

UNITED NATIONS COMMITTEE ON THE ELIMINATION OF
DISCRIMINATION AGAINST WOMEN

59th Session of the UN Committee on the Elimination of

Discrimination against Women

20 October – 7 November 2014

**THE INTERNATIONAL COMMISSION OF JURISTS' SUBMISSION
TO THE UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION
AGAINST WOMEN IN ADVANCE OF THE EXAMINATION OF BRUNEI
DARUSSALAM'S INITIAL AND SECOND PERIODIC REPORTS UNDER
ARTICLE 18 OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF
DISCRIMINATION AGAINST WOMEN**

Submitted on 3 October 2014

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

Introduction

1. During its 59th session, from 20 October to 7 November 2014, the Committee on the Elimination of Discrimination against Women (CEDAW or the Committee) will examine Brunei Darussalam's implementation of the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (the Convention), including in light of the state party's initial and second periodic reports.¹ The International Commission of Jurists (ICJ) welcomes the opportunity to submit the following observations to the Committee.
2. This submission addresses the violations of Articles 1 and 2 of the Convention that arise as a result of Brunei Darussalam's adoption in 2013 of the Syariah Penal Code Order and as a result of the State Party's failure to criminalize marital rape.

Criminalisation of consensual adult sexual relations

3. The State Party adopted a new Syariah Penal Code Order in October 2013. The Syariah Penal Code criminalises consensual heterosexual extramarital sexual relations, including pre-marital sex, as well as consensual homosexual sexual relations, under any circumstances.² The applicable punishments differ depending on the marital status and/or religion of the 'offenders' and on whether certain evidentiary requirements are met. Sentences upon conviction may include whipping, imprisonment, detention in rehabilitation centres and fines. Where the perpetrator is married, and certain evidentiary requirements are met, then the sentence is death by stoning.³
4. The ICJ is therefore concerned that the new Syariah Penal Code 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 extramarital and premarital sexual relations and consensual homosexual sexual relations, under any circumstances, 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.
5. The first set of provisions of the new Syariah Penal Code that entered into force on 1 May 2014 are those that carry sentences of imprisonment or a fine. Examples of these are the failure to perform Friday prayers (article 194) and propagating a religion other than Islam (article 209). The second phase of entry into force will be on

¹ Brunei Darussalam's Initial and second periodic reports under Article 18 of the Convention, CEDAW/C/BRN/1-2, 1 November 2013.

² Brunei Darussalam, *Syariah Penal Code Order* (2013), Brunei Darussalam Government Gazette No. S 69, pp. 1703, 1709.

Zina

68. (1) A man and a woman are said to commit *zina* if they willfully had sexual intercourse without being validly married to each other or such intercourse is not *syubhah* intercourse.

...

Liwat

82. (1) Any person who commits *liwat* is guilty of an offence and shall be liable on conviction to the same punishment as provided for the offence of *zina*.

(2) For the purposes of this Order, "*liwat*" means sexual intercourse between a man and another man or between a man and a woman other than his wife, done against the order of nature that is through the anus.

³ *Ibid*, p. 1704.

Punishment for *zina*.

69. (1) Any Muslim who commits *zina* and it is proved either by *ikrar* of the accused, or by *syahadah* of at least four *syahid* according to *Hukum Syara'* after the Court is satisfied having regard to the requirements of *tazkiyah al syuhud*, is guilty of an offence and shall be liable on conviction to *hadd* punishment as follows –

(a) if he is *muhshan*, stoning to death witnessed by a group of Muslims ...

23 October 2014 when those provisions that carry the penalty of *qisas*⁴ or *diyat*⁵, such as homicide (article 124) and causing hurt (article 167) will come into force. The final phase of entry into force will be on 23 October 2015 when those provisions with *hudud* punishments will be brought into operation. Examples of these crimes are robbery (article 62), adultery (article 68), rape (article 75), and consensual homosexual sexual relations (article 82).

6. The criminalisation of private adult consensual sexual activities -- whatever the sex, gender identity and sexual proclivities of those involved, and whatever the actual sexual practices -- violates international human rights law and, among other things, undermines women's enjoyment of their rights to privacy, personal integrity and equality.
7. For example the Human Rights Committee has considered that it is undisputable that adult consensual sexual activity in private is covered by the concept of "privacy" and criminalising private sexual acts between consenting adults constitutes an arbitrary interference with privacy and cannot be justified.⁶ The Human Rights Committee has also observed in a number of Concluding Observations that the criminalisation of private sexual activities between consenting adults of the same sex violates the right to privacy, **the prohibition of discrimination, and the right of equality before the law**, and has repeatedly called for the revocation of such provisions from various countries' penal codes.⁷ Special procedures of the Human Rights Council have stated that criminalization of these activities is contrary to the right to health,⁸ the right to a fair trial, and the principle of equality before the courts.⁹
8. The UN Working Group on Discrimination against Women has also specified that sexual relations between consenting adults should not be criminalised, and must not be punished by fine, imprisonment, flogging, or death by stoning or hanging.¹⁰ The Working Group has noted that, for example, where adultery is a criminal offence, this means in practice that women will continue to face extreme vulnerabilities, and violation of their rights to dignity, privacy and equality, given the continuing

⁴ Ibid, p. 1721.

