



International  
Commission  
of Jurists

10/1 Soi Aree 2  
Phaholyothin Road  
Samsennai, Phayathai  
Bangkok 10400  
Thailand

t +66 2 61 98 477/478  
f +66 2 61 98 479  
www.icj.org

**H.M. HAJI HASSANAL BOLKIAH**

Prime Minister of Negara Brunei Darussalam  
Jalan Perdana Menteri  
Bandar Seri Begawan BB3913  
Negara Brunei Darussalam  
Tel. no. +673 2 2224645/ 2223626/ 2224684/ 2224796  
Email: info@jpm.gov.bn

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Your Excellency,

I am writing to you today, on behalf of the International Commission of Jurists (ICJ), to seek clarification over the Syariah Penal Code Order 2013 ("2013 Penal Code"), which we understand will take effect on April 2014.

As you may be aware, the ICJ, for the past 60 years, has devoted itself to promoting the understanding and observance of the rule of law and the legal protection of human rights throughout the world.

The ICJ has noted with concern that the 2013 Penal Code, enacted by the Government of Brunei Darussalam in October 2013, contains provisions which (a) allow the imposition of the death penalty and other penalties that constitute torture or other cruel, inhuman, or degrading treatment or punishment, (b) continue to criminalize adultery, extramarital sexual relations and sodomy, in violation of international human rights law and standards, (c) discriminate against women, and (d) violate the rights to religious freedom, freedom of opinion and freedom expression.

We believe that these provisions in the 2013 Penal Code violate international human rights standards. We also believe that these provisions are not in accord with the commitment made by Brunei Darussalam as a member of the Association of Southeast Asian Nations (ASEAN) to promote and protect human rights in the region.

***Death Penalty and Stoning***

Brunei Darussalam has not implemented the death penalty since 1957 and had, until now, generally been viewed as having abolished the death penalty *de facto*.

The ICJ is thus particularly dismayed by the adoption of provisions of the 2013 Penal Code that appear to revive this cruel and inhuman penalty in the domestic laws of Brunei Darussalam.

Notably, the 2013 Penal Code provides for the death penalty as a possible penalty for both Muslims and non-Muslims for the crimes of robbery (Article 63), rape (Article 76), adultery and sodomy (Article 82). It is also prescribed as a penalty for Muslims only upon conviction for acts constituting extramarital sexual relations (Article 69).

The 2013 Penal Code also specifies that the manner by which capital punishment is to be imposed for rape, adultery, sodomy, and extramarital sexual relations is stoning to death.

The inclusion of the death penalty as a punishment for these crimes in the 2013 Penal Code is out of step with the global trend towards the abolition of the death penalty and the establishment of a moratorium on execution. In his report to the UN General Assembly in 2012, the Secretary-General of the United Nations noted that 150 of the 193 States Members of the United Nations have abolished the death penalty or introduced a moratorium, either in law or in practice. In those States that retain it, there is an observable trend among many of them to restrict its use or to call for a moratorium on executions. The Secretary-General also reported in 2013 that 174 of the 193 UN Member States were reportedly execution free in 2012.

The trend towards the abolition of the death penalty and the establishment of a moratorium on execution is also evidenced by General Assembly Resolution 67/176, adopted on 20 December 2012 calling on all states to impose a moratorium on the use of the death penalty (A/RES/67/176). This resolution, which expresses deep concern about the continued use of the death penalty, also calls upon all States "to reduce the number of offences for which the death penalty may be imposed."

In the ASEAN, there is some evidence of these global trends taking hold in member states. The Philippines has ratified the 2<sup>nd</sup> Optional Protocol to the International Covenant on Civil and Political Rights aiming at abolishing the death penalty, and like in Brunei Darussalam, the death penalty has not been carried for several years in both Laos and Myanmar. Though Singapore still retains the death penalty, it announced in 2012 that it "intended to reform legislation providing for the mandatory death penalty, including for drug-related offenses" and that "no executions will be carried out until these measures are enacted."

Furthermore the inclusion of the death penalty for these crimes contravenes other international standards, which clarify that states retaining the death penalty must ensure that its application is limited to "the most serious crimes". The General Assembly and a range of regional and international human rights bodies reflect these standards in their calls on States retaining the death penalty to apply it only to the "most serious crimes". Following an exhaustive study of the jurisprudence of UN bodies, in 2007 the Special Rapporteur on extrajudicial executions clarified that in this context, this limitation should be understood to mean that crimes punishable by death must be limited to those in which there was intention to kill and which resulted in loss of life.

