

**Mandates of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on violence against women, its causes and consequences and the Working Group on the issue of discrimination against women in law and in practice**

REFERENCE:  
OL MYS 5/2018

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Excellency,

We have the honour to address you in our capacities as Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on violence against women, its causes and consequences and Working Group on the issue of discrimination against women in law and in practice, pursuant to Human Rights Council resolutions 32/2, 34/19, 32/19 and 32/4.

In this connection, we would like to express our grave concern regarding the criminalization of consensual sexual relations between adults and the application of punishments for such acts that are contrary to the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

The criminalization of acts that fall within a person's personal or sexual choices constitutes a violation of the right to privacy, liberty and security, and non-discrimination. We are concerned at the imposition of corporal punishment, such as whipping or caning, for sexual relations between consenting adults, as well as the collective dimension and public character of such punishment that serves the social objective of influencing the conduct of others. We are very concerned about the devastating consequences that such violence has on the physical and psychological integrity and well-being of those who are affected by it, which may include persons other than those physically punished. Such punishments violate customary international law prohibitions on the use of torture and other ill-treatment. Such discriminatory legislation may also exacerbate gender-based violence, and violence based on sexual orientation and gender identity as women and lesbian, gay, bisexual and transgender (LGBT) people who are accused and/or convicted of adultery, sodomy, or same-sex sexual relations 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.

**Criminalization of sexual relations between consenting adults**

The Federal Penal Code criminalizes “carnal intercourse against the order of nature” (section 377A), defined as oral or anal intercourse between a man and another person of any sex and punishable by 20 years in prison and with whipping; and “any act of gross indecency with another person” (section 377D), punishable by up to two years of imprisonment. Same-sex sexual relations are also outlawed under Sharia Criminal Offences laws in Malaysia's 13 states and its federal territory, which apply only to

Muslims and are enforced by state religious departments. In Terengganu, for instance, *liwat* (sodomy) and *musahaqah* (sex between women) can result in up to three years in prison, fines, and up to six strokes with a cane.

Sharia Criminal Offences laws in Malaysia also outlaw sexual intercourse “out of wedlock”, whether or not either party is married. The conviction for such acts may include a fine, imprisonment, or whipping. In this context, reference is made to the other letter ([OL MYS 5/2017](#)) sent to your Excellency’s Government on 29 November 2017. In this letter, the Working Group on the issue of discrimination against women in law and in practice expressed its firm belief that laws criminalizing adultery are based on and result in discrimination against women and that criminalization of sexual relations between consenting adults should be regarded as an interference with the privacy of the individuals concerned. We acknowledge your Government’s response to that communication dated 24 May 2018, but wish to express our concern that related human rights violations may be ongoing.

Criminalizing adult consensual sexual relations violates internationally protected rights to privacy, liberty and security, and non-discrimination. In this context, we would like to recall resolutions 32/2, 17/19 and 27/32 of the Human Rights Council, expressing grave concern for acts of violence and discrimination committed against individuals because of their sexual orientation and gender identity, as well as recommendations of UN human rights treaty bodies and special procedures mandate holders that States inter alia prohibit discrimination on the basis of sexual orientation and gender identity.

United Nations human rights mechanisms and the High Commissioner for Human Rights have repeatedly called on States to repeal discriminatory laws used to punish individuals based on their sexual orientation, including laws criminalizing homosexuality (A/72/172, A/HRC/38/43, A/HRC/29/23, A/HRC/19/41). United Nations human rights mechanisms have also called upon States to fulfil their obligations to protect the rights to privacy, liberty and security of the person and to non-discrimination by repealing such laws and have rejected attempts to justify these laws on grounds of the protection of public health or morals. The criminalization of sexual relations between women also violates Malaysia’s obligations under the Convention on the Elimination of All Forms of Discrimination against Women, which Malaysia ratified on 05 July 1995, as recognized in General Recommendation 28 of the Committee supervising the implementation of the Convention. In March 2018, that Committee called on Malaysia to “amend all laws that discriminate against lesbian, bisexual and transgender women and intersex persons, including the provisions of the Penal Code and Sharia laws that criminalize same-sex relations between women and cross-dressing” and “to prohibit the whipping of women as a form of punishment” (CEDAW/C/MYS/CO/3-5, para. 48).

The criminalization of sexual relations between consenting adults violates the right to bodily autonomy and integrity. The Beijing Platform states that “the human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.” 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 vulnerabilities and violations of their human rights to dignity, privacy, and equality, given continuing discrimination and inequalities faced by women. Criminalisation of adultery hence contravenes article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 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. The offence of adultery, though it may constitute a matrimonial offence, should not be regarded as a criminal offence punishable by death by stoning, corporal punishment or imprisonment.

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 criminalizes adultery or any other criminal provisions that affects women disproportionately (CEDAW/C/GC/35, paragraph 31(a)).

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has also recommended that States repeal all laws that support the discriminatory and patriarchal oppression of women, inter alia laws that criminalize adultery, and decriminalize same-sex relationships between consenting adults (A/HRC/31/57).

### **Corporal punishment**

The Constitution of Malaysia does not prohibit corporal punishment, nor is such prohibition found in criminal legislation.

