

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

REFERENCE: AL
OTH 12/2014:

11 November 2014

Dear Mr. Caplen,

I have the honour to address you in my capacity as Chairperson-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice pursuant to Human Rights Council resolutions 26/5.

In this connection, I would like to bring to the attention of the Law Society information the Working Group received concerning its issuance of a practice note on Sharia succession rules intended as a guide for use by solicitors in England and Wales when making a Sharia-compliant will, which the Working Group consider discriminatory against women, especially Muslim women, and/or women from minority communities.

According to the information received:

In March 2014, the Law Society of England and Wales reportedly published a practice note for solicitors to assist them in the use of Sharia law succession rules, in particular, drafting wills compliant with Sharia Law, Sharia trust issues and disputes over Sharia estates.

According to the practice note, in order to prepare a Sharia-compliant will, three steps must be taken, which are reportedly different to traditional probate processes in England and Wales. First, the cost of the burial and any debts must be paid. Secondly, a third of the estate may be given to charities or individuals who are not obligatory heirs. Finally, the remainder of the estate is given to a defined set of “primary” and then “residual” heirs.

Regarding the distribution of assets under Sharia law, paragraph 3.6 of the practice note advises that “male heirs in most cases receive double the amount inherited by a female heir of the same class. Non-Muslims may not inherit at all, and only Muslim marriages are recognized.” In addition, in the same paragraph,

the practice note states that “a divorced spouse is no longer a Sharia heir, as the entitlement depends on a valid Muslim marriage existing at the date of death” and “illegitimate and adopted children are not Sharia heirs.”

Paragraph 3.6 of the practice note also refers to Muslim clients who often wish to have an expression of faith at the start of their will and therefore directs solicitors to the client’s local mosque, who “may be able to supply suitable wording.” Furthermore, paragraph 5.2 of the practice note also advises solicitors that “local Sharia scholars are a useful source of information and may be contactable via the client’s mosque.”

In its press release following the issuance of the practice note, the Law Society reportedly acknowledged that Sharia rules are not identical in every Muslim country and that there are differences between Sunni and Shia rules, and different interpretations of Sunni law.

In May 2014, the Solicitor’s Regulatory Authority (“SRA”), the regulatory body for solicitors in England and Wales, reportedly issued guidance on the drafting and preparation of wills, in which it advised that the practice note of the Law Society may be helpful for solicitors for whom Sharia succession rules may be relevant. However, it was reported that the SRA subsequently withdrew this reference to the Law Society’s practice note from its ethics guidance on wills, stating that it had done so “in response to concerns that had been raised.”

It is further reported that, despite criticism regarding the content of its practice note on Sharia succession rules, the Law Society stated that it had no plans to withdraw this guidance. In a letter dated 4 June 2014, the Law Society wrote that it had taken “into account any equality and diversity implications for members of the profession.” On 24 June 2014, the Law Society reportedly held its first introductory training course on “Developing services for Muslim clients: an introduction to Islamic rules for law firms.”

I would like to take this opportunity to express the Working Group’s concern regarding the aforementioned practice note, as it effectively promotes an interpretation of Sharia succession rules that supports the apportionment of estates in a manner that discriminates against women, especially Muslim women, and/or women from minority communities.

When preparing a will, a solicitor owes a duty of care in respect of negligence and also to the intended beneficiaries, in respect of whom he/she has deemed to have “assumed responsibility” (*White and Carter (Councils) Ltd v McGregor* [1962] AC 413). There is also a professional duty of “good service” to a client which, in certain circumstances, a solicitor must provide, to advise the latter in a way that promotes the interest of the intended

beneficiaries of a claim (Reader v Molesworth Bright Clegg [2007] EWCA Civ 169; [2007] 1 WLR 1082).

In addition, section 29 of the Equality Act 2010 and Chapter 2 of the SRA Code of Conduct refer to non-discrimination in the provision of services to the public, with the latter Code specifically referring to the prevention of unlawful discrimination in the relationship between a solicitor and client in respect of, inter alia, “marriage and civil partnership, pregnancy, religion or belief, sex and sexual orientation” and emphasizing a solicitor’s duty to provide services to that client “in a way that respects diversity.”

The Working Group is concerned that, while the Law Society asserts that it has considered equality and diversity implications for its solicitors in drafting the practice note, the corresponding impact of the advice contained therein on women, whether from Muslim or non-Muslim backgrounds, does not appear to have been equally considered.