118. For the purposes of this Order, "*qisas*" means retaliation or similar penalty for offences of *qatlul-'amd* or causing hurt to anybody.

⁵ Ibid.

119. For the purposes of this Order, "*diyat*" means the specified amount payable to the heirs of the victim of *qatl*.

⁶ *Toonen v. Australia*, Human Rights Committee (HRCttee), Communication No. 488/1992, Views of 31 March 1994, UN Doc. CCPR/C/50/D/488/1992 (1994), paras. 6.8, 8.2; *X v. Serbia*, HRCttee, Communication No. 1355/2005, Views of 26 March 2007, UN Doc. CCPR/C/89/D/1355/2005 (2007), para. 3.2; see also *François Ayissi et al. v. Cameroon*, Working Group on Arbitrary Detention, Opinion No. 22/2006, UN Doc. A/HRC/4/40/Add.1, p. 91, para. 19-20.

⁷ HRCttee, Concluding observations Maldives 2012, UN Doc. CCPR/C/MDV/CO/1, para. 8; HRCttee, Concluding observations Ethiopia 2011, UN Doc. CCPR/C/ETH/CO/1, para. 12; HRCttee, Concluding observations Iran 2011, UN Doc. CCPR/C/IRAN/CO/3, para. 10; HRCttee, Concluding observations Kenya 2012, UN Doc. CCPR/C/KEN/CO/3, para. 8; HRCttee, Concluding observations Togo 2011, UN Doc. CCPR/C/TGO/CO/4, para. 14; HRCttee, Concluding observations Cameroon 2010, UN Doc. CCPR/C/CMR/CO/4, para. 12; HRCttee, Concluding observations Romania 1999, UN Doc. CCPR/C/79/Add.111, para. 16; HRCttee, Concluding observations Chile 1999, UN Doc. CCPR/C/79/Add.104, para. 20.

⁸ Anand Grover, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/66/254, Summary & para. 17.

⁹ Gabriela Knaul, Special Rapporteur on the independence of judges and lawyers, Interim report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/66/289, para. 74.

¹⁰ *Statement by the United Nations Working Group on discrimination against women in law and in practice*. Geneva, Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&LangID=E>> (Accessed 28 August 2014).

discrimination and inequalities they face.¹¹

9. These observations echo those of CEDAW, which has repeatedly observed that laws criminalising extramarital sex, are in practice, disproportionately invoked against women.¹² CEDAW has also called for States parties to repeal the criminalisation of extramarital sexual relations.¹³
10. In addition, a range of the punishments envisaged in Brunei's new Syariah Penal Code, including corporal punishment, violate women's rights to freedom from torture and other ill-treatment.¹⁴ Moreover where such crimes are subject to the death penalty, they violate women's rights to life. For example the Human Rights Committee has deplored the imposition of the death penalty for adultery, specifying that it gives rise to a violation of the right to life as the death penalty may only be imposed for the most serious crimes and adultery should not be characterised as a crime.¹⁵
11. The ICJ notes that 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*. However, provisions of the Syariah Penal Code that have been adopted revive this cruel and inhuman penalty, that violates the right to life, 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 Syariah 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 Syariah Penal Code is out of step with

¹¹ Working Group on discrimination against women in law and in practice, Background Note on Adultery, pp. 8-9.

¹² CEDAW, Concluding observations Mexico 2012, UN Doc. CEDAW/C/MEX/CO/7-8, para. 13; CEDAW, Concluding observations Libya 2009, UN Doc. CEDAW/C/LBY/CO/5, paras. 24-25; CEDAW, Concluding observations Congo 2012, UN Doc. CEDAW/C/COG/CO/6, paras. 43-44; see also Manfred Nowak, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum: Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention, UN Doc. A/HRC/13/39/Add.5, para. 218-219.

Other treaty bodies and special procedures have also found that such provisions discriminate against women: see HRCtte, Concluding observations Venezuela 2001, UN Doc. CCPR/C/79/Add.104, para. 20; Committee on Economic, Social and Cultural Rights, Concluding observations Philippines 2008, UN Doc. E/C.12/PHL/CO/4, para. 18; Special Procedures' Letter of 5 September 2012 to Sudan, UN Doc. UA G/SO 218/2 G/SO 214 (3-3-16) G/SO 214 (33-27) G/SO 214 (89-15) G/SO 214 (53-24) Sudan, SDN 6/2012, p. 2.

