

Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on freedom of religion or belief; the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on violence against women, its causes and consequences and the Working Group on the issue of discrimination against women in law and in practice

REFERENCE:
OL BRN 1/2019

1 April 2019

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on extrajudicial, summary or arbitrary executions; Special Rapporteur on freedom of religion or belief; Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on violence against women, its causes and consequences and Working Group on the issue of discrimination against women in law and in practice, pursuant to Human Rights Council resolutions 35/15, 31/16, 32/2, 34/19, 32/19 and 32/4.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the imposition of cruel, inhuman and degrading punishments, including stoning to death, whipping and amputation, in connection with the criminalisation of adultery and consensual same sex relations in the Syariah Penal Code Order which will come into force on 3 April 2019.**

At the outset of this letter, we wish to recall communication BRN 1/2014, sent on 25 September 2014, communication BRN 1/2015, sent on 8 May 2015 and communication BRN 1/2017, sent on 15 November 2017, whereby Special Procedures mandate holders expressed concerns regarding the Syariah Penal Code Order and other discriminatory legislation and in which Your Excellency's Government was urged 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replies of 13 November 2014, 11 March 2015 and 15 May 2015, we regret that the 2013 Penal Code Order has not been repealed yet and that provisions mentioned below will be implemented.

The Syariah Penal Code Order came into effect on 1 May 2014 and is set to have different phases of implementation. **Phase One** began on 1 May 2014, giving effect to the implementation of part I, part II and part III of the Syariah Penal Court Order. **Phase Two** will come into effect on 3 April 2019 and will give effect to part V and IV of the Syariah Penal Code Order, containing provisions that define adultery and consensual same sex relationships as criminal offenses punishable by cruel, inhuman and degrading punishments, including stoning, whipping and amputation. The law will apply to Muslims and non-Muslims alike, although some offenses apply specifically to Muslims.

Convictions will come into effect based on confessions of the accused or if there are multiple Muslim witnesses.

Article 68 of the Code defines the act of *zina* as willful sexual intercourse between a man and a woman who are not validly married to each other or such intercourse is not *syubhah* intercourse. Article 82 of the Code defines the act of *liwat* as anal intercourse between a man and another man or between a man and a woman other than his wife. According to article 81, the punishment for committing *liwat* will be liable on conviction to the same punishment as provided for the offence of *zina*. Based on article 83, *liwat* shall be proved in the same manner as provided for the offense of *zina*.

The penalties, pursuant to article 69 of the Code, are only applicable to Muslims 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. The penalties, pursuant to article 70, are applicable to persons who are not *mukallaf* or have not attained the age of *baligh*; (i) where the proof of the crime is by confession of the accused, (ii) testimonies of at least four witness: shall be liable on conviction to whipping not exceeding 30 strokes and shall be detained in any rehabilitation center as the Court thinks appropriate for a term not exceeding 3 years; (iv) it is proved by evidence other than (ii) is guilty of an offence and shall be liable on conviction to whipping not exceeding 15 strokes and shall be detained in a rehabilitation center as the Court thinks appropriate for a term not exceeding 3 years.

We wish to express our grave concern that a number of the provisions of the Syariah Penal Code Order coming into force on 3 April 2019, contravene international human rights standards as set forth in the 1948 Universal Declaration of Human Rights (UDHR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which your Excellency's Government ratified on 24 May 2006, and the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration) – in particular, as they relate to the prohibition of discrimination, the right to privacy, the right to life, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the right to freedom of thought, conscience and religion, equality between men and women.

Defining adultery and consensual same sex relations as criminal offenses, such as is done in the Syariah Penal Code Order, result in discrimination and violence against women and persons based on their perceived or actual sexual orientation or gender identity. The right to be free from discrimination is enshrined in article 2 of the Universal Declaration of Human Rights (UDHR) and codified in all human rights treaties, while

CEDAW guarantees equality to women. The definition of sexual relations between consenting adults as criminal offenses should be regarded as an unlawful interference with the right to privacy of the individuals concerned, such as defined in article 12 of the UDHR, 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. The imposition of the death penalty for offences related to homosexuality and adultery violates the right to life. Criminalization of same-sex relations also fuels stigma, legitimizes prejudice and exposes people to family and institutional violence and further human rights abuses such as hate crimes, death threats and torture.

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, 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. The offence of adultery, should not be regarded as a criminal offence punishable by death, stoning or imprisonment. In addition, the criminalization 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 their family or community or by law enforcement officers, due to a belief that they deserve to be punished for their moral crimes. 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 Syariah Penal Code Order 2013, which, under its second 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).

We also wish to remind Your Excellency's Government that mandatory death penalty is incompatible with the right to life as reflected in article 3 of the UDHR. The universal nature of this right has been reiterated in numerous United Nations resolutions, thematic and country-specific reports by Special Rapporteurs and treaty bodies, including by the United Nations Human Rights Committee. We further highlight that countries that have not abolished the death penalty may only impose it for the most serious crimes. This provision has consistently been interpreted by international experts to mean that the death sentence may only be imposed in respect of offences that resulted in the loss of life (A/HRC/4/20, para. 53). Furthermore, reliance only on the accused's confession in reaching a guilty verdict significantly increases the risk of torture and other cruel,

inhuman or degrading treatment or punishment and, therefore, is incompatible with the obligation of states under customary international law to prevent such abuse.

In addition and without prejudice to the state's obligation to entirely decriminalize adultery and consensual same-sex relations, we would like to recall that the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment views the punishment of stoning as a method of execution, violating the prohibition of torture and that this form of sanction 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 and girls, inter alia laws that criminalize adultery, and to repeal all laws that criminalize persons on the basis of their actual or perceived sexual orientation or gender identity or expression (A/HRC/31/57). With regard to flogging, please note that the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment concluded that any form of corporal punishment is of the view that any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment as reflected in article 5 of the UDHR 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 view of the aforementioned observations, we respectfully urge your Excellency's Government to revoke the Syariah Penal Code Order and to repeal it completely as it would not be in conformity with international human rights law.

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

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information on the impact of the criminalisation of adultery and consensual same sex relationships on discrimination and violence against women and girls and persons based on their perceived or actual sexual orientation or gender identity.
3. 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.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website within 48 hours. They will

also subsequently be made available in the usual report to be presented to the Human Rights Council.

This communication will also be made available to the public on the website page of the mandate of the Independent expert on protection against discrimination and violence based on sexual orientation and gender identity.

While awaiting a reply, we urge that all necessary interim measures be taken to prevent the alleged violations.

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

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Special Rapporteur on extrajudicial, summary or arbitrary executions

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