The Working Group does not consider the statements of the Law Society in its letter of 4 June 2014 that “express consideration was given as to whether the note endorsed values that were against human rights” and the practice note “could not be seen as endorsing values that were against human rights” as sufficient due diligence on its part. The practice note does not warn solicitors of the risk of discrimination when advising on and preparing wills, which could result in their violation of section 29 of the Equality Act 2010. Similarly, the note does not appear to uphold the non-discrimination guarantee provided under article 14 of the Human Rights Act 1998. According to *Jordan v United Kingdom* (2003) 37 EHRR 2 at paragraph 154, Article 14 is applicable to policies or measures that have “disproportionately prejudicial effects on a particular group.”

It is estimated that approximately 70 percent of Muslim marriages in the United Kingdom are unregistered. If a Muslim woman who has not registered her marriage wishes to divorce in the United Kingdom, she has normally no other option than to seek the services of a sharia council, many of whom have been found to have discriminated against women on the basis of their sex. Sharia councils do not have legally binding status; however, this is not always the impression they give to vulnerable women using their services. The Working Group is concerned that there is no effective regulatory framework governing these councils to ensure that standards are enforced. Rather than providing guidelines which would contribute to improving women’s situation in these councils, protecting their right to equality under the civil law, the Law Society is, in its practice note, normalizing and legitimizing discriminatory application of Sharia law.

Furthermore, the Working Group wishes to emphasize that there is no single unified interpretation of Sharia law; for example, within the Sunni schools of law, substantial variations on inheritance rules exist. The Working Group is concerned that rather than being considered as “good practice”, the current practice note issued by the

Law Society is narrow in its scope and such an interpretation of Sharia succession rules could hinder wider global efforts by women in the struggle for more just inheritance laws.

The Working Group is not clear as to which organizations the Law Society consulted in the drafting of its guidance on Sharia succession rules. The Working Group recommends that, if the Law Society wishes to provide advice in this area, it should advocate a more progressive interpretation of inheritance laws, such as the “model” approach implemented in Morocco, where the principles of Islam have been reconciled with international human rights law and where husbands and wives are treated equally under its Family Code. It also draws the Law Society’s attention to recent attempts to reform Muslim inheritance law in Indonesia, Somalia and Tunisia. Indeed, the Special Rapporteur on freedom of religion or belief has noted in paragraph 28 of his aforementioned 2013 interim report to the General Assembly (A/68/290) that “freedom of religion or belief, in conjunction with freedom of expression, helps open up religious traditions to systematic questions and debates... This can lead to more gender-sensitive readings of religious texts and far-reaching discoveries in this field.”

The Working Group stresses the importance of the Law Society advancing efforts to respect, protect and fulfil women’s rights and equality in cooperation with all relevant actors, including women’s organizations. In its current form, however, the Working Group would strongly recommend that **the Law Society withdraw its practice note** and, if it intends to proceed with this guidance, seek further opinion, including that of women’s organizations working to support Muslim women and/or women from minority communities, in any future drafting of the note. The Working Group stands ready to provide the Society with relevant advisory support.

Although it notes that the Law Society, as defined by its Charter, is an independent private body, the Working Group nonetheless wishes to refer to the **Reference to national and international law Annex** attached to this letter which cites national and international human rights instruments and standards relevant to these observations.

Since it is the Working Group’s responsibility under the mandate provided to it by the Human Rights Council to seek to clarify all cases brought to its attention, it would be grateful for your observations on the following matters:

1. Please provide any additional information and/or any comment you may have on the above-mentioned guidance contained in the practice note on Sharia succession rules.
2. Please provide details of any efforts by the Law Society to consult with a wide range of stakeholders, including women’s organizations, during the drafting of this

practice note and any additional information regarding training courses being offered by the Law Society relating to this guidance.

The Working Group would appreciate receiving a response within 60 days.

This communication and your response will be made available in a report to be presented to the Human Rights Council for its consideration.

The Working Group has also written to the Government of the United Kingdom of Great Britain and Northern Ireland to inform it of its concerns.

Please accept, Mr. Caplen, the assurances of the Working Group's highest consideration.

