Any sexual activity with a person under this age should be considered sexual abuse and be criminally sanctioned. Consent in these cases is immaterial.

Recommendation

Establish a minimum age of sexual consent which recognizes that any sexual act committed with a person under a certain age is criminalized by law. However, as the UN Committee on the Rights of the Child has stated, adolescents of similar ages should not be criminalized for consensual, non-coercive, and non-exploitative sexual activity. Children should have access to comprehensive sexuality and relationship education and reproductive rights and services.

4. Provisions which provide for the impunity of the perpetrator by marrying the victim of sexual violence

Article 182 of the Kuwaiti Penal Code stipulates:

"If the abductor marries the one he abducted, in a legally-recognized marriage with the permission of her guardian, and the guardian agrees that the abductor not undergo punishment, then he is not sentenced to punishment."

Specifically, Article 182 of the Kuwaiti Penal Code effectively provides that if the perpetrator legally marries his victim with the permission of her guardian and the guardian requests that the perpetrator is not punished, then he will not be punished. Such a provision treats the perpetrator with impunity, denies justice to the complainant, and effectively sends a signal that rape is not being taken seriously.¹⁸

In 2017, the CEDAW Committee recommended that Kuwait repeal Article 182 in order to "prevent kidnappers and rapists from avoiding criminal persecution by marrying their victim with the consent of the victim's

¹⁶ Equality Now, *The World's Shame: The Global Rape Epidemic - How laws around the world are failing to protect women and girls from sexual violence*; page 26

¹⁷ Explanatory Report to the Istanbul Convention, Article 36

¹⁸ Equality Now, *The World's Shame: The Global Rape Epidemic - How laws around the world are failing to protect women and girls from sexual violence*; Page 19

guardian”.¹⁹ According to information collected by Musawah and Abolish 153²⁰, “women who have been kidnapped or raped are often forced into marriage to ward off ‘shame’ and to save the family ‘honor’”. The woman’s consent is not required for such marriages and Sunni marriage procedure does not even require her to be present during the procedure or to sign the marriage certificate. Women are removed from having any agency or choice and this provision perpetuates the cycle of

violence and abuse. Instead of the perpetrator facing shame from the community, the victim instead bears the responsibility.

Recommendation

Repeal Article 182 of the Kuwaiti Penal Code and remove any provisions which enable impunity for the perpetrator of sexual violence.

CASE STUDY:

Ever since I qualified as a lawyer I've been working to protect the rights of women. Kuwaiti law around sexual violence does not protect women and girls, instead, it centers the family's honor.

I represented Hana* who was raped at the age of 16. To protect her family’s honor and avoid a scandal, she was then forced to marry the man who raped her. I represented her and her family throughout the case. Hana hated that marriage.

Hana was kidnapped by someone she knew. She was walking to school, just like any other day, and he stopped her. He convinced her he just wanted to talk. He took her to a deserted place and he raped her. Hana told me how she begged him to leave her alone, how she couldn’t stop crying.

At the end of the school day he took her back home, and she didn’t tell anyone what had happened to her.

A few months later, Hana went to the doctor suffering stomach pains. The hospital discovered that she was pregnant, and contacted the police to investigate the case. The whole story was uncovered.

In Kuwait, Article 182 allows an abductor to escape punishment if he marries the person that he abducted. The case against the man who abducted and raped Hana was closed by the Attorney General when they implemented Article 182. Hana was forced to marry the man who raped her due to family and societal pressure as a way to “save the honor of the family”.



Hana’s marriage lasted only a few days, then she was able to divorce her rapist. Hana’s parents refused to let her raise her child. Instead, the child lives with their father, Hana’s rapist.

“My life stopped when I was raped and abducted. I left school and I do not go outside the house. I do not have a future.” - Hana

I would encourage the government of Kuwait and Parliament to repeal Article 182 as it discriminates and violates the right of girls and women to live in dignity and not to be forced into marrying their rapists.

**Name has been changed to respect anonymity.*

¹⁹ CEDAW, Concluding Observations on CEDAW Fifth Periodic Report of Kuwait, November 2017

²⁰ CEDAW, Joint Report on Article 16, Muslim Family Law and Muslim Women's Rights in Kuwait, November 2017

ABOUT EQUALITY NOW

Equality Now is an international human rights organization that works to protect and promote the rights of women and girls around the world by combining grassroots activism with international, regional and national legal advocacy.

Our international network of lawyers, activists, and supporters achieve legal and systemic change by holding governments responsible for enacting and enforcing laws and policies that end legal inequality, sex trafficking, sexual violence, and harmful practices such as child marriage and female genital mutilation.

For more information visit equalitynow.org.



facebook.com/equalitynoworg



[@equalitynow](https://twitter.com/@equalitynow)



[@equalitynoworg](https://www.instagram.com/@equalitynoworg)

ABOUT ABOLISH ARTICLE 153

Abolish Article 153 is a national campaign led by a group of activists in Kuwait, concerned with ending all forms of violence against women in the Arabian Gulf and the region.

Our goal is to create a safe environment where mothers, daughters, sisters and wives are protected from all forms of violence, to raise awareness of these violent practices and the legislation that sanctions them, and ensure the creation of safe houses for women under threat of violence, which are lacking in Kuwait.

Our aim is to also build coalitions across the GCC and the Arab world to abolish similar laws across the region.

For more information visit abolish153.org.



facebook.com/abolish153



[@abolish153](https://twitter.com/@abolish153)



[@abolish153](https://www.instagram.com/@abolish153)

