



Feminist League

Committee on the Elimination of Discrimination against Women
Human Rights Treaties Division (HRTD)
Office of the United Nations High Commissioner for Human Rights (OHCHR)
Palais Wilson - 52, rue des Pâquis
CH-1201 Geneva
Switzerland
By E-mail: cedaw@ohchr.org

Re: Information on Kazakhstan for Consideration by the Committee on the Elimination of Discrimination against Women at its 74th Session (21 October - 8 November 2019)

30 September 2019

Dear Distinguished Committee Members,

We respectfully submit this letter in advance to the Committee on the Elimination of Discrimination against Women (“the Committee”) for consideration during its 74th Session (21 October - 8 November 2019). Equality Now, the Public Movement Against Violence #NeMolchi.Kz and the Feminist League of Kazakhstan request that this letter be used to supplement Kazakhstan’s 5th State Party periodic report to the Committee. Our joint submission details our concerns with regard to laws related to rape and other forms of sexual violence and procedures and practices which effectively deny access to justice for survivors of sexual violence. Specifically, Kazakhstan’s legal system provides a number of opportunities for perpetrators to escape criminal liability or punishment, namely through the way sexual violence crimes are defined; allowing for the direct release of a perpetrator from liability or punishment in certain circumstances; and through the way sexual violence crimes are investigated and prosecuted, including with respect to adolescent girls.

Equality Now is an international human rights NGO with the mission to achieve legal and systemic change that addresses violence and discrimination against women and girls around the world. Founded in 1992, Equality Now has offices in London, New York, Nairobi and Beirut, as well as consultants based in various parts of the world. Ending sexual violence, sex trafficking, harmful practices and achieving legal equality are the main areas of Equality Now’s work. This submission is in reference to Equality Now’s 2019 report, “Roadblocks to Justice: How the Law is

Failing Survivors of Sexual Violence in Eurasia”¹ which identified gaps in the law, thereby allowing for actual and potential impunity for perpetrators of sexual violence crimes.

The public fund “The Public Movement Against Violence #NeMolchi.Kz” is based in Almaty, Kazakhstan but operates across the country and in Central Asia more broadly. Since July 2016, it has been working as a national public movement to protect the rights of women and children who have experienced different forms of violence. The majority of cases that it deals with are sexual abuse, but it also works on domestic violence, economic violence and bride kidnapping. It provides legal, psychological and social support to survivors, organises trainings and seminars for youth and undertakes litigation in cases relating to child custody, property and alimony.

The Feminist League of Kazakhstan is an organisation with ECOSOC status, based in Almaty in Kazakhstan and was registered as an organisation in 1994. It has been advocating for equality in all spheres of life, including economic, political, social, cultural and within the family unit. It engages in fighting against sexism in education, culture and the media, creating a space for feminist culture and examining laws relating to women and making recommendations to the Kazakh government.

The legal provisions and practices detailed in our submission highlight the failure of the State to comply with its duty to provide equal protection under the law to survivors of sexual violence (Article 2(c) of CEDAW) and failure of law enforcement to protect women from sexual violence (Article 2(c) and (e)). Our submission also asserts that the decisions and failings of the authorities and their agents constitute demonstrable direct and indirect discrimination against women (Article 2(d)); as well as failing to recognise and identify the gender-dimension of sexual violence during the prosecution of the accused and in the punishment of this crime (Article 2 (e)). In violation of the Convention, Kazakhstan has also failed to enact criminal law provisions to effectively prosecute sexual violence and gross manifestations of violence against women (Article 2 (b)). We submit that the root cause of the failures of the State is its non-compliance with the obligation to transform gender hierarchies and stereotypical attitudes towards women, contrary to Articles 2 (f) and 5 (a) of the Convention and the obligation to combat violence against women and provide access to justice to survivors, as provided in General Recommendations 19, 33 and 35 of the CEDAW Committee.