Caning or whipping is widely used as a supplementary punishment to imprisonment under both secular laws and Islamic Law (Sharia law). Some 40 offences are punishable by whipping under the Penal Code of Malaysia including “carnal intercourse against the order of nature”. Under secular law, women cannot be caned. Only men between the ages of 18 and 50 years can be caned, with the exception of men above the age of 50 years who can be caned in the case of rape.

Sections 286-291 of the Criminal Procedure Code lay out the procedures governing the punishment of whipping. The maximum number of strokes shall not exceed twenty-four in the case of an adult or ten in the case of a ‘youthful offender’ between the ages of 18 and 21 years. Caning officers are trained to tear into victims’ bodies with a cane and drag the tip of the cane into the victim’s naked skin, which provokes intense suffering and often leave permanent scars on the offender.

Islamic Law is applicable to all Muslims in Malaysia. The 13 States in Malaysia including the Federal Territories have similar enactment pertaining to Islamic criminal offences. The Islamic laws have jurisdiction on family and succession matters and offences in respect of the behavior of a Muslim, including sexual intercourse “out of wedlock” and

same-sex sexual relations which carry the penalties of caning, fines or imprisonment. Under Islamic Law, men, women and children who reached “the age of puberty” can be caned.

Caning under the Islamic Law is implemented more rarely and in a less severe manner than judicial caning under Malaysian criminal law. The primary objective of such punishment is to shame offenders rather than inflicting intense pain and suffering. Offenders remain fully dressed during the punishment, which is carried out in an enclosed area, away from the view of the public. According to information at our disposal, such punishment has however been carried out in public in the past. Each stroke is to be executed with moderate force so as not to break the skin of the offender.

Corporal punishment, such as caning/whipping, is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment under international law. The prohibition against torture is well established under customary international law as *jus cogens*. It has the highest standing in customary law and is so fundamental as to supersede all other treaties and customary laws. In connection to this, the United Nations General Assembly reaffirmed that no one shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. It recalled that freedom from torture and other cruel, inhuman or degrading treatment or punishment is a non-derogable right under international law and that the absolute prohibition of torture or other cruel, inhuman or degrading treatment or punishment is affirmed in relevant international instruments. The General Assembly repeatedly indicated in its resolution that the prohibition of torture is a peremptory norm of international law and that international, regional and domestic courts have recognized the prohibition of cruel, inhuman or degrading treatment or punishment as customary law (General assembly resolutions A/RES/60/148, A/RES/61/153, A/RES/62/148, A/RES/63/166, A/RES/64/153, A/RES/65/205, A/RES/66/150, A/RES/67/161 and A/RES/68/156).

In its Resolution 8/8 the Human Rights Council reminded Governments that “corporal punishment, including of children, can amount to cruel, inhuman or degrading punishment or even to torture.” (Para.7a). Both the Human Rights Committee and the Committee against Torture have called for the abolition of judicial corporal punishment. In paragraph 5 of General Comment No. 20 (1992), the Human Rights Committee stated that the prohibition of torture and ill-treatment must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.

In this context, we would also like to draw your Government’s attention to the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the 60th session of the General Assembly, in which he, with reference to the jurisprudence of UN treaty bodies, concluded that any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. He also noted that “States cannot invoke provisions of domestic law to justify the violation of their human rights obligations under international law, including the prohibition of corporal punishment,” and called upon States to abolish all forms of judicial and administrative corporal punishment without delay (A/60/316, para. 28).

In addition, we would like to remind your Excellency's Government that the Geneva Conventions, to which Malaysia is a party since 24 August 1962, and customary international humanitarian law expressly prohibit the use of corporal punishment even in times of armed conflict (Art. 32 GC IV; Rule 91 ICRC Study on Customary International Humanitarian Law).

Caning or whipping is, per se, a cruel and degrading form of punishment that strips an individual of dignity and self-respect. It cannot be carried out “humanely”, as argued by the Attorney General’s Chambers during the consideration of Malaysia by the Committee on the Elimination of Discrimination against Women on 20 February 2018. In this respect, we concur with the position of the Human Rights Commission of Malaysia (SUHAKAM) that arguments such as the length and diameter of the cane are immaterial and irrelevant. All kinds of corporal punishment have devastating consequences on the physical and psychological integrity and well-being of the victims.

Taking into consideration the above mentioned concerns and international human rights standards, we would like to urge your Excellency’s Government to repeal all provisions criminalizing sexual relations between consenting adults, including sexual intercourse “out of wedlock” and same-sex sexual relations. We also call on your Excellency’s Government to impose a moratorium against all forms of corporal punishment as an interim measure, and to repeal provisions related to such punishment in all legislation, including the Penal Code, the Criminal Procedure Code, and the Shariah Criminal Offences laws.

We welcome the commitment of your Excellency’s Government to ratify the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment. In this context, we encourage your Excellency’s Government to review the provisions contravening the Convention, including those related to corporal punishment and other cruel, degrading or inhuman treatment or punishment, with a view to prepare for the ratification.

This communication, as a comment on legislation, regulations or policies, and any response received from your Excellency’s Government will be made public via the communications reporting [website](#) within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence.

Please accept, Excellency, the assurances of our highest consideration.

Victor Madrigal-Borloz  
Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity

Nils Melzer  
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or  
punishment

Dubravka Šimonović  
Special Rapporteur on violence against women, its causes and consequences

Ivana Radačić  
Chair-Rapporteur of the Working Group on the issue of discrimination against women in  
law and in practice