

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

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Excellency,

I have the honour to address you in my capacity as the 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 information I have received concerning the **criminalisation of adultery under the Sharia Criminal Offences (Federal Territories) Act 1997 which seems to contravene international human rights norms and standards as outlined below.**

In the secular laws, including the Constitution and the Penal and Criminal Procedure Codes, there are no provisions relating to the punishment of adultery per se. However, with regards to Muslims in Malaysia, the Sharia Criminal Offences (Federal Territories) Act 1997 criminalises sexual intercourse "out of wedlock", whether or not either party is married. The conviction may include a fine, imprisonment, or whipping.

Despite the fact that the law prescribes equivalent punishment for women and men, according to the information received, it is far more common for women to get charged with the crime. Furthermore, Shari'a law imposes an evidentiary burden of four male witnesses to the commission of a crime of adultery. If a woman becomes pregnant, this will constitute prima facie evidence of the sexual intercourse out of wedlock. The evidence of adultery in the case of pregnancy only works against the woman. Additionally, there have been reports of potential women witnesses being pressured not to turn up, both for rape and for adultery allegations against men.

Death and stoning are punishments prescribed by the Hudud penalties under Shari'a law, though the Shari'a courts' competence for punishment of adultery is currently limited to imprisonment, fines and caning.

If a woman is raped but is accused of committing a criminal act of adultery, as a result of which she became pregnant, she will be able to raise the rape as a defence. However, the allegation of rape must be proven, and the significant administrative and evidential burdens for reporting rape make it difficult for women to rely on this defence. In a situation where a woman alleges that a rape has occurred, but is unable to provide sufficient evidence for a successful prosecution, she may be prosecuted for adultery, and thus may act as a disincentive from reporting rape crimes. Furthermore, in Shari'a courts four male witnesses are required (or eight female witnesses). Men are also allowed to be witnesses in their own accusations, whereas women are not allowed to give evidence on their own behalf. This makes it more difficult for women to report both rape and adultery.

It is our firm belief that laws criminalizing adultery, such as the Sharia Criminal Offences (Federal Territories) Act 1997, 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 (acceded to by Malaysia on 05 July 1995), 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 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 (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 Sharia Criminal Offences (Federal Territories) Act 1997, 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 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 decriminalize adultery, regarding the punishment of stoning prescribed by the Hudud penalties under Shari'a law, 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).

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 my highest consideration.

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