

Adultery as a criminal offence violates women’s human rights

*Working Group on the issue of discrimination against women in law and in practice*¹
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The UN Working Group on Discrimination against women in law and in practice has issued a call to Governments to repeal laws criminalizing adultery². The Working Group notes that the enforcement of such laws leads to discrimination and violence against women in law and in practice.

Criminal law definitions of adultery may be ostensibly gender neutral and prohibit adultery by both men and women. However, closer analysis reveals that the criminalization of adultery is both in concept and practice overwhelmingly directed against women and girls. Taking as a primary basis the previous work of the UN Secretary-General, OHCHR special rapporteurs and the treaty bodies, the Working-Group has analysed the concept of adultery, discriminatory legislation on adultery, discriminatory punishment for adultery and the way in which the classification of adultery as criminal provides impunity for violence against women.

The aim of this paper is for the WG to offer elements in relation to its joint statement³ based on existing jurisprudence and standards in order to contribute to the evolution of intl. human rights law/standards on this issue. In this note, the Working Group does not address additional aspects of the criminal law relating to adultery, which discriminate against women, such as defences to crimes committed in the name of family honour, the defence to a crime of murder of a female

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² See “Joint Statement by the United Nations Working Group on discrimination against women in law and in practice” of 18 October 2012, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&LangID=E>

³ See supra.

family member on grounds of provocation, or mitigation of sentences for rape of an unmarried girl where the rapist marries the victim. The Working Group refers on these matters to the recommendations adopted by the CEDAW Committee and the experts who participated in a Expert Group Meeting on good practices in legislation on “harmful practices” against women organized by the UN Division for the Advancement of Women (UN DAW).⁴

The traditionalist religious, cultural and legal concept of adultery

Religious prohibitions of adultery, traditionalist cultural practices and legal history reveal the discriminatory nature of the concept of adultery under most traditions.

In Jewish biblical law, adultery is defined as sexual intercourse between a man and married woman, not between a woman and a married man.⁵ Furthermore the penalty is directed against the married woman and not against her co-respondent. In Islam, Zina (زنا) is an Arabic term for illegal intercourse; premarital or extramarital, by a person (whether man or woman) with someone to whom they are not married. Adultery is a violation of the marital contract and one of the major sins condemned by Allah in the Qur'an.⁶ However, this provision does not impact men and women equally as men may take additional wives or concubines and thus avoid liability for adultery. In Native American cultures, severe penalties could be imposed on an adulterous wife by her husband. In many instances she was made to endure a bodily mutilation which would, in the mind of the aggrieved husband, prevent her from ever being a temptation to other men

⁴ See: [General Recommendation 19](#), CEDAW, Paragraph 24(r)(ii) (recommending the adoption of laws to remove the defense of “honour” in a crime against or murder of a female family member; [Good Practices in Legislation on “Harmful Practices”](#) against Women, UN Division for the Advancement of Women, May 26-29, 2009, pp. 19-20

⁵ “And the man that committetd adultery with another man's wife, even he that committed adultery with his neighbour's wife, the adulterer and the adulteress shall surely be put to death.” (Lev. 20:10).

⁶ Qur'anic verses prohibiting adultery include:

“Do not go near to adultery. Surely it is a shameful deed and evil, opening roads (to other evils).”[Quran 17:32]“Say, 'Verily, my Lord has prohibited the shameful deeds, be it open or secret, sins and trespasses against the truth and reason.’”[Quran 7:33]

again. Among the Aztecs, wives caught in adultery were occasionally impaled, although the more usual punishment was to be stoned to death.⁷ The Laws of Manu of ancient India said: "though destitute of virtue or seeking pleasure elsewhere, or devoid of good qualities, yet a husband must be constantly worshiped as a god by a faithful wife"; on the other, hand, "if a wife, proud of the greatness of her relatives or [her own] excellence, violates the duty which she owes to her lord, the king shall cause her to be devoured by dogs in a place frequented by many."⁸ In Christianity, in contrast, adultery is considered according to some Christian sources to be immoral and a sin for both men and women.⁹ Nevertheless in the common law in England, a Christian state, adultery involving a married woman and a man other than her husband was considered a very serious crime; in 1707, English Lord Chief Justice John Holt stated that a man having sexual relations with another man's wife was "the highest invasion of property" and claimed, in regard to the aggrieved husband, that "a man cannot receive a higher provocation".

Discriminatory legislation

In many states where adultery is prohibited, the criminal law provisions are themselves discriminatory, imposing criminal liability on women and girls in situations in which men would not be criminally liable.