Frances Raday
Chairperson-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice

Annex
Reference to international human rights law

Without implying any conclusion to what is illustrated in this letter and mindful of the nature of the Law Society as an independent private body, we wish to recall article 2 (e) which requires States to take all appropriate measures to eliminate discrimination against women by any person organization or enterprise; article 2 (f) which requests the modification or abolishment of existing laws, regulations, customs and practices which discriminate against women; article 5 (a), which requests the modification of social and cultural patterns of conduct in order to eliminate the prejudices based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women; and article 16 (1), which requires the adoption of all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations of the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), ratified by the United Kingdom on 7 April 1986.

In addition, we recall paragraph 13 of its General Recommendation 21 on *Equality in Marriage and Family Relations* (1994), which states that “whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as article 2 of the Convention requires.” Similarly, in paragraph 9 of its General Recommendation 28 on the *Core Obligations of States Parties under Article 2 CEDAW*, “the obligation to protect requires that States parties protect women against discrimination by private actors and take steps directly aimed at eliminating customary and all other practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for men and women.” These provisions are very relevant as the advice set out in the Law Society’s practice note should both reflect and reinforce the United Kingdom’s commitment to CEDAW.

In accordance with paragraph 4 of the Human Rights Committee General Comment 28 on *Equality of Rights between Men and Women* (2000), the United Kingdom, having ratified the International Covenant on Civil and Political Rights (“ICCPR”) on 20 May 1976, is bound to address discrimination against women by private actors. By extension therefore, the Law Society, as a private body, has a correlated responsibility to ensure that its actions do not interfere with the equal enjoyment by women of their rights, in particular, articles 3, 18 and 27 as prescribed under the Covenant.

While we recognize that the right to freedom of religion is protected under articles 18 and 27 ICCPR, we would like to recall paragraph 69 of the 2011 interim report of the Special Rapporteur on freedom of religion and belief to the General Assembly (A/65/207) and paragraph 30 of the Special Rapporteur’s 2013 interim report to the

General Assembly (A/68/290), where freedom of religion and belief can never serve as a justification for the violation of women and girl's rights. Similarly, article 5 of the *Vienna Declaration and Programme of Action* (1993) prioritizes and guarantees women's rights to equality in all contexts, including where discrimination derives from religion, and paragraph 5 of the aforementioned Human Rights Committee General Comment 28 is clear in that where a clash between the two rights occurs, it is the right to equality which prevails.

In paragraph 30 of the 2013 interim report of the Special Rapporteur on freedom of religion or belief to the General Assembly (A/68/290), the Special Rapporteur emphasizes that "... as a human right, freedom of religion or belief can never serve as a justification for violations of the human rights of women and girls." Furthermore, in paragraph 69 of the 2011 interim report to the General Assembly (A/65/207), the Special Rapporteur on freedom of religion or belief stresses that "it can no longer be taboo to demand that women's rights take priority over intolerant beliefs used to justify gender discrimination."

Paragraph 5 of the Human Rights Committee General Comment 28 on *Equality of Rights between Men and Women* (2000) states that "inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes ... States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights." Paragraph 26 of this same General Comment also states that "women should have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses."

Reference to women's rights to inheritance is dealt by other sources of international human rights law and agendas for women's empowerment. This includes paragraph 27 of the General Comment 16 on *The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights* from the Committee on Economic, Social and Cultural Rights, where there is a clear obligation on the United Kingdom having ratified the International Covenant on Economic, Social and Cultural Rights ("ICESCR") on 20 May 1976, "to ensure that women have equal rights to marital property and inheritance upon their husband's death." Similarly, paragraph 60 (f) of the 1995 *Beijing Platform for Action*, affirms that women's rights to full and equal access to economic resources, including the right to inheritance and to the ownership of land and other property should be protected.

Finally, we would like to recall the domestic legal framework in relation to concerns outlined and particularly section 13 (1) of the Equality Act 2010, which defines "direct discrimination" as occurring when a person, "because of a protected

characteristic” treats another less favourably than he treats or would treat others. Section 13 (6) of the same Act lists sex as a “protected characteristic.”

Section 29 (2) of the Equality Act 2010 states that “a service-provider (A) must not, in providing the service, discriminate against person (B) –

- (a) as to the terms in which A provides the service to B;
- (b) by terminating the provision of the service to B;
- (c) by subjecting B to any other detriment.”

Equally, section 29 (6) of the Equality Act 2010 states that “a person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimization.”

Article 14 of the Human Rights Act 1998 states that “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”