

Mandate of the Working Group on the issue of discrimination against women in law and in practice

REFERENCE:
OL AFG 2/2017

15 November 2017

Excellency,

I have the honour to address you in my capacity as Chairperson of the Working Group on the issue of discrimination against women in law and in practice, pursuant to Human Rights Council resolution 15/23.

In this connection, I would like to bring to the attention of your Excellency's Government **concerns relating to the criminalisation of adultery under the the 1976 Penal Code of Afghanistan, which seems to contravene international human rights norms and standards as outlined below.** The Working Group wishes to recall its communication of 18 July 2012 whereby it brought to the attention of your Excellency's Government information concerning the killing in public of a woman who was allegedly accused of adultery (see AFG 1/2012) and the reply dated 4 October 2012 received from your Excellency's Government. More generally, the Working Group wishes to recall its communications of 31 October 2014 (AFG 1/2014) and 9 June 2015 (AFG 2/2015) whereby it brought to the attention of your Excellency's Government information concerning the persistence of legislation which directly or indirectly discriminate against women and girls.

Adultery is a criminal offence in Afghanistan as set out in article 427(1) of the 1976 Penal Code even though the latter does not contain a definition of adultery. The applicable penalty is "long imprisonment". While the 1976 Penal Code does not explicitly discriminate against women, as adultery is gender-neutral and the punishments under law apply equally to both men and women, in practice women are still more likely than men to face charges of adultery.

It is our firm belief that laws criminalizing adultery, such as the Penal Code, are based on and result in discrimination against women. Our Group noted that the enforcement of such laws leads to discrimination and violence against women in law and in practice and stressed that while criminal law definitions of adultery may be ostensibly gender neutral and prohibit adultery by both men and women, closer analysis reveals that the criminalization of adultery is both in concept and practice overwhelmingly directed against women and girls. Criminalisation of adultery hence contravenes article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (ratified by Afghanistan on 5 March 2003), in which States parties condemn discrimination against women in all its forms, and agree to pursue, by all appropriate means and without delay, a policy of eliminating discrimination against women. Our expert group considers that the offence of adultery, though it may constitute a matrimonial offence, should not be regarded as a criminal offence punishable by imprisonment death or stoning.

It is also our view that criminalization of sexual relations between consenting adults should be regarded as an interference with the privacy of the individuals concerned in violation of article 17 of the International Covenant on Civil and Political Rights (ICCPR) (ratified by Afghanistan on 24 January 1983) which provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (See our position paper in this regard available at <http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/WGWomenIndex.aspx>).

We therefore call upon your Excellency's Government to comprehensively review the provisions of the Penal Code, and to remove all provisions that discriminate against, or have a discriminatory impact on women, including those regarding adultery.

In addition we would like to express our concerns that the criminalisation of adultery contravenes article 5 of the Convention on the Elimination of All Forms of Discrimination against Women, by reinforcing social and cultural patterns that are based on prejudice and stereotyped roles for men and women. We are concerned that such discriminatory legislation may exacerbate gender-based violence, as women who are accused and/or convicted of adultery tend to be targets of violence and abuse, by members of family, community or law enforcement officers, due to a belief that they deserve to be punished for their moral crimes.

During her 2014 visit to Afghanistan and more specifically during her visits to a women's prison in Kabul and the juvenile rehabilitation center in Herat, the Special Rapporteur on violence against women, its causes and consequences expressed serious concern at the high number of women and girls arrested, prosecuted and imprisoned for so-called "moral crimes", including adultery and extra-marital sex. The Special Rapporteur indicated that interlocutors stated that such convictions were often made on the basis of minimal evidence of wrongful behaviour and that investigations were often not properly carried out. The Special Rapporteur noted that of the 744 female prisoners across the country, 428 — or 58 per cent — were charged with so-called "moral crimes" and that a total of 11 girls were being held at the juvenile rehabilitation facility in Herat, most of who had been arrested on charges of attempted *zina*. The Rapporteur also expressed concern at the forced submission to virginity testing of women and girls accused of moral crimes, including those have been raped, to gather evidence for the purposes of a conviction (A/HRC/29/27/Add.3).

Furthermore, article 398 of the Penal Code provides a partial defence to murder where a person "defending his honour" has witnessed his spouse or close relation "committing adultery or being in the same bed with another". A man convicted of an honour killing faces a maximum sentence of two years imprisonment, as compared with a death sentence or "long imprisonment" for murder under articles 395 and 396.

In this regard, the Working Group wishes to recall the 2013 Concluding Observations of the Committee on the Elimination of Discrimination against Women (CEDAW/C/AFG/CO/1-2) in which the Committee deplored the practice of arresting and

prosecuting runaway women and girls for “moral crimes” and charging them with the aggravating intention to commit *zina* (sexual intercourse outside of wedlock) or pre-emptive *zina*, even though running away is not a crime under Afghan law. It also regretted that, owing to the lack of a definition of rape in the Penal Code, rape victims are charged with *zina* and are further revictimized as some of them are forced to get married to their rapists. It also expressed concern at the increase of so-called “honour killings” and at the discriminatory provision in the Penal Code which allows presenting the defence of honour as a mitigating circumstance for perpetrators of such crimes.

In its General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 on violence against women, the CEDAW Committee recommends that Member States repeal all legal provisions that discriminate against women, and thereby enshrine, encourage, facilitate, justify or tolerate any form of gender-based violence against them; including in customary, religious and indigenous laws, including legislation that criminalises adultery or any other criminal provisions that affects women disproportionately [CEDAW/C/GC/35, paragraph 31(a)].

As it is our responsibility under the mandate provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide information on the impact of the criminalisation of adultery, including the number of prosecutions for adultery and the number instituted pursuant to a complaint of rape.
2. Please provide information on any measures that your Excellency’s Government has taken or intends to take in order to implement the recommendations by UN human rights mechanisms, referred to above, and to bring its legislation into compliance with international human rights law.

The Working Group would appreciate a response within 60 days and remains available for any type of technical advice on legislative reform that your Excellency’s Government may require.

We would like to inform you that this communication will be made available to the public on the website page of the mandate of the Working Group and will be included in the periodic communications reports of the Special Procedures to the Human Rights Council. Any response of Your Excellency’s Government will also be made public in the same manner.

Please accept, Excellency, the assurances of our highest consideration.

Alda Facio

Chair-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice