



April 10, 2019

Dr. Amara Pongsapich
Chairperson

Thailand Representative and Chair to the ASEAN Intergovernmental Commission on Human Rights

Re: Urgent concern about the 2013 Syariah Penal Code of Brunei Darussalam

Dear Dr. Pongsapich:

The ASEAN SOGIE Caucus (ASC), the International Commission of Jurists (ICJ), the Asian Forum for Human Rights and Development (FORUM-ASIA), and the Southeast Asian Press Alliance (SEAPA) would like to submit a letter of concern about Brunei Darussalam's 2013 Syariah Penal Code. As of 3 April 2019, all provisions of the Syariah Penal Code will have entered into force, in the final, third phase of implementation of this legislation. The 2013 Syariah Penal Code violates international human rights law and standards. Its provisions also conflict 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, including those enshrined in the ASEAN Charter and the ASEAN Community Vision 2025.

On the imposition of the death penalty & stoning to death

1. We consider the imposition of the death penalty a violation of the right to life and the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Given that Brunei Darussalam carried out the last execution in 1957 and that, therefore, the death penalty has been generally viewed as abolished *de facto*, we are alarmed that the Syariah Penal Code brings back the death penalty into the domestic laws of Brunei.
2. The Syariah 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).
3. In this respect, we note that consensual sexual activities, such as sodomy, adultery and other extramarital and premarital sexual relations, as much as consensual same-sex sexual conduct, do not constitute recognizably criminal offences under international human rights law and standards and should therefore not be criminalized at all (for more on this see also below). In addition, the

Syariah Penal Code provides for the imposition of capital punishment for offences other than the “most serious crimes” in clear contravention of international law. With respect to the expression “most serious crimes”, the Human Rights Committee has recently affirmed that, “[t]he term ‘the most serious crimes’ must be read restrictively and appertain only to crimes of extreme gravity, involving intentional killing.” Crimes not resulting directly and intentionally in death, such as attempted murder, corruption and other economic and political crimes, armed robbery, piracy, abduction, drug and sexual offences, although serious in nature, can never serve as the basis for the imposition of the death penalty. In the same vein, a limited degree of involvement or of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission of murder, cannot justify the imposition of the death penalty.¹

4. Furthermore, bringing back the death penalty in the Syariah Penal Code is inconsistent with the global trend towards abolition of the death penalty and the establishment of a moratorium on execution. In December 2018, the UN General Assembly adopted a resolution calling for a global moratorium on the death penalty, with the support of 120 countries. Today, some 170 UN Member States have either abolished capital punishment in law or have a *de facto* moratorium on executions.
5. In the ASEAN region, this trend is taking hold. Cambodia and the Philippines have abolished the death penalty. Like Brunei Darussalam, Myanmar and Laos have not carried out executions for several years. In 2013, Singapore reformed its laws limiting the mandatory imposition of death penalty for certain offences. In addition, although Malaysia retains the death penalty, it is now taking steps to remove its mandatory character for several offences.

We are especially alarmed that the Syariah Penal Code provides that the manner by which the death penalty is carried out upon conviction for rape, “adultery”, “sodomy”, and “extramarital sexual relations” is stoning to death. We must 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, which is firmly enshrined in Article 5 of the Universal Declaration of Human Rights, among others.

6. Although the 2013 Syariah Penal Code states that the penalty of stoning to death applies regardless of whether the offender is male or female, women and girls face a greater risk of being convicted and sentenced to death because they are more likely to be found guilty of “adultery” or of otherwise having engaged in “extramarital sexual relations”, including as a result of becoming pregnant, which may be used as evidenced against them. Proving rape and prosecuting rapists is also difficult because of the nature of the crime, which often involves only two people (i.e. the perpetrator and the victim) and no witnesses. If women and girls who have been raped, including those who have conceived a child as a result of rape, could not fulfill the stringent requirements for proof of rape, it would be highly possible for them to end up being prosecuted for “adultery” or having engaged in “extramarital sexual relations”. In light of this, stoning to death also violates the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), by which Brunei is bound. Specifically, Brunei has the obligation under the

¹ Human Rights Committee, General Comment 36, CCPR/C/GC/36, 30 October 2018, para. 35, footnotes in the original omitted.

Articles 2 and 3 of CEDAW 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.

7. Stoning to death will also violate the commitments made by Brunei through the Declaration of the Elimination of Violence Against Women in the ASEAN Region in 2014. Under the declaration, all ten ASEAN members have agreed to ending violence against women, particularly by developing mechanisms focused on the areas of concern, such as providing services to fulfill the needs of the survivors and taking appropriate responses to offenders and perpetrators (Article 2).