- In some of these laws, adultery is defined as consensual sexual intercourse between a married woman and a man who is not her husband, targeting married women.¹⁰

⁷ Schoolcraft, *Historical and Statistical Information Respecting the History, Condition and Prospects of the Indian Tribes of the United States*, I, 236; V, 683, 684, 686; H.H. Bancroft, *The Native Races of the Pacific States of North America*, I, 514; ABA aug Journal 1969, p.738;

⁸ Laws of Manu, V, 154; VIII, 371

⁹ 1 Corinthians 6:9–10

¹⁰ See CEDAW/C/THA/CO/5 (CEDAW, 2006), Thailand: Observation: With regard to divorce, whereas adultery committed by wife constitutes grounds for divorce, a married man may have sexual intercourse with other women; Minnesota law provides: "When a married woman has sexual intercourse with a man other than her husband,

- In some states, pregnancy outside of marriage constitutes sufficient evidence to enable a woman to be convicted of adultery, targeting women.¹¹
- In some states in which adultery prohibitions apply to both men and women in a way which is apparently equal, there are provisions which allow men to have multiple sexual partners as wives in polygamous marriages or in concubinage arrangements, without incurring liability for adultery, thus establishing a discriminatory criminal regime regarding marital infidelity for women and men.¹²
- In some states, the crime of adultery (*zina*) includes non-consensual sex and in this context applies in a discriminatory fashion to women and girls who have been raped.¹³
- A tragic example was reported by UNICEF: a 13 year old Somali girl, Aisha Duhulow, was stoned to death in a stadium of spectators in Kismayo on 27 October 2008 after having been found guilty of adultery. Reports indicate that she had been raped by three men while traveling on foot to visit her grandmother in the war-torn capital, Mogadishu.

whether married or not, both are guilty of adultery.”; E/C.12/1/ADD.45 (CESCR, 2000), DRC: Observation: marriage and family laws overtly discriminate against women (for instance, adultery is illegal for women but, in certain circumstances, not for men;

¹¹ See Report of the Special Rapporteur on violence against women (Ms. Radhika Coomaraswamy) submitted in accordance with Commission on Human Rights resolution 2002/52 Addendum, E/CN.4/2003/75/Add.2, 14 January 2003

¹² E/C.12/PHL/CO/4 (CESCR, 2008), Philippines

¹³ Report of the expert group meeting on Good practices in legislation on “harmful practices” against women (Organised by DAW/DESA and UNECA Addis Ababa, Ethiopia 26 to 29 May 2009): In many countries around the world, adultery continues to be a crime punishable by severe penalties, including, in the most extreme instance, stoning. Adultery laws have often been drafted and implemented in a manner prejudicial to women, both because religious procedural law in some countries makes it difficult to prove adultery by a man, as well as because women who have been raped and are unable to prove the crime are then charged with having committed adultery.



Following the assault, she sought protection from local leaders, who then accused her of adultery and sentenced her to death.¹⁴

The CEDAW Committee, the Human Rights Committee and the CESCR Committee have consistently called for the repeal of discriminatory legislation.¹⁵ The CEDAW Committee has referred to such legislation as obsolete and the HRC Committee has pointed out that adultery provisions must be repealed so that women are not deterred from reporting rapes by fears that their claims will be associated with the crime of adultery.

Some states have criminal law definitions of adultery that are entirely gender neutral, both expressly and in the family law context in which they are applied, which is monogamous and does not provide impunity for sexual violence against women. Hence the prohibition in such

¹⁴ Report from [UN Office of the SRSG for Children and Armed Conflict](#) (Press release published on 07 Nov 2008, OSRSG/081107):

¹⁵ CEDAW/C/YEM/CO/6 (CEDAW, 2009), Yemen; A/58/38(SUPP) (CEDAW, 2003), Congo, Observations: a) Continued existence of legal pluralism with discriminatory components and obsolete provisions in customary law and statutory law, latter including criminal law regarding adultery, labour and taxation laws, and family law, particularly with regard to difference in age at which women and men may enter into marriage; b) Continued existence of discriminatory family laws and traditional practices, including those related to dowries and adultery. A/57/38(SUPP) (CEDAW, 2002), Uganda: Observation: Continued existence of legislation, customary laws and practices on inheritance, land ownership, widow inheritance, polygamy, forced marriage, bride price, guardianship of children and definition of adultery that discriminate against women and conflict with constitution and CEDAW. CCPR/C/SDN/CO/3 (HRC, 2007), Sudan: Recommendation: Undertake to review its legislation, in particular articles 145 and 149 of the 1991 criminal code, so that women are not deterred from reporting rapes by fears that their claims will be associated with the crime of adultery. CEDAW/C/BDI/CO/4 (CEDAW, 2008), Burundi: Amendment of the provisions that establish discrimination with regard to adultery (article 3 of the penal code); CCPR/CO/71/VEN (HRC, 2001), Venezuela: Recommendation: Comply with obligations arising from articles 2, 3 and 26 ICCPR, amend all laws that still discriminate against women including those relating to adultery and ban on marriage for 10 months following dissolution of previous marriage; E/C.12/PHL/CO/4 (CESCR, 2008), Philippines: Observation: State party has not made sufficient progress in reviewing and repealing discriminatory provisions against women still existing in national legislation c) marital infidelity bill, which seeks to remove the discriminatory provisions in the revised criminal code pertaining to “concubinage” and “adultery”, has not yet been adopted.

