

Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the sale of children, child prostitution and child pornography; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Working Group on the issue of discrimination against women in law and in practice

REFERENCE: OL
MYS 6/2016:

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Dear Mr. Rastam,

We have the honour to address you in our capacities as Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the sale of children, child prostitution and child pornography; Special Rapporteur on contemporary forms of slavery, including 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 24/6, 25/6, 24/3 and 15/23.

In this connection, we would like to bring to the attention of your Government information we have received concerning the **Amendment to the 2001 Child Act which does not explicitly include child pornography offences and subsisting legislation which permits child marriage, which is a form of forced marriage.**

According to the information received:

An Amendment to the 2001 Child Act, which aimed inter alia at bringing national legislation further in line with the Convention on the Rights of the Child, was adopted by the House of Representatives in March 2016. It is reported that the Amendment to the 2001 Child Act does not address the current gap in protection regarding offences related to child pornography. Indeed, though the 2001 Child Act lists a series of offences relating to the sexual exploitation of children in Part VI, Chapter II, it does not specifically include as an offence the representation of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

According to information received, the House of Representatives has not taken the opportunity of the Amendment to the Child Act to outlaw child marriage which is currently permitted through the Law Reform (Marriage and Divorce) Act 1976 and the Islamic Family Law (Federal Territories) Act 1984. Indeed, in Part III Section 21 (2) of the Law Reform (Marriage and Divorce) Act 1976, it is stipulated that the Chief Minister may in his discretion authorize the solemnization of the marriage of a girl from the age of 16. In Part II Section 8 of the Islamic Family Law (Federal Territories) Act 1984, the minimum age of marriage of girls is set at 16 while it is 18 for boys. In addition, the Syariah Judge may grant permission to marry before these minimum ages in certain circumstances.

We would like to take this opportunity to express our grave concern to your Government regarding the Law Reform (Marriage and Divorce) Act 1976 and the Islamic Family Law (Federal Territories) Act 1984 which condone and legitimize child marriage, which is a form of forced marriage and a slavery-like practice. As children do not have the capacity to consent to marriage, child and/or forced marriages are in essence marriages without the right to refuse. Child and forced marriages are harmful practices which violate the fundamental human rights of children, especially girls, including their right to physical and mental health, and they severely undermine their safety and their long-term prospects for education or economic and social opportunities. Furthermore, child and forced marriages have a strong inter-relationship with gender discrimination since girls are predominantly affected and they are rooted in prejudicial, customary or other practices based on stereotyped roles for men and women, and for boys and girls. This gender based discrimination is apparent in both the Law Reform (Marriage and Divorce) Act 1976 and the Islamic Family Law (Federal Territories) Act 1984 which set a different minimum age of marriage for boys and girls.

Both child and forced marriages violate the right to enter a marriage with free and full consent and constitute the infringement of girls' and women's physical integrity and human dignity. Child and forced marriages also expose girls and women to physical, sexual and psychological abuse and violence within the marriage which infringes upon their right to the enjoyment of the highest attainable standard of physical and mental health.

We are further concerned by the absence of a specific offence of child pornography in the 2001 Child Act. As a party to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Malaysia must ensure that the production, distribution, dissemination, import, export, offer, sale or possession of child pornography is fully covered under criminal or penal law.

In light of the above, we would therefore encourage your Government to reform the Law Reform (Marriage and Divorce) Act 1976 and the Islamic Family Law (Federal Territories) Act 1984, so that the minimum age requirement conforms to national legislation, as set out in the 2001 Child Act, as well as to all the principles and provisions of international treaties ratified by Malaysia, in particular, the Convention of the Rights of the Child which defines as a child every human being below the age of 18. Moreover, we would also encourage your Excellency's Government to revise the 2001 Child Act in order to explicitly criminalize the production, distribution, dissemination, import, export, offer, sale or possession of child pornography and to prohibit child and forced marriage.

In connection to the above alleged facts and concerns, please see the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

It is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. We would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide an update on the status of the Law Reform (Marriage and Divorce) Act 1976 and the Islamic Family Law (Federal Territories) Act 1984, and on the Amendment to the 2001 Child Act.
3. Please provide further information on any measures taken by Your Government to address and tackle child and/or forced marriages which discriminate women and girls and have negative impacts on their health, development, education, life options and their protection from violence, in light of its international human rights obligations.
4. Please provide any further information on additional issues such as appropriate redress mechanisms available for victims of child and/or force marriage, including rehabilitation, counselling and reintegration, girls' education, and awareness raising campaigns, with the involvement of men and women, boys and girls, and community and religious leaders, to prevent and eliminate child marriage.
5. Please provide any further information on measures taken to prohibit and criminalize child pornography, addressing the demand and ensuring the provision of comprehensive care, recovery and reintegration services to child victims.

We would appreciate receiving a response within 60 days. Your Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Mr. Rastam, the assurances of our highest consideration.

Dainius Pūras

Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

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Urmila Bhoola
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Frances Raday
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law and in practice

Annex

Reference to international human rights law

The above-mentioned alleged facts would indicate a prima facie violation of a number of rights and principles guaranteed under the Convention on the Rights of the Child (CRC), acceded to by Malaysia on 17 February 1995, which includes non-discrimination (article 2); the best interests of the child (article 3); the right not to be separated from their parents against their will (article 9); the right of the child to be heard and express his or her views (article 12), the right to the enjoyment of the highest attainable standard of health, where States must “take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children” (article 24 (3)); the right to education and to receive educational and vocational information and guidance (article 28); and the rights to protection from all forms of physical and mental violence, injury or abuse, including sexual abuse, while in the care of parents or legal guardians (article 19); sexual exploitation (article 34); sale of children (article 35) and exploitation (article 36).

