

# كسر القوالب Breaking the mold

#Breaking\_The\_Mold

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

Country: **Bahrain**

Keywords: **Gender, Women's rights, Rape laws, legal reforms, feminist movement, Bahrain**

### Examining the Draft Amendments to Article 353 of the Bahraini Penal Code

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Despite several attempts to abolish Article 353 of the Bahraini Penal Code, it has only been amended in order to allow courts to exercise discretion on a case-by-case basis. This paper proposes a survivor-centered approach to examine the legislative proposals regarding Article 353. It also highlights the efforts of the Bahraini Women Union (BWU) towards the abolition of the aforementioned article.

#### OVERVIEW OF THE CASE

The government of Bahrain has implemented many policies that aim to enforce gender equality in Bahrain. However, one law often privileges men – specifically, male criminals – over -law-abiding-women; Article 353 of the Bahraini Penal Code does not punish a rapist who subsequently marries his victim after the criminal act. The specific wording of Article 353 of Law (15) of the 1976 Bahraini Penal Code is as follows: “No penalty shall be inflicted against a person who has committed one of the crimes set forth in the preceding Articles if he was subject to a final court judgement before concluding the marriage, such judgement shall be subject to a stay of execution and its penal effects shall cease.”

Exoneration by marriage, or marry-the-rapist laws, leave survivors on the sidelines, and center the entire issue around family, society or traditions. These laws do not assure full protection for rape survivors as they provide a legal way for rapists to escape punishment. According to the Bahraini Supreme Council for Women, from 2010 to 2014, only one out of 24 cases of recorded rape involved Article 353 being used in court (Al A'ali, 2016). However, abolishing this article would symbolize recognition that rape survivors should not be less privileged in their rights than the criminal perpetrators.

In Bahrain, policy-makers (members of parliament, government officials, and officials from semi-governmental organizations) have delivered several proposals regarding Article 353 of the

Penal Code. The proposals include a full repeal of the article and a partial repeal in which the exemption of the punishment will not be given to perpetrators in certain cases. The Bahraini Council of Representatives approved the recommendation to fully repeal the article in March 2018. However, two months later, the council retracted its decision and amended the article to follow the partial appeal, thereby giving judges the discretion to determine whether or not to proceed with sentencing.

#### TIMELINE: THE UNSUCCESSFUL REPEAL EFFORTS

Efforts to repeal the controversial article were made by civil society organizations (CSOs) like the BWU, semi-governmental organizations such as the Bahraini Council for Women, and a number of Bahraini MPs.

The partial repeal proposals: During the Bahrain National Dialogue sessions, which began in 2011, the Supreme Council for Women proposed an amendment to Article 353 that guarantees that an offender will remain married to the victim for at least five years in order for him to be exempted from punishment. However, the Legislation and Legal Opinion Commission has rejected this proposal claiming that it is incompatible with the husband's right to divorce according to the Islamic Sharia (CR 4/2D/3733/2016).

The full repeal proposals: In May 2015, MP Mohammed al-Ma'arafi submitted a bill to fully repeal Article 353 of the Bahraini Penal Code. The MP stated that this article is in conflict with the philosophy of punishment and the principles of deterrence of criminal acts (CR 4/2D/3733/2016). In March 2016, the Foreign Affairs, Defense, and National Security Committee at the Council of Representatives recommended an approval of the repeal. However, the proposal was tabled, which triggered a number of CSOs to start a campaign to demand the full repeal of the article. In 2018, the Council of Representatives put the issue back on the agenda for discussions (Akhbar-alkhaleej, 2018) which ended by the approval

of the full repeal of Article 353 in March 2018 (Alwatannews 2018). In May 2018, despite the approval of three governmental and semi-governmental entities, the Council of Representatives backed down on its decision to fully repeal the article.

### OPPONENTS OF THE REPEAL: THE ARTICLE PRESERVES FAMILY HONOR

The Ministry of Interior along with the National Institute for Human Rights have rejected the repeal proposal on the grounds that rape is a “stain” on family honor (CR 4/2D/3733/2016). Subsequently, keeping this article in the Penal Code is necessary for families that resort to the marriage option in order to protect their “honor” in cases of pregnancy or loss of “virginity.” The rhetoric of the Ministry of Interior assumes that victims have the absolute freedom to choose between protecting their family honor and pursuing charges against their rapists (CR 4/2D/3733/2016).

