



كسر القوالب Breaking the mold

#Breaking_The_Mold Arab Civil Society Actors and their Quest to Influence Policy-Making

Country: **Kuwait**

Reexamining Gender Norms in Kuwait: A Case Study of Article 198 of the Penal Code | Abdullah al-Khonaini |

INTRODUCTION

On a Thursday afternoon in June 2020, Maha, a Kuwaiti transgender woman, posted snapchat videos before turning herself into the police for the 'crime' of imitating the appearance of the opposite sex. In 2007, Kuwait criminalized 'imitation of the appearance of the opposite sex' as proposed through an amendment to Article 198. In the videos, Maha stated that she was wary of having to return to prison, given that she had previously been imprisoned in men's jailcells where she was sexually and physically assaulted by the police (Hajjaji, 2020), without any official response from the government. The video went viral and for almost four weeks afterwards discussions on social media continued on transgenderism, police abuse, gender, and sexuality.

This case study explores the ramifications of Article 198 of the Penal Code that criminalizes imitating the appearance of the opposite sex. This case study, which is divided into five main sections, draws from interviews conducted with a lawyer, an activist, and people who have been affected by the law. First, I provide a descriptive background of the legislation. Then, I describe the timeline of the Article 198 amendment and its consequences since the enactment. Next, I highlight the transformative moment that Maha's video sparked and I move to analyze the interrelation of different spaces involved in Maha's case from a sociopolitical stand; I draw on work by Cornwall and Coelho (2007) and the rigid gender-normative discourse that Article 198 reproduces and perpetuates. Finally, I conclude and highlight the way forward.

BACKGROUND

The Penal Code is one of the oldest legislations in Kuwait: some articles date back to the pre-independence period and the legislation itself predates the Kuwaiti constitution. In addition to that, it has been amended by the Kuwait National Assembly (KNA) and the government since the enactment of the constitution in

1962. However, it was not until 2007 that the ban on 'imitating the appearance of the opposite sex' was added to Article 198 and was deemed punishable for up to a year in prison and/or a \$3,250 fine (KNA, 2007b). While this is not an analytical study of the political context that shaped the amendments, it is important to highlight the political environment that has led to this amendment. It is also equally important to distinguish this article from other articles in the Penal Code that criminalize sexual acts.

In the political arena, there was tension between the Members of Parliament (MPs) and the government during 2006 and 2007. This tension was mirrored in the high number of the interpellations against the multiple ministers and the prime minister at the time (KNA, 2006b). Furthermore, Nabihah Khamsa, a grassroots movement, started around the same time to pressure both MPs and the government to push for a new electoral legislation (Albloushi, 2018). Unable to facilitate cooperation between the executive and the legislative branches, three Kuwaiti governments resigned in the period between 2006 and 2007 (Alanba, 2008). These tensions opened a political window for the amendment of Article 198.

TIMELINE

The legislation to amend Article 198 was proposed, voted, and applied within a six-month period. It was proposed by MP Waleed Al-Tabtabai in late 2006. It was then discussed in a closed parliamentary committee, which held two meetings in a week and voted unanimously in favor of the amendment without inviting any other stakeholders, such as medical or social specialists, civil society, or any governmental entities (KNA, 2006a). Then, in mid-2007, the KNA held a public session with 40 MPs attending and 24 absent, resulting in a vote in favor of the amendment. However, unlike the norm, the session did not include a discussion of the committee report and any potential objections to it (KNA, 2007a).

As a result, the wording of the legislation that criminalizes imitating the appearance of the opposite sex is vague and open to interpretation (KNA, 2007b). The lack of clarity on what accounts as 'imitating the opposite sex' has enabled the police to arbitrarily abuse their power when reporting cases related to this article. Furthermore, the vagueness of the article led to increased transgender detainees who have reported sexual abuse, torture, and humiliation (Moumneh et al., 2012). In addition to these implications, transgender detainees are detained or imprisoned based on their assigned sex at birth, meaning a transwoman is imprisoned in a men's prison, which immediately puts them in danger of assault and rape (Alsaleh, 2010). It is worth mentioning that cases of assaults between inmates have been reported among international human rights organizations but rarely by the Kuwaiti media (Moumneh et al., 2012). In addition, residents (expatriates, stateless, and low-wage workers) who are accused of imitation are treated differently in terms of process of punishment and often end up being deported to their passport country regardless of their sense of belonging, and without a possible appeal in the court (Alanba, 2019).

In 2015, the KNA approved the new Juvenile Protection and Cyber Crimes legislations. Because of the 2007 amendment to the Penal Code, these laws adopted the 'imitating the appearance of the opposite sex' into its clauses. However, the Juvenile law treats it differently: in case of minors (those under the age of 18) imitating the opposite sex is considered a deviance. Rather than criminalizing it, public social institutions such as the Social Care Home for Juveniles, pathologize 'imitating the opposite sex' (KNA, 2015b). This disparity has created confusion in the legal framework, where under the legal age 'imitating the opposite sex' is considered deviance, while above the legal age it is criminalized in both offline and online (cyber) spaces. Moreover, in 2018, the head of the Department for Legal Advice and Legislation, who is considered the legal advisor to the government of Kuwait issued a fatwa (legal opinion) based on the request from the National Council for Culture, Arts, and Letters to allow crossdressing in cinema, theatre, and other art forms (Alanba, 2018). This fatwa establishes that one's creative expression through art falls under one's constitutional right to freedom of opinion and expression, rendering Article 198 from the Penal Code irrelevant.