states applies equally to both men and women.¹⁶ In these states, however, there are almost no prosecutions and the crime of adultery appears to be a dead letter of the law so that decriminalisation of adultery will have no practical impact.

Discriminatory punishment for adultery

The punishments imposed by states for violation of adultery laws are imposed almost exclusively on women and girls. Out of the allegations submitted to the OHCHR, specifically regarding adultery prosecutions, all seem to have concerned the prosecution of women or girls.

Adultery laws have usually been drafted and almost always implemented in a manner prejudicial to women.¹⁷ Research shows that, even where the penalty for adultery on its face appears to be gender neutral, it in fact both in law and practice discriminates against women.¹⁸

The CEDAW Committee has noted in a concluding observation that under the adultery statutes of the state, women are systematically prosecuted, while a man, or any other male relative, who

¹⁶ For example, New York defines an adulterer as a person who "engages in sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse." [10] North Carolina defines adultery as occurring when any man and woman "lewdly and lasciviously associate, bed, and cohabit together." [11] In the 2003 New Hampshire Supreme Court case *Blanchflower v. Blanchflower*, it was held that female same-sex sexual relations did not constitute sexual intercourse, based on a 1961 definition from Webster's Third New International Dictionary; and thereby an accused wife in a divorce case was found not guilty of adultery. In 2001, Virginia prosecuted an attorney, John R. Bushey, for adultery, a case that ended in a guilty plea and a \$125 fine. [13] [14] Adultery is against the governing law of the U.S. military. [15]

¹⁷ CRC/C/PAK/CO/3-4 (CRC, 2009), Pakistan: Observation: High percentage of women and girls in jails awaiting trials for adultery-related hudood offences and at the imposition, by parallel judicial systems, of sentences like whipping, amputation and stoning amounting to torture or cruel, inhuman or degrading treatment; CAT/C/YEM/CO/2/Rev.1 (CAT, 2010) observations on Yemen: Observation: the majority of women in prison have been sentenced for prostitution, adultery, alcoholism, unlawful or indecent behaviour, in a private or public setting, as well as for violating restrictions of movement imposed by family traditions and Yemeni laws; such sentences are applied in a discriminatory way against women

¹⁸ See Rochelle Terman and Mufuliat Fijabi, *Stoning Is Not Our Culture*, at pp 21 and 29.

kills his wife, or a female members of the family suspected of adultery, is not prosecuted with murder. With reference to the same state, It noted that the majority of women in prison have been sentenced for prostitution, adultery, alcoholism, unlawful or indecent behaviour, in a private or public setting.¹⁹

Under many of the criminal laws which prohibit adultery there is a harsher penalty for women than for men who commit adultery.²⁰ The CESCR Committee has observed more severe punishment of women for adultery and "honour crimes".²¹ Many of the communications to governments by the mandate holders have been in relation to honour crimes committed by family members, or to the action/inaction of the State with regard to stoning, flogging or death by hanging of women for suspected premarital sex, for adultery, for failing to prove rape, and for acts deemed incompatible with chastity. In many cases mandate holders have issued joint urgent appeals to prevent the execution of sentences of stoning issued by courts on the grounds, inter alia, that the death sentence should not be applied to the offence of adultery. In these allegations, there is systemic evidence of procedural unfairness or discrimination against women, as regards the rules of evidence or representation by counsel, and mandate holders have issued joint urgent

¹⁹ CEDAW/C/YEM/CO/6 (CEDAW, 2009), Yemen, Observation: articles 273 and 275 identifying and criminalizing acts violating "public decency", under which women are systematically prosecuted, as well as article 232 providing that a man, or any other male relative, who kills his wife, or a female members of the family suspected of adultery, is not prosecuted with murder. The majority of women in prison have been sentenced for prostitution, adultery, alcoholism, unlawful or indecent behaviour, in a private or public setting.