On the imposition of punishments that constitute torture and other ill-treatment

8. Persons who have been found to have committed “extramarital sexual relations” (*zina*) or rape (*zina bil-jabar*) may be sentenced to be whipped up to 100 strokes, and imprisoned for a term of one year.² Children are not exempted from this penalty and those who are 15 years of age³ and above, but have not reached the age of puberty, and who have been convicted of *zina*, may also be sentenced to be whipped from anything between 15 to 30 strokes, and detained in a rehabilitation center for a period not exceeding three years.⁴ Children who are 15 years of age, but have not yet reached the age of puberty, and were found guilty of attempting to commit *zina* or abetting *zina*, may be sentenced to be whipped up to 15 strokes.⁵ Children convicted of rape who are 15 years of age or above but have not reached the age of puberty, shall be sentenced to be whipped with up to 20 to 40 strokes and detained in a rehabilitation center for a period not exceeding five years.⁶
9. Brunei, being a State Party to the Convention on the Rights of the Child (CRC), has the obligation to ensure that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”⁷ Furthermore, under Article 19 of the CRC, States Parties are obliged to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.”⁸ In its General Comment No. 8, the Committee on the Rights of the Child (CRC Committee) pointed out that the term “all forms of physical or mental violence” includes all types of legalized violence against children, including whipping as a judicially imposed punishment. According to the CRC Committee, “corporal punishment and other cruel or degrading forms of punishment are forms of violence and States

² Sections 69(1)(b) and 76(1)(b) of the 2013 Syariah Penal Code.

³ The 2013 Syariah Penal Code does not mention an age of criminal responsibility. There are two factors that are considered to determine extent of criminal responsibility and gravity of punishment: *baligh* (“a person who has attained the age of puberty in accordance with Hukum Syara”) and *mumaiyiz* (“a child who has attained the age of being capable to differentiate a matter”). These are defined also in the Syariah Courts Evidence Order 2001. In 2016, the Committee on the Rights of the Child, in its Concluding Observations on Brunei, said: “The Committee reiterates its previous concern (see CRC/C/15/Add.219, para. 55) that the minimum age of criminal responsibility is very low (7 years).” (para. 69).

⁴ Section 70 of the 2013 Syariah Penal Code.

⁵ Sections 72 & 74 of the 2013 Syariah Penal Code.

⁶ Section 77 of the Syariah Penal Code.

⁷ Article 37 of the Convention on the Rights of the Child.

⁸ Article 19 of the Convention on the Rights of the Child.

must take all appropriate legislative, administrative, social and educational measures to eliminate them.”⁹ In its General Comment No. 13, the CRC Committee expounded that “all forms of violence”, as mentioned in Article 19 of the CRC, includes harmful practices such as corporal punishment and other cruel or degrading forms of punishment, and amputations.¹⁰ In addition, children belonging to certain marginalized groups or those in potentially vulnerable situations are likely to be exposed to violence; they include but are not limited to children not living with their biological parents, children from indigenous groups or ethnic minorities, those in early marriage, and children who are lesbian, gay or transgender.¹¹ In 2003, the CRC Committee called on Brunei to abolish the sentence of whipping for boys provided for in its ordinary Penal Code.¹² In 2016, the CRC Committee expressed concern on the Syariah Penal Code and urged the government to review, without delay, all provisions that directly and indirectly discriminate children.¹³

10. The UN Human Rights Committee considers that the prohibition of torture and cruel treatment or punishment extends to corporal punishment, including when ordered as punishment upon conviction for a crime.¹⁴
11. Regional human rights bodies have condemned corporal punishments such as flogging or whipping, and view them as constituting cruel, inhuman or degrading treatment or punishment, or even torture. The European Court of Human Rights has condemned corporal punishment of children in the penal system, in schools, and in homes.¹⁵ The Inter-American Court of Human Rights issued an Advisory Opinion on the Legal Status and Human Rights of the Child (2002), wherein it emphasized that State Parties to the American Convention on Human Rights “are under the obligation ... to adopt all positive measures required to ensure protection of children against mistreatment, whether in their relations with public authorities, or in relations among individuals or with non-governmental entities.”¹⁶ The African Commission on Human and Peoples’ Rights, in a decision on an individual communication concerning a sentence of ‘lashes’ imposed on students, said that “there is no right for individuals, and particularly the Government of a country to apply physical violence to individuals for offences”, and that “such a right would be tantamount to sanctioning State-sponsored torture under the Charter and contrary to the very nature of this human rights treaty.”¹⁷

On the criminalization of consensual sexual relations

⁹ General Comment No. 8, Committee on the Rights of the Child, UN Doc. CRC/C/GC/8 (2007), para. 18.