The ICJ considers the imposition of the death penalty to be a violation of the right to life and the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

It is important to emphasize that the use of stoning as a punishment, in any circumstance, violates the absolute prohibition of all forms of torture, and other cruel, inhuman or degrading treatment or punishment, including corporal punishment in international law. The absolute prohibition on torture and other cruel, inhuman, or degrading treatment or punishment is firmly entrenched in Article 5 of the Universal Declaration on Human Rights, Article 7 of the International Covenant on Civil and Political Rights, and Article 16 of the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment. In 1997, the Special Representative of the Commission on Human Rights on the situation in the Islamic Republic of Iran denounced the practice of stoning, a penalty provided in Iran's Islamic Criminal Code. He stated therein that although the government may claim that stoning rarely happens in Iran, "for it to happen at all is unsustainable both legally and morally." (A/52/472)

### ***Women and the Penalty of Stoning***

In addition to being inconsistent with the absolute prohibition of torture and other ill-treatment, the inclusion of the penalty of stoning in the 2013 Penal Code is contrary to the commitment the Government of Brunei Darussalam made as a Party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), particularly its obligations under Articles 3 and 2 to take "all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment

of human rights and fundamental freedoms on a basis of equality with men” and to take all necessary measures to eliminate all forms of discrimination against women.

We note that although under the 2013 Penal Code the penalty of stoning to death applies regardless of whether the offender is male or female, studies have shown that in countries where stoning is still imposed, women face more risk of receiving this penalty because they are more likely to be found guilty of adultery or having engaged in extramarital sexual relations. For instance, women may be found guilty more easily of adultery or having engaged in extramarital sexual relations because of the visible evidence of pregnancy. It is also very difficult proving rape and prosecuting rapists because of the nature of the crime, which more often than not, would have no witnesses and involve only two people --- the offender and the victim. Hence, women who have been raped, including women who have conceived a child as a result of the rape, and could not fulfill the stringent requirements for proof of rape, would most likely end up prosecuted for adultery or having engaged in extramarital sexual relations.

The systematic and institutionally codified gender discrimination in every aspect of life in countries imposing the penalty of stoning mean that women are more likely to receive this penalty than men. We note that such institutionalization of gender discrimination exists in Brunei Darussalam. In a 2008 report, the Special Rapporteur on freedom of religion or belief noted that women in Brunei Darussalam “face discrimination in the application of religious laws, in particular in areas such as divorce, inheritance, custody of children, and transmission of citizenship.” (A/63/161) For instance, under Brunei laws, a man can easily obtain divorce by pronouncing *talaq* three times, and then reporting the divorce to the Registrar within seven days. Women, on the other hand, face many legal and financial obstacles and need to refer their intention to obtain a divorce to a judge who will then rule on the matter in accordance with Islamic law.

### ***Restrictions on Religious Freedom and Freedom of Expression***

During the 2010 Universal Periodic Review (UPR) of Brunei’s human rights record by the UN Human Rights Council, the Government asserted that there is no restriction for an individual to peacefully exercise his or her right to freedom of expression. The Government also claimed that “the importation of religious materials or scriptures regardless of any faiths is not banned in the country.” (A/HRC/13/14/Add.1)

In contrast to these claims, we note, however, that provisions of the 2013 Penal Code, penalise both Muslims and non-Muslims for printing, disseminating, importing, broadcasting, and distributing publications “contrary to *Hukum Syara*” (Articles 213, 214, and 215). We consider that these provisions constitute undue restrictions on religious freedom and violate of the rights of freedom of expression and opinion.

The Human Rights Committee, the expert body which monitors states’ implementation of the International Covenant on Civil and Political Rights (ICCPR), explained that “all forms of opinion are protected, including opinions of a political, scientific, historic, moral, or *religious nature*”. It also explained that is incompatible with the right to freedom of expression guaranteed under the ICCPR to criminalize the holding of an opinion. The Human Rights Committee further explained that States should guarantee the right to freedom of expression, which includes *religious discourse*. International protection of the right to freedom of expression extends to the range of forms of communication and the means of their dissemination. These forms include books, newspapers, pamphlets, posters, banners, etc. (CCPR/C/GC/34).

In light of the concerns enumerated above, we would be most grateful if the Government of Brunei Darussalam could kindly provide us with further clarification on the following matters:

- (i) How does the Government envision implementing the 2013 Penal Code while still complying with international law and standards, including its legal obligations under the CEDAW, the Convention on the Rights of the Child and the UN and ASEAN Charters as well as other standards mentioned above?

(ii) When will the Government of Brunei Darussalam ratify or accede to the core international human rights instruments, in particular the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment? During the 2010 Universal Periodic Review of Brunei's human rights record, recommendations to consider ratification or accession to these instruments were made by several States, including the Philippines, another Member State of the ASEAN. The Government of Brunei Darussalam responded then that it was reviewing these human rights instruments.

Thank you for your time and we look forward to hearing from you soon.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'S. Zarifi', with a long horizontal line extending to the right.

**Sam Zarifi**

Regional Director for Asia & the Pacific  
International Commission of Jurists

*For questions and clarifications, please contact Ms. Emerlynne Gil, International Legal Adviser for Southeast Asia, tel. no. +662 619 8477 or [emerlynne.gil@icj.org](mailto:emerlynne.gil@icj.org)*