INFLUENCING FACTORS AND TRANSFORMATIVE MOMENT

As mentioned in the introduction, the video has recently sparked discussions online among social media influencers, social activists, religious clerics, psychiatrists, political groups, local transgender individuals, and Arab and international LGBTQ+ organizations. These discussions took the form of text and hashtags on Twitter, illustrations and memes, and live debates and monologues on platforms such as Instagram Live and Zoom, while traditional media did not report on any of it. What makes these discussions remarkable is the wide range of views and demands that have been expressed. Some local civil society and online activists have demanded the government open an investigation about the sexual assaults in prisons and police stations (KLM, 2020), while others have argued that 'imitating the other sex' should not be pathologized or criminalized. The unprecedented effect of the video online sparked a new form of debate on social issues, one that allows various groups of people and individuals to speak up and share their stories and opinions. This growing online debate shows that traditional media is no longer the only source of information and that social media has provided new means to challenge the general status quo.



ANALYSIS: CONTESTED SPACES, BINARIES AND BORDERS

In order to unpack the implications of this amendment, I first explore the conflicted nature of political, public, and private spheres in Kuwait as well as the online [digital] and offline [physical] realms. To contextualize these spaces and define spaces for potential change, I build on the work of Cornwall and Coelho (2007). I will then explain how such spaces perpetuate a strict binary understanding of gender and sex that leads to discrimination and abuse especially affecting marginalized groups such as transgenders and non-Kuwaiti residents.

In order to fully evaluate the political space, I want you to imagine it as a meeting room with its door locked where not everyone is allowed to enter. Then, we need to address the dynamics of how this space is created, as Gaventa (2004) argues that in order to fully evaluate these spaces, we need to address the dynamics of these spaces as follow: "(i) how spaces are created; (ii) the places and levels of engagement; and (iii) the degree of visibility of power within them" (Gaventa, 2004). In reference to the previous section, the parliamentary committee had not invited any stakeholders to discuss the amendment of Article 198. Therefore, the members of the committee have influenced who is inside or outside of the space in terms of voices and identities, and who is excluded and/or included (Cornwall and Coelho 2007). The locked meeting room was never accessible to those affected by the amendment, leaving the MPs exclusively in control of a closed political space, which has the power to decide on the public space.

For the public space to be contextualized, the Kuwaiti Penal Code defines it as "a place where anyone can be seen by others" (KNA, 1960). Therefore, whether one is at the mall, walking in the street, or driving their car, they can be stopped and interrogated by the police if it views them as 'imitating the opposite sex' (Moumneh et al., 2012). Because of its ambiguity and its broad definition, this law can potentially lead to discrimination against all women and men including transwomen and transmen. In contrast to the public space, the private space is left out of the ban on 'imitating the other sex.' However, the 2018 fatwa has challenged this execution. The fatwa allows intersecting and crossing of gender norms in cultural spaces such as theatre, drama, and arts (Alanba, 2018). Therefore, the fatwa has allowed a semi-public space to exist, a cultural space, where the law does not apply. This strict imposition of binary gender norms in one public space and relaxing it in another is

telling of the inherent problems of this ban. In addition to that, the online space is now subject to the Cyber Crime legislation (KNA, 2015a) in which rigid gender norms have to be enacted yet allowed in certain cultural contexts based on the legal fatwa. These overlapping and sometimes contradicting processes of policing gender-normative spaces lead to essential questions such as: What is public space? How can we define what is cultural and what is not? Where is the line for private space? Without addressing these questions, the ban remains vague and discriminatory.

Furthermore, the implications of this law resonate with what Foucault argued as Biopolitics; our bodies are managed by the internal geopolitical discourses (inevitably through the KNA) and through policing and punishment (Foucault, 1990). In the proposal to amend the legislation, MP Al-Tabtabie included an explanatory note that limits women to their 'feminine' mannerism, and men to their 'masculine' mannerisms (KNA, 2007b). Once again, the essential question of what is considered 'masculine' and 'feminine' in a dynamic and evolving society such as Kuwait remains unanswered (KNA, 2006). The final version of the law adopted the same explanation; therefore, this has mandated the public space to be policed in order to enforce the law. As a result, the amendment of the law institutionalized the gender binary as 'feminine and masculine in appearances' to the pre-determined sexes female and male respectively without taking into account the constant changes of cultural and social roles and norms. Any form of appearance besides exclusively masculine for male and exclusively feminine for female is therefore punishable by law. Consequently, this policing is not only targeting transgender of the opposite sex, it expands to include 'suspicions' of behaving too feminine or masculine, hence reinforcing the gender binary (Mousa & Schull, 2017).

The power dynamics between different groups of people and between stakeholders and governmental bodies in Kuwait has led to a political space that excludes those affected by the implications of Article 198. Subsequently, the ambiguity within the article reinforces rigid gender norms and increases the chances of discrimination and abuse by individual police officers, who have the authority to act upon their subjective opinion and arrest a person in nearly all public spaces. The implications of amending Article 198 have affected almost all the citizens and residents in different forms and structures. An example of this imbalanced power structure is a recent case that happened to a non-Kuwaiti resident, a young adult called Shehab who recently turned 18. Shehab was born and raised in Kuwait and was arrested and accused for imitating the appearance of the opposite sex on social media, and as a result, he was deported to his passport country (Iran) amid the COVID-19 pandemic and strict airport movement.

Unlike Maha, Shehab was not a Kuwaiti citizen, and he was deported on the orders of the minister of interior, without any formal appeal in court (Alqabas, 2020). These two cases (Maha and Shehab) were treated differently because of their nationality and the way the legal system works in extending more power to the minister of interior. The government has the right to deport any residents who violate the law to their passport country without any appeal in court (Alwatan, 2014). In contrast to Maha's case, where she was released from custody thanks to online activism and pressure, Shehab did not get as much attention. Therefore, it reinforces the lack of agency and imbalance of power between different groups of people that are affected by the Article 198.

WAY FORWARD AND CONCLUSION

The online exchange of views on social media and live streams have created an increasingly socio-political debate on Article 198. Maha's case has challenged traditional views and has created space for marginalized groups to reclaim their voices. Unlike traditional media, where marginalized groups have always been misunderstood and ridiculed (Alenazi, 2008), they have been given a space via online platforms. The younger generations have nudged the status quo using different means of participation and communication mainly through social media. Therefore, the reaction to Maha's case has consolidated and harmonized the efforts in penetrating closed political spaces. As Kuntsman and Alqasimi (2012) put it delicately, "an approach that is unprecedented as an attempt to more successfully call into question the local/global, imported/indigenous, alien/authentic, act/identity, primitive/civilized, East/West binaries." The fact that the political spaces, where the decision-making happens, are not accessible to marginalized groups, has led to problematic implications. As a result, the amended Article 198 leaves the phrase 'imitating the opposite sex' undefined and ambiguous. Hence, it puts various groups of people and individuals in danger of being mistreated and abused by the police. As an evolving society, definitions of femininity/masculinity, womanhood/manhood are constantly changing in Kuwait. However, this article assumes an unrealistic division between the two sexes, and cements binaries and imagined spaces that are exclusive to limited identities and voices. Maha's video has initiated a social and cultural dialogue on the implications of Article 198 that can only be taken forward. Her story invites us to hear voices that are rarely heard, reminding us to re-question our social and political dynamics, and in particular, the institutionally enforced gender norms.



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BREAKING THE MOLD PROJECT

In mid-2018, the “Civil Society Actors and Policymaking in the Arab World” program at IFI, with the support of Open Society Foundations, launched the second round of its extended research project “Arab Civil Society Actors and their Quest to Influence Policy-Making”. This project mapped and analyzed the attempts of Arab civil society, in all its orientations, structures, and differences, to influence public policy across a variety of domains. This research produced 92 case studies outlining the role of civil society in impacting political, social, economic, gender, educational, health-related, and environmental policies in ten Arab countries: Lebanon, Syria, Palestine, Jordan, Egypt, Morocco, Tunisia, Yemen, and the Arab Gulf.

Over two dozen researchers and research groups from the above countries participated in this project, which was conducted over a year and a half. The results were reviewed by an advisory committee for methodology to ensure alignment with the project’s goals, and were presented by the researchers in various themed sessions over the course of the two days.

THE CIVIL SOCIETY ACTORS AND POLICY-MAKING PROGRAM

at the Issam Fares Institute for Public Policy and International Affairs at AUB, examines the role that civil society actors play in shaping and making policy. Specifically, the program focuses on the following aspects: how civil society actors organize themselves into advocacy coalitions; how policy networks are formed to influence policy processes and outcomes; and how policy research institutes contribute their research into policy. The program also explores the media’s expanding role, which some claim has catalyzed the Uprisings throughout the region.

THE ISSAM FARES INSTITUTE FOR PUBLIC POLICY AND INTERNATIONAL AFFAIRS AT THE AMERICAN UNIVERSITY OF BEIRUT

The Issam Fares Institute for Public Policy and International Affairs at the American University of Beirut (AUB Policy Institute) is an independent, research-based, policy-oriented institute. Inaugurated in 2006, the Institute aims to harness, develop, and initiate policy relevant research in the Arab region. We are committed to expanding and deepening policy-relevant knowledge production in and about the Arab region; and to creating a space for the interdisciplinary exchange of ideas among researchers, civil society and policy-makers.

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