

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

REFERENCE:
OL BRN 1/2017

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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 Syariah Penal Code Order which came into effect on 1 May 2014, which seems to contravene international human rights norms and standards as outlined below.**

The Syariah Penal Code Order criminalises adultery and is set to impose harsh punishments, including the death penalty and amputation, once the third phase of the Order has been implemented. Implementation of the third phase was scheduled for the end of 2015, however, delays have resulted in a revised date of 2018. In this regard, the Working Group wishes to recall its communications of 25 September 2014 (BRN 1/2014) of 08 May 2015 (BRN 1/2015) whereby it expressed concerns regarding the Syariah Penal Code Order and other discriminatory legislation and in which the Working Group urged the Government to revoke implementation and repeal completely the legislation. While taking note of the Government's replies of 13 November 2014, 11 March 2015 and 15 May 2015, the Working Group regrets that the 2013 Penal Code Order has not been repealed yet.

Article 68 of the Code defines the act of *zina* as being willful sexual intercourse between a man and a woman without being validly married to each other or such intercourse is not *syubhah* intercourse. The penalties, pursuant to article 69 of the Code, are only applicable to Muslims who commit *zina* and vary depending on the evidence that proves the act has been committed: (i) where the proof of the crime is by confession of the accused, (ii) testimonies of at least four witness in accordance with the requirements of article 29(1): if the person is married, they shall be sentenced to death by stoning; and if the person is unmarried, they shall be sentenced to 100 whipping strokes and imprisonment for a year; (iii) where the proof of the crime is any means other than pursuant to paragraph (i) above, if the person is married, they shall be sentenced to no more than 30 whipping strokes and a term of imprisonment not exceeding seven years; and if the person is unmarried, they shall be sentenced to no more than 15 whipping strokes and a term of imprisonment not exceeding three years.

It is our firm belief that laws criminalizing adultery, such as the Syariah Penal Code Order, are based on and result in discrimination against women. Our Group has noted that the enforcement of such laws leads to discrimination and violence against women in law and in practice and has 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 Brunei Darussalam on 24 May 2006), in which State 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 death, stoning or imprisonment.

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) 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 Syariah Penal Code Order, 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 family, community or law enforcement officers, due to a belief that they deserve to be punished for their moral 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)].

In this respect we would like to recall the latest Concluding observations of the Committee on the Elimination of All Forms of Discrimination against Women ((CEDAW/C/BRN/CO/1-2) in which the Committee stated it was gravely concerned at the State party's restrictive interpretation of sharia law and at the adverse impact on women's human rights of the recently adopted Sharia Penal Code Order 2013, which,

under its third phase of implementation, will impose the death penalty by stoning for several “crimes”, in particular adultery and extramarital relations (*zina*). The Committee stated that it was seriously concerned that women are disproportionately affected by punishment for “crimes” involving sex, and are at a higher risk of being convicted of adultery and extramarital relations, owing to discriminatory investigative policies and provisions on the weighing of evidence. In particular, it noted with concern that women will face greater difficulty in collecting the evidence necessary to prove rape, meaning that the fear of being accused of *zina* is likely to prevent women from reporting rape. Therefore, the Committee urged the State party to immediately review the new Sharia Penal Code Order 2013 with a view to repealing its direct and indirect discriminatory provisions affecting women.

In addition and without in any way derogating from the state’s obligation to entirely decriminalize adultery, regarding the punishment of stoning provided by the Syariah Penal Code, we would like to recall that in the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’s views stoning as a method of execution violates the prohibition of torture and is, beyond dispute, a violation of the prohibition of cruel, inhuman and degrading treatment or punishment. The Special Rapporteur recommended States repeal all laws that support the discriminatory and patriarchal oppression of women, inter alia laws that criminalize adultery (A/HRC/31/57).

Similarly, with regard to flogging, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment concluded that any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment and that States cannot invoke provisions of domestic law to justify violations of their human rights obligations under international law, including the prohibition of corporal punishment. In paragraph 5 of General Comment No. 20 (1992), the Human Rights Committee stated that the prohibition of torture and ill-treatment must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime.

We would like to recall the Concluding observations of the Committee on the Elimination of All Forms of Discrimination against Women on the combined initial and second periodic reports of Brunei in which the Committee stated that it was, inter alia, gravely concerned at the State party’s restrictive interpretation of sharia law and at the adverse impact on women’s human rights of the recently adopted Sharia Penal Code Order 2013, which, under its third phase of implementation, will impose the death penalty by stoning for several “crimes”, in particular adultery and extramarital relations (*zina*) (CEDAW/C/BRN/CO/1-2, paragraph 12).

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