¹³ CEDAW, Concluding observations Qatar 2014, UN Doc. CEDAW/C/QAT/CO/1, paras. 23-24; CEDAW, Concluding observations Libya 2009, *supra*, para. 24-25; Switzerland. 2012. *Statement by the United Nations Working Group on discrimination against women in law and in practice*, *supra*.

¹⁴ CEDAW, General Recommendation No. 19, UN Doc. A/47/38, p. 1, para. 7; *A.S. v. Sweden*, Committee Against Torture, Communication No. 149/1999, Views of 15 February 2001, UN Doc. CAT/C/25/D/149/1999, paras. 1.1, 8.4, 9; Juan E. Méndez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/67/279, para. 31; *Osbourne v. Jamaica*, HRCtte, Communication No. 759/1997, Views of 15 March 2000, UN Doc. CCPR/C/68/D/759/1997, para. 9.1; HRCtte, Concluding observations Indonesia 2013, UN Doc. CCPR/C/IND/CO/1, para. 15; HRCtte, Concluding observations Iran 2011, UN Doc. CCPR/C/INR/CO/3, para. 16; HRCtte, Concluding observations Sudan 2007, UN Doc. CCPR/C/SDB/CO/3, para. 19.

¹⁵ HRCtte, Concluding observations Sudan 2007, UN Doc. CCPR/C/SDN/CO/3, para. 19; HRCtte, Concluding observations Iran 1993, UN Doc. CCPR/C/79/Add.25, para. 8; HRCtte, Concluding observations Sudan 1997, UN Doc. CCPR/C/79/Add.85, paras. 8-9; Special Procedures' Letter of 5 September 2012 to Sudan, UN Doc. UA G/SO 218/2 G/SO 214 (3-3-16) G/SO 214 (33-27) G/SO 214 (89-15) G/SO 214 (53-24) Sudan, SDN 6/2012, p. 2.

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 2012,¹⁶ the Secretary-General of the United Nations noted that 150 of the 193 States Members of the United Nations had 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. In his most recent report to the 27th session of the UN Human Rights Council of 30 June 2013 on the question of the death penalty (A/HRC/27/23), the Secretary-General reported that "some 160 States have abolished or introduced a moratorium", whereas reportedly "executions were carried out in at least 22 States". The trend towards the abolition of the death penalty and the establishment of a moratorium on execution is also evidenced by the voting record on the periodical General Assembly Resolution on a moratorium on the use of the death penalty, which calls on all states to impose a moratorium on the use of the death penalty and has steadily gathered more support each time it has been adopted (A/RES/67/176 for the latest iteration). 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."

12. The recent report of the UN Secretary-General to the Human Right Council also reiterates that the use of the death penalty for consensual sexual relations and activities does not meet the threshold of "most serious crimes."¹⁷ Further, the same report affirms that about laws that criminalize actual or purported engagement by adults in consensual sexual relations, including extramarital sex and premarital sex, contravene international human rights law and standards. Moreover, the Secretary-General's report states that stoning as a punishment, in any circumstance, violates the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment, including corporal punishment in international law.
13. 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 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)
14. 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 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.
15. The ICJ notes 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

¹⁶ Report of the UN Secretary-General on the question of the death penalty to the General Assembly, A/HRC/21/29, 2 July 2012.

¹⁷ For a detailed discussion of the phrase "the most serious crimes" in this context, see the report of the UN Secretary-General to the General Assembly on the moratoriums on the use of the death penalty, A/63/293, 15 August 2008, para. 32.

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.

16. The ICJ notes women encounter serious gender discrimination throughout their daily lives 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." (UN Doc. A/63/161, para 37). 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.

17. The ICJ considers that in order to meet its obligations under the CEDAW the State Party should repeal those provisions in the new Syariah Penal Code that criminalize adult consensual sexual relations.

Marital rape

18. The ICJ also notes with concern that the State Party has thus far failed to criminalize marital rape. In this connection, the organization observes that the Syariah Penal Code operates together with the existing Penal Code.

19. Both the Syariah Penal Code and Penal Code do not criminalize marital rape. The Penal Code includes an exception that states expressly that sexual intercourse by a man with his own wife, the wife not being under 13 years of age, is not rape (article 375). The Syariah Penal Code (article 75) specifically states that rape can only occur when sexual intercourse takes place without consent with someone to whom the offender is not validly married.

20. Further, in its replies to the List of Issues the State Party indicated that "there is no marital rape in Islam".

21. The ICJ considers that, to ensure consistency with the Convention, the State Party should criminalize marital rape.