### PROPOSERS OF THE REPEAL: RAPE IS A DELIBERATE CRIME

In support of the full repeal, the Ministry of Labor and Social Development stated that women are the essence of any family and that this article aims only at conserving patriarchal customs and traditions (CR 4/2D/3733/2016). The ministry supported the proposal to remove the article from the Penal Code as it violates the Convention for the Elimination of Discrimination Against Women (CEDAW). It also stated that rape is a deliberate crime, and that it is unreasonable to withhold punishment if all of the evidence indicates that a crime has been committed. Moreover, the Supreme Council for Women (SCW) supported this full repeal proposal stating that Article 353 is a violation of women’s dignity, and a violation of a woman’s right to choose her life partner. The article, according to their discourse, does not prioritize the victim’s mental and emotional wellbeing and must be revoked for that reason (CR 4/2D/3733/2016).

In addition, the SCW expressed that the article violates Islamic law and the concept of “public right” that is adopted within the legislative criminal policy. According to the notion of the “public right”, rape charges should be pursued as a protection of public order and security regardless of whether or not a victim chooses to proceed with the charges. The Supreme Council for Islamic Affairs has also supported the full repeal proposal for the same reasons (CR 4/2D/3733/2016).

### CIVIL SOCIETY STRATEGIES AND TACTICS: THE BAHRAINI WOMEN UNION

The BWU was one of the first CSOs to welcome the proposal for full repeal of Article 353. The union has adopted two strategies that aim to influence the final decision of the Council of Representatives; the first strategy focused on social mobilization through a series of social media campaigns and legal seminars that aim to break the silence and raise awareness about the importance of removing this article. Many young independent activists were encouraged to contribute to these campaigns; Bahraini university students have circulated media materials to raise awareness about the issue and have conducted academic research that emphasizes the importance of repealing the article (Alayam, 2017).

As a second strategy, representatives of the BWU were keen to regularly attend parliamentary sessions that address Article 353 in order to deliver their vision directly to MPs. The union has also relied on its strong connection with the SCW which has conveyed the civil society’s perspective to the legislative circles. Moreover, the BWU has issued, along with 19 Bahraini CSOs, a statement that calls for the immediate repeal of Article 353 of the Penal Code in order to safeguard survivors (Alayam, 2018).



### POLICY WINDOWS

The partial repeal proposed by the SCW, along with the full repeal proposal submitted by a member of the parliament, and accompanied by efforts of the BWU, were all factors that have opened great policy windows; however, the decision not to revoke Article 353 may have come with the idea to avoid any potential conflicts with conservative political factions that generally oppose policies regarding progressive women’s rights (Karolak, 2013).

### POLICY OUTCOME

In May 2018, the Foreign Affairs, Defense and National Security Committee at the Council of Representatives approved the partial repeal amendment to Article 353 which relies on the discretion of the court on the grounds that the article relates to crimes other than rape, and is best judged on a case-by-case basis (Alayam, 2018).

### THE ABSENCE OF A CLEAR DEFINITION OF “RAPE”

Although the law distinguishes between consensual sex and rape in the preceding articles, Article 353 ignores the issue of spousal rape by considering marriage as a valid reason for exemption of punishment. In addition, the reliance on judicial discretion, in the recent amendment of the article, comes as a result of the absence of a clear definition of “rape” in the Bahraini Penal Code.

Moreover, the interchangeable use of the terms “rape” and “adultery/fornication” in legislative literature, along with the referral to the traditional Islamic punishment of adultery show that there is confusion about what “consent” means and what constitutes a rape crime. Therefore, there is a need to specify the punishment of rape whether it occurs under the umbrella of marriage or outside of it.

### THE FREEDOM OF CHOICE ASSUMPTION

Article 353 presupposes that women have the freedom, in all circumstances, to make the choice of marrying their rapists. The article does not take into account familial or societal pressures that force women to resort to the marriage option. In addition, it violates Article 27 of the Fourth Geneva Convention, to which Bahrain acceded to in 1971, which emphasizes the need to protect women from attacks on their honor, and especially from rape.

### CONCLUSION

Failure to revoke the article reflects an apologetic rape culture, limits Bahraini women’s ability to seek legal protection, and holds them accountable for crimes they did not commit. The referral to the discretionary power of the judge – which could still drop rape charges – is a result of the lack of a clear definition of rape. The final decision of the parliament was a shock to CSOs as the motives behind it were not clear. However, this decision may show how the lack of separation of powers in Bahrain influences policy-making.

Although the case is still ongoing and a full repeal of the article may still be possible, and taking into consideration the continued efforts of CSOs, a change at the policy level is still necessary. The provision of legal tools that protect women from violence is crucial for the success of women’s economic and political empowerment programs. Although the government of Bahrain has been keen on empowering women in the public sector, the weak legal protection from gender-based violence hinders women empowerment in the conservative private sphere (Karolak, 2013).



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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.

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