We reiterate the Concluding Observations on the fourth periodic report of Kazakhstan² and underline, in particular, the recommendations urging the government of Kazakhstan to “ensure effective investigation of all complaints and the ex officio prosecution of acts of violence against women, ensure that perpetrators are punished with appropriate sanctions, and do away with any form of mediation and reconciliation in cases of violence against women”,³ as well as the recommendation that the State revises its legislation to ensure that the definition of rape is in accordance with the Convention and CEDAW’s jurisprudence.⁴

¹ https://www.equalitynow.org/roadblocks_to_justice

² https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fKAZ%2fCO%2f3-4&Lang=en

³ CEDAW/C/KAZ/Co/3-4 para 19(c).

⁴ CEDAW/C/KAZ/Co/3-4 para 19(d).

Definitions of sexual violence crimes enabling impunity for perpetrators

Kazakhstan's Criminal Code continues to provide an inadequate and limited definition of sexual violence crimes leaving many of the coerced and non-consensual acts of a sexual character without any punishment, as was underlined in the Committee's 2014 Concluding Observations. In addition, classifying such offences as less serious serves to obstruct proper justice for victims of sexual violence. Article 120 defines rape as sexual intercourse with the use of violence or threats of violence, of a female victim or other persons or abusing the "helpless state of the victim", while Article 121(1) criminalises "pederasty, lesbianism or other actions of a sexual character committed with the use of violence or with a threat thereof, with respect to a male (or female) victim or other persons, or with the use of the helpless state of the victim". Even though the law punishes forms of penetration other than vaginal penetration (as per Article 121), there is an extremely limited understanding that other forms of penetration also constitute rape/sexual violence and often the authorities tend not to initiate any criminal investigation in such cases. As a result, due to this limited interpretation, it has been virtually impossible to prove rape when penetration is not penile-vaginal, even in cases where there is additional violence, and the victim is instead perceived to be slandering the alleged perpetrator.

Violence and threat of violence, as elements of rape, are interpreted to be only physical, rather than also psychological or economic harm or of any other form of coercive behaviour. There is no definition of economic violence under the civil or criminal codes. In addition, threats of violence need to be a threat of 'imminent' violence. Threats of future violence, no matter how severe, are not considered as an element of rape. In addition, whilst the victim may have suffered other additional forms of physical violence, they are not being recorded as separate offences by the authorities. In cases where rape is alleged but there is no additional serious physical harm, the courts may even dismiss the rape charge. It is common practice that nobody, including law enforcement and the courts, will believe that a rape was committed when there is no shouting, witnesses, resistance or additional injuries. The "helpless state of the victim" is included in the definition of rape as an alternative element to the requirement for additional violence on the part of the perpetrator, but in practice there does not appear to be a common understanding about what "helpless state" means as the term is not defined in the law.

Contrary to international and regional standards, Articles 120, 121 and 123 (whereby the last Article criminalises compulsion to sexual acts) do not include the lack of voluntary and genuine consent on the part of the victim as a constituent element for sexual violence crimes. As well as neglecting the importance of willing consent, the reviewed sexual violence laws do not enumerate a wide range of coercive circumstances that can paralyse the will and the actions of the victim, such as abuse of trust and authority and situations of dependence as highlighted above, but also deceit. These provisions run counter to CEDAW's General Recommendation 35 which provides that States should ensure that a "definition of sexual crimes, including marital and acquaintance or date rape, is based on the lack of freely given consent and takes into account

coercive circumstances”⁵, and further defined in the CEDAW Communications of Vertido v The Philippines⁶ and R.P.B. v The Philippines.⁷

Legal provisions allowing impunity for perpetrators of sexual violence

Contrary to international human rights standards, Kazakh law allows impunity for perpetrators of sexual violence if they “reconcile” with the victim. According to Article 68 of the Criminal Code, a person might not be found responsible for a crime if he reconciles with the victim and “compensates” the harm without further examination by the authorities. This Article can also be applied in cases of rape (non-aggravated), violent actions of a sexual character, statutory rape and compulsion to perform sexual actions. Local groups report that there have been cases of rape and gang rape which did not reach the trial stage yet, but where investigators were found to be exerting pressure on the relatives to get the victim to close the case as the authorities did not want to harm their relationship with the perpetrators whom they knew. In such cases where there is undue pressure by investigators, victims and their relatives often stop pursuing legal justice and agree on a form of compensation. Pressure to “reconcile” directly exerted on the victims by the perpetrators is also a serious concern. There are however no official records or statistics on how many cases were closed like this.