¹⁰ General Comment No. 13, Committee on the Rights of the Child, UN Doc. CRC/C/GC/13 (2011), para. 29.

¹¹ General Comment No. 13, Committee on the Rights of the Child, UN Doc. CRC/C/GC/13 (2011), para. 72(g).

¹² Brunei’s ordinary Penal Code provides for sentences of whipping upon conviction for several crimes, such as gang robbery (Article 395), intentionally causing bodily harm in committing robbery (Article 394), and mischief by killing or maiming an animal (Article 428).

¹³ CRC Committee, Concluding Observations on Brunei, UN Doc. CRC/C/BRN/CO/2-3 (2016), paras. 9-10.

¹⁴ CCPR General Comment No. 20 on Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), paragraph 5.

¹⁵ See *Tyrer v. UK* (1978), *Campbell and Cosans v. UK* (1982) *Costello-Roberts v. UK* (1993), *A v. UK* (1998).

¹⁶ Inter-American Court of Human Rights, Advisory Opinion OC-17/2002 of 28 August 2002, paras. 87 and 91.

¹⁷ African Commission on Human and Peoples’ Rights, *Curtis Francis Doebbler v. Sudan*, Comm. No. 236/2000 (2003), para. 42.

12. The 2013 Syariah Penal Code criminalizes consensual heterosexual “extramarital sexual relations”, including pre-marital sex, as well as consensual same-sex sexual relations, under any circumstances.¹⁸ Punishments vary, depending on the offenders’ marital status and/or religion, and on whether certain evidentiary requirements are met. Those convicted may be sentenced to penalties ranging from stoning to death, whipping, imprisonment, detention in rehabilitation centers and fines.
13. The criminalization of private consensual sexual activities – whatever sex, gender identity and sexual proclivities of those involved – violates international human rights law, and specifically the rights to privacy, personal integrity, and equality.
14. The UN Human Rights Committee considers that consensual sexual activity in private is covered by the concept of “privacy” and criminalizing private sexual acts between consenting individuals constitutes an arbitrary interference with privacy and cannot be justified.¹⁹ Various special procedures of the UN Human Rights Council have also emphasized that criminalization of these activities is contrary to the non-discrimination principle and the right to equality before the law and equal protection of the law without discrimination, and it may lead to violations of the right to a fair trial,²⁰ and of the right to the highest attainable standard of physical and mental health,²¹ among others. Moreover, criminalization of consensual same-sex relations, even when the law is not enforced, “fuels stigma, legitimizes prejudice and exposes people to family and institutional violence and further human rights abuses such as hate crimes, death threats and torture”.²²
15. The UN Working Group on the issue of discrimination against women in law and in practice has emphasized that sexual relations between consenting individuals should not be criminalized, and must not be punished by fine, imprisonment, flogging, or death by stoning or hanging.²³ Where, for example, adultery is a criminal offence, women will continue to face extreme vulnerabilities, and violations of their rights to dignity, privacy and equality, given the continuing discrimination and inequalities they face. The CEDAW Committee has also said that laws criminalizing extramarital sex, are in practice, disproportionately invoked against women.²⁴ On several occasions, the CEDAW Committee has called on States Parties to abolish laws that criminalize extramarital sexual relations.

¹⁸ Sections 68 (*zina*) and 82 (*liwat*) of the 2013 Syariah Penal Code.

¹⁹ *Toonen v. Australia*, Human Rights Committee (HRCtte), 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*, HRCtte, Communication No. 1355/2005, Views of 26 March 2007, UN Doc. CCPR/C/89/D/1355/2005 (2007), para. 3.2

²⁰ *Report of the Special Rapporteur on the independence of judges and lawyers*, UN Doc. A/66/289 (2011), para. 74.

²¹ *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 (2011), para. 17.

²² *Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, UN Doc. A/72/172 (2017), para. 32.

²³ *Statement by the UN Working Group on discrimination against women in law and in practice*, Office of the High Commissioner for Human Rights (OHCHR), 18 October 2012, available at <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12672&LangID=E>

²⁴ See for instance, CEDAW Committee, *Concluding Observations on Mexico*, UN Doc. CEDAW/C/MEX/CO/7-8 (2012), para. 13; CEDAW Committee, *Concluding Observations on Libya*, UN Doc. CEDAW/C/LBY/CO/5 (2009), paras. 24-25; and CEDAW Committee, *Concluding Observations on the Congo*, UN Doc. CEDAW/C/COG/CO/6 (2012), paras. 43-44.