²⁰ CEDAW/C/COG/CO/6 (CEDAW, 2012), DRC: the Committee expressed concern regarding the disproportionate sanction applied to women in case of adultery (penal code, arts. 336 and 337); CEDAW/C/KWT/CO/3-4 (CEDAW, 2011), Kuwait: Observation: express concerns about the so-called "honour crimes" and the extremely lenient penalties those acts attract under article 153 of the criminal code. Under that article, men suspected of murder for adultery can face a penalty of up to three years in prison or a fine of up to 3,000 rupees, as compared to women, who can receive a life sentence.

²¹ E/C.12/1/ADD.63 (CESCR, 2001), Syria, Observation: more severe punishment of women for adultery and "honour crimes"; CEDAW/C/COG/CO/6 (CEDAW, 2012), DRC, Observation: the committee is concerned about the delay of the state party in reviewing its discriminatory provisions on the disproportionate sanction applied to women in case of adultery (penal code, arts. 336 and 337).

appeals to cancel sentences on the grounds that the accused was not given a fair trial. In many of these cases the result of the joint urgent appeals and the action of women's civil society organisations has been the annulling or commuting of the sentence. However, in some states the courts' sentences of death by stoning have been carried out, as, recently, in Mali.²² According to recent report, 28 women and 6 men have recently been stoned or have stoning sentences pending against them.²³

Decriminalization of adultery and good practice

The UN Division for the Advancement of Women recommended in 2009 that drafters should repeal any criminal offenses related to adultery or extramarital sex between consenting adults , remarking that often, these laws discriminate against women whether on their face or in practice.²⁴

There are several examples of good practices, where countries have remedied the discrimination against women and violation of women's rights by decriminalizing adultery. Adultery was abolished in England in 1857, and the Republic of Ireland in 1976, which was one of the last European countries to decriminalize adultery.²⁵ In 2005 in Haiti a Decree was promulgated which, in the context of regulating offences of sexual aggression and eliminating discrimination against women, decriminalized adultery.²⁶ A 1996 decision of the Guatemalan Constitutional

²² In July 2012, a couple who had sex outside marriage was stoned to death by Islamists in the town of Aguelhok in northern Mali. See: "[Mali unwed couple stoned to death by Islamists](#)", BBC.

²³ See [Mapping Stoning in Muslim Contexts](#), February 2012

²⁴ See: *Good Practices in Legislation on "Harmful Practices" against Women*, May 26-29, 2009, p. 19

²⁵ In common-law countries, adultery was also known as "criminal conversation". This became the name of the civil tort arising from adultery, being based upon compensation for the other spouse's injury. Criminal conversation was usually referred to by lawyers as "crim. con."

²⁶ See: *Good Practices in Legislation on "Harmful Practices" against Women*, May 26-29, 2009, p. 19

Court struck down the penal code's punishment of marital infidelity or adultery on the basis both of the constitution's equality guarantees and human rights treaties²⁷, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).²⁸ Similarly, in 2007, the Ugandan Constitutional Court overturned the adultery law that penalised women for adultery while leaving their male partners unpunished.²⁹

Previously, human rights mechanisms have made urgent appeals to commute criminal sentences for adultery in specific cases, on grounds of unfair trial or because application of the death penalty for the crime of adultery is contrary to international standards. However, the Working Group considers that commuting sentences, though welcome, is not enough and the offence of adultery must not be regarded as a criminal offence at all.

The Working Group recognises that in accordance with some traditions, customs or civil law systems, adultery may constitute a matrimonial offence bearing legal consequences in divorce cases, the custody of children or the denial of alimony amongst others. However, it should not be a criminal offence and must not be punishable by fine, imprisonment or death.

The experts on the Working Group emphasized that the criminalisation of sexual relations between consenting adults is a violation of their right to privacy, infringing the International Covenant on Civil and Political Rights, as established almost two decades ago by international human rights jurisprudence. It is a violation of CEDAW's prohibition of discrimination in the family. Maintaining adultery as a criminal offence – even when, on the face of it, it applies to both women and men – means in practice that women will continue to face extreme

²⁷ [Sentencia n° 936-95 de Corte Constitucional](#), 07 March 1996

²⁸ Case No. 935-95

²⁹ [Law Advocacy for women in Uganda v. Attorney General](#), Constitutional Petitions Nos. 13/05 & 05/06 [2007] UGCC 1 (5 April 2007)



vulnerabilities, and violation of their human rights to dignity, privacy and equality, given continuing discrimination and inequalities faced by women.