Reconciliation is often used and abused with the result that perpetrators of sexual violence escape any form of criminal punishment or repercussions for their criminal behaviour, including avoiding a criminal record. Such provisions are concerning as they serve to undermine and prevent survivors of rape and sexual violence from seeking justice, as had also been highlighted during the Committee’s review of Kazakhstan’s policies on violence against women in 2014. Article 70 enables a perpetrator to be released from criminal responsibility due to change of circumstances, such as if it is established that at the time of the trial, the perpetrator ceased to be “socially dangerous”. This provision has often been abused to exonerate the perpetrators of sexual violence from responsibility after marriage to the victim. In the case of adolescent girls and statutory rape, their relatives and parents negotiate with the police to arrange the marriage with the perpetrator. The police are seen to try to resolve statutory rape cases in this way without filing a case. In rural communities, local groups report that there have been cases of gang-rape where a victim would be forced to ‘marry’ one of the men who raped her in an attempt to ‘keep the village peace’. In some cases, they may later divorce. For relatives in these communities it is perceived as more important that the victim has been ‘married’ than have her family honour destroyed as a result of having been raped.

Local groups have reported that the police assist perpetrators to evade criminal responsibility by encouraging them to pay a relatively small amount over a period of time to the victim or to assist perpetrators in ensuring that their case does not reach the trial stage. Such practices give impunity for sex and gender-based violent crimes against women and girls.

⁵ CEDAW, CEDAW/C/GC/35, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19.

⁶ Karen Tayag Vertido v The Philippines, CEDAW, Communication No. 18/2008, UN Doc CEDAW/C/46/D/18/2008 (2010)

⁷ R.P.B. v The Philippines, CEDAW/C/57/D/34/2011, Communication No. 34/2011

Failure to provide mandatory prosecution for sexual violence

The lack of mandatory (*ex officio*) prosecution for sexual violence, as provided by the law, denies justice to survivors and is contrary to international human rights standards. As noted by the CEDAW Committee in its General Recommendation 35, States should “ensure effective access of victims to courts and tribunals; ensure authorities adequately respond to all cases of gender-based violence against women, including by applying criminal law and as appropriate *ex officio* prosecution to bring the alleged perpetrators to trial in a fair, impartial, timely and expeditious manner and imposing adequate penalties”.⁸

Article 32 of the Criminal Procedure Code provides that cases defined as ‘compulsion to perform sexual actions’ (Article 123 of the Criminal Code) will qualify as cases of private prosecution, meaning they are initiated upon a claim by the victim and will be terminated in case of reconciliation with the defendant, or when the victim has withdrawn the complaint for any other reason. Rape and other violent sexual acts (Articles 120 and 121) qualify as private-public prosecution which again is initiated upon the claim of the victim and will be terminated in cases of reconciliation with the defendant. Such legal provisions deny justice to survivors, because the survivor, rather than the state, is required to bear the burden of the criminal proceedings, including when it comes to the collection of evidence required to prove the circumstances of the crime. These provisions also give space to local law enforcement authorities to discourage women from filing such claims and to postpone the initiation of the investigation, anticipating in practice that one way or another, a woman is likely to withdraw her claim. Moreover, there is often also pressure from relatives or family members on the victim to withdraw her complaint, and local groups report there have often been situations where the victims have been intimidated or bribed. Due to the clustering of the population in small, close-knit communities or enclaves, it is incredibly difficult for reports to be filed against the perpetrators. There is also pressure on women to keep silent by the senior community leaders. Local groups further assert that they frequently hear from investigators that the women themselves are to blame for the sexual violence they suffered, even those who come forward with additional severe physical injuries because they tried to resist the perpetrator.

Moreover, local groups also assert that in practice there is no distinction made between numerous acts of rape: multiple rapes by the same person will be considered as one act of rape despite the fact that Article 120 of the Criminal Code explicitly criminalises multiple rapes by the same individual and imposes a graver penalty than for a single rape committed by the same individual.

