

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

REFERENCE:
OL SOM 2/2017

14 November 2017

Excellency,

I have the honour to address you in my capacity as Chair 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 information I have received concerning the **criminalisation of adultery under Somalia's Penal Code of 1962, which seems to contravene international human rights norms and standards as outlined below.**

Article 426 of the Penal Code defines the crime of adultery, saying, "Whoever, being bound by a marriage having civil effects, has carnal intercourse with a person other than his or her spouse, shall be punished with imprisonment up to two years. The same punishment shall be imposed on the accomplice."

In certain locations within Somalia, individuals accused of having committed adultery have been punished by flogging or met with execution by stoning carried out by armed groups.

It is our firm belief that laws criminalising adultery, such as the Penal Code of 1962, 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 criminalisation of adultery is both in concept and practice overwhelmingly directed against women and girls. 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 criminalisation 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) (acceded to by Somalia on 24 January 1990) 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 reinforces 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.

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 addition and without in any way derogating from the state's obligation to entirely decriminalise adultery, regarding the punishment of stoning carried out by armed groups within Somalia, we wish to recall that although such punishments were committed by non-State actors, Somalia has a due diligence requirement to protect its people from such human rights violations and to ensure the prosecution of perpetrators and the right to a remedy for victims. We would also like to recall that in the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment's view stoning as a method of execution violates the prohibition of torture and is, beyond dispute, a violation of the prohibition cruel, inhuman and degrading treatment or punishment. The Special Rapporteur recommended that 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.

The Working Group would also like to recall the recommendations made in the context of the Universal Periodic Review of Somalia, which are supported or under consideration by the Government of Somalia, which called on the State to, inter alia, intensify its effort in the promotion and protection of the rights of women by, inter alia, ratifying the Convention on the Elimination of All Forms of Discrimination against Women, revising discriminatory legal provisions and effectively enforcing its law to fight against gender-based violence (A/HRC/32/12, paragraphs 136.60), and to reform its legislation in view of promoting non-discrimination and equality between men and

women within marriage and for rights of women in case of dissolution of marriage (A/HRC/32/12, paragraph 136.61).

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