In paragraph 9 of its General Comment No. 4 (2003) on Adolescent Health and Development in the Context of the Convention on the Rights of the Child, the Committee on the Rights of the Child has noted that “States parties need to ensure that specific legal provisions are guaranteed under domestic law, including with regard to setting a minimum age for ... marriage”, which “should be the same for boys and girls.” In paragraph 20, the Committee strongly recommends that “State parties “review and, where necessary, reform their legislation and practice to increase the minimum age for marriage with and without parental consent to 18 years, for both girls and boys.”

Similarly, the Special Rapporteur on the sale of children, child prostitution and child pornography has indicated that child marriage may be considered as sale of children for the purposes of sexual exploitation, in violation of (articles 2-3) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (CRC-OPSC), acceded to by Malaysia on 12 April 2012.

Furthermore, the Committee on the Rights of the Child recommended, following its review of Malaysia in 2007 (CRC/C/MYS/CO/1), that “the State party take all necessary measures to harmonize the definition of the child, including the terminology used, in the national laws so as to eliminate inconsistencies and contradictions.” The Committee also recommended “that the State party should ensure that the best interest of the child is a primary concern.”

The Convention on the Elimination of all forms of discrimination against women (CEDAW), which was acceded to by Malaysia on 5 July 1995, is also very relevant in this case, particularly (article 2), which condemns all forms of discrimination against women; (article 5), which requests the modification of social and cultural patterns of conduct in order to eliminate discrimination against women; (article 10), which requires the elimination of discrimination against women in the field of education; (article 12),

which requires the elimination of discrimination against women in the field of health care and; (article 16), which requires the elimination of discrimination against women in all matters relating to marriage and family relations.

The CEDAW Committee, in paragraph 36 of its General Recommendation No. 21 (1994) on Equality in Marriage and Family Relations, has specified that “the minimum age for marriage should be 18 years for both men and women.” Furthermore, in paragraph 39, the Committee has called upon State parties to “require the registration of all marriages, whether contracted civilly or according to custom or religious law.”

Both the CRC and CEDAW Committees have stressed the importance of additional legal safeguards to protect the right of all individuals to freely enter into marriage, even in plural legal systems which include both customary and statutory law. In paragraph 54 (h) of the Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on Harmful practices, it is stated that “a system of national compulsory, accessible and free birth registration of all children [should be] established, in order to effectively prevent harmful practices including child marriages”.

Girls who marry young are also more vulnerable to intimate partner violence and sexual abuse than those who marry later in life. In this context, we wish to recall that the Committee on the Elimination of Discrimination against Women (CEDAW) in its general recommendation No. 19 (1992), defines gender-based violence against women as impairing or nullifying the enjoyment by women of human rights and fundamental freedoms, and constitutes discrimination within the meaning of article 1 of the Convention on the Elimination of All forms of Discrimination Against Women, whether perpetrated by a State official or a private citizen, in public or private life. Thus, the Committee considers that States parties are under an obligation to act with due diligence to investigate all crimes, including that of sexual violence perpetrated against women and girls, to punish perpetrators and to provide adequate compensation without delay. In general recommendation No. 19, the Committee sets out specific punitive, rehabilitative, preventive and protective measures States should introduce to fulfil this obligation; in paragraph 9, it makes clear that “under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”.

According to a 2012 report released by the United Nations Population Fund, “Marrying too Young, End Child Marriage”, this practice can lead to complications of pregnancy and child birth. Still births and new born deaths are 50 percent higher among mothers under twenty than in women who become pregnant in their twenties. As well as facing an increased risk of exposure to sexually transmitted infections including HIV, obstetric fistula is also one of the disabilities associated with early childbirth, which can leave girls in constant pain and vulnerable to infection. For these reasons, the World Health Organization has discouraged marriage before the age of eighteen and pregnancy before the age of twenty. The International Conference on Population and Development

and the Commission on the Status of Women have called on States to review, enact and strictly enforce laws and regulations concerning the minimum legal age of consent and the minimum age for marriage in order to end the practice of child and forced marriages.

Furthermore, we would like to emphasize the fact that under the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, which was acceded to by Malaysia on 18 November 1957, all forms of servile marriage, in which a spouse is reduced to a commodity over whom any or all the powers of ownership are attached, are defined as a practice similar to slavery (article 1(c)). The Convention implicitly prohibits child marriage, which constitutes forced marriage, since the child is not in a position to provide informed consent, and calls on the State parties to prescribe, where appropriate, suitable minimum ages of marriage, to encourage the use of facilities whereby the consent of both parties to a marriage may be freely expressed in the presence of a competent civil or religious authority, and to encourage the registration of marriages (article 2). Other slavery-like practices linked to servile marriage are domestic servitude and sexual slavery (see A/HRC/21/41, paras. 13, 14 and 17).

Lastly, following the visit to Malaysia in 2014 by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, it was recommended in his report (A/HRC/29/33/Add.1) that the Government of Malaysia “ensure that the legal age for marriage is set at 18 years of age, as established in international human rights standards, and do its utmost to eradicate and prevent child marriage and the negative effects it has on the health and well-being of girls”.

In respect to child pornography, Malaysia as a party to the CRC-OPSC has the obligation to criminalize the production, distribution, dissemination, import, export, offer, sale or possession of child pornography (article 3). Child pornography is defined as any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes (article 2).

In addition, the Committee on the Rights of the Child regretted “the absence of specific legislation against Internet-related sexual offences, including child pornography”, following its review of Malaysia in 2007 (CRC/C/MYS/CO/1). It further recommended that “the State party [...] consider adopting specific legislation on the obligations of Internet service providers in relation to child pornography on the Internet.”