Burdensome evidence requirements, gender stereotyping and secondary victimisation throughout the legal proceedings further deny justice to survivors. There are no clear criteria or adequate awareness by authorities and investigators to evaluate the impact of rape on a victim’s psychology and the subsequent trauma she endures, which could influence her behaviour throughout the criminal proceedings. In a case worked on by a contributor to this submission involving a 16 year old girl who was raped on a train by two train attendants, the investigators interrogated residents from the girl’s village which served to re-traumatise her. There was no

⁸ CEDAW, CEDAW/C/GC/35, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19.

awareness or appreciation that in asking all residents about information pertaining to the case, this would publicise the girl's personal ordeal and force her to relive the traumatic experience. In another case, a 16 year old girl committed suicide two years after she reported that her step-father had raped her. In her suicide note, she wrote "nobody believes me". The CEDAW Committee emphasised the fact that "the secondary victimisation of women by the criminal justice system has an impact on their access to justice, owing to their heightened vulnerability to mental and physical abuse and threats during arrest, questioning and in detention".⁹

Local groups report that the situation is particularly difficult for women and girls living in rural areas where it is often the case that they do not have enough knowledge or confidence to file a complaint and instead are easily dissuaded from accessing justice. If there are no witnesses, a victim living in a rural area will, in most cases, keep silent about the crime, while in cases where there are witnesses, there is a greater, yet still limited, chance that the case will be able to proceed.

There is a lack of common rules and procedures across the country, resulting in each investigator operating in his/her own way. This detrimentally affects the uniform application of justice and is difficult for victims to navigate within this system. Furthermore, local groups have expressed that there have been claims that investigators have impeded access to justice by assisting perpetrators to escape justice, without facing any legal repercussions themselves for obstructing justice. Examples include assisting perpetrators to flee and being influenced by their own personal relationship to the perpetrator.

Suggested Questions for Kazakhstan

We respectfully urge the Committee to raise the following questions with the government of Kazakhstan regarding the violations of the Convention addressed in this submission:

- What measures have been undertaken by the government of Kazakhstan to ensure that sexual violence crimes are defined in compliance with the standards developed by the CEDAW Committee? In particular, are amendments envisaged for Articles 120, 121 and 123 of the Criminal Code to cover all forms of sexual violence acts committed without the victim's voluntary, genuine and willing consent, and to include a wide range of coercive circumstances? Are there amendments envisaged to make sure that sanctions for these crimes correspond to the gravity of the crimes?
- What measures have been undertaken by the government of Kazakhstan to legally abolish private-public prosecution and reconciliation for sexual violence crimes, in accordance with the CEDAW Committee's recommendations and international human rights standards?
- What measures have been undertaken by the government of Kazakhstan to remove burdensome evidence requirements and ensure gender-sensitive investigation of sexual violence crimes?

⁹ Report of Dubravka Simonovic – the Special Rapporteur on violence against women, its causes and consequences on her mission to Georgia; 22 July 2016, A/HRC/32/42/Add 3.

Recommendations for Action by the Government of Kazakhstan

We also respectfully urge the Committee to make the following proposed recommendations to the government of Kazakhstan regarding the violations of the Convention addressed in this submission:

- Amend Articles 120, 121 and 123 of the Criminal Code to ensure that the definitions of sexual violence crimes are in compliance with standards developed by the CEDAW Committee and cover all forms of sexual violence acts committed without the victim's voluntary, genuine and willing consent, and envisage a wide range of coercive circumstances; ensure that sanctions for these crimes correspond to the gravity of the crimes;
- Make relevant amendments in the Criminal Code of Kazakhstan to ensure that perpetrators of sexual violence do not go unpunished based on "reconciliation" with the victim, or due to the "change of circumstances" of the perpetrator;
- Amend the Criminal Procedure Code of Kazakhstan to ensure that sexual violence crimes (rape, sexual assault, compulsion to sexual intercourse) are subject to mandatory investigation and prosecution by the state (ex officio, public prosecution). Ensure that the Criminal Code excludes private or public-private prosecution options for these crimes.

Thank you very much for your kind attention, and please do not hesitate to contact us if we can provide further information.

Sincerely,



Jacqui Hunt
Director Europe/Eurasia
Equality Now



Dinara Smailova
Leader of the Public Movement NeMolchi Kazakhstan



Evgeniya Kozyreva
Chairperson
Feminist League