Undue limitations on the right to freedom of religion or belief, and the right to freedom of opinion and expression

16. Articles 213, 214, and 215 of the 2013 Syariah Penal Code penalize both Muslims and non-Muslims for printing, disseminating, importing, broadcasting, and distributing publications “contrary to *Hukum Syara*”. In addition, articles 197 and 198 of the 2013 Syariah Penal Code also punishes ‘indecent’ dressing and cross-dressing. The vagueness of the definition of indecent and “cross-dressing” can restrict freedom of expression and privacy rights, as well as further perpetuate discrimination and its intersection with gender expression. We consider these provisions constitute undue restrictions on religious freedom and violate the rights of freedom of expression and opinion.
17. The UN Special Rapporteur on the right to freedom of religion or belief has noted how penal provisions such as those mentioned above “specifically target members of minorities or persons otherwise deviating from the predominant religious or belief tradition of the country.”²⁵ These provisions may give rise to situations where possession of a certain religious literature may lead to criminal prosecution and to long-term imprisonment. Furthermore, “non-coercive communicative outreach activities” may be viewed by the government as “proselytism”. The Special Rapporteur pointed out that the threat of criminal sanctions for these activities has “far-reaching intimidating effects on members of religious minorities, many of whom may decide to hide their convictions or refrain from practising their religion or belief.”²⁶
18. The UN Special Rapporteur thus has urged States to “repeal any criminal law provisions that penalize apostasy, blasphemy and proselytism as they may prevent persons belonging to religious or belief minorities from fully enjoying their freedom of religion or belief.”²⁷
19. Furthermore, we recall the threat made by the Sultan Hassanal Bolkiah of Brunei on 23 February 2014, that those who express opposition to the implementation of the 2013 Syariah Penal Code may be “committing offences under the General Offences Chapter” of the said law. The Sultan characterized some opposition to the Code as amounting to slander, including of the King and of Ulama, or Muslim scholars.²⁸
20. As emphasized by the UN Human Rights Committee, “all forms of opinion are protected, including opinions of a political, scientific, historical, moral, or *religious* nature.” It is incompatible with the right to freedom of expression to criminalize the holding of an opinion.²⁹
21. As member of ASEAN, Brunei needs to uphold its commitments to promote and protect fundamental freedoms and the principles of democracy, rule of law, and good governance as stipulated in the ASEAN Charter. This includes the right to freedom of opinion and expression, which comprises of the freedom to hold opinions without interference and to seek, receive and

²⁵ *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc. A/HRC/22/51 (2012), para. 53.

²⁶ *Ibid.*

²⁷ *Ibid.* at para. 66.

²⁸ International Commission of Jurists, *Brunei: Sultan must allow debate on new Penal Code*, 28 February 2014, available at <https://www.icj.org/brunei-sultan-must-allow-debate-on-new-penal-code/>

²⁹ UN Human Rights Committee, General Comment No. 34 on Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34 (2011), para. 9.

impart information and ideas through any media and regardless of frontiers, as recognized as universal and regional norms. These are an essential components towards achieving the ASEAN Community, which is rules-based, people-oriented, people-centred and community bound by fundamental principles, shared values and norms, in which our peoples enjoy human rights, fundamental freedoms, and social justice.

On restrictions to gender identity and gender expression

20. Article 198 of the Syariah Penal Code penalizes “[any] man who dresses and poses as a woman or any woman who dresses and poses as a man in any public place”. If such act was done “without reasonable excuse”, the person can be penalized with a fine of a maximum of BND1,000, or imprisonment for a term not exceeding 3 months, or both. If such act was done “for immoral purposes”, the person can be penalized with a fine of a maximum of BND4,000, or imprisonment for a term not exceeding one year, or both.
21. A Bruneian civil servant was arrested in the evening of 17 October 2014 for wearing women’s clothes undertaken by the religious law enforcement officers.³⁰ The person was subsequently charged and found guilty of violating Section 198(1) of the Syariah Penal Code and was asked to pay a fine of BND1,000. The prosecutor who handled the case said to the media: “[i]f this is not dealt with, it can lead to the spread of social disorder such as homosexuality, free sexual relations, drug abuse and so on”.³¹
22. The prohibition against “cross-dressing” or against “imitation of the opposite sex” compounded by the absence of a gender recognition law in puts transgender and gender-diverse persons in a legal vacuum and makes them vulnerable to persecution.³² The UN Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity (SOGI) pointed out that sexual orientation, gender identity and gender expression are prohibited grounds for discrimination, just like sex, race, color or religion.³³ The said mandate holder recommended that States should reform laws on public decency or public morality that are used criminalize transgender persons in relation to gender identity and its expression.³⁴

As we have set out above, it is clear that the 2013 Syariah Penal Code is incompatible with the obligations of Brunei under international human rights law, including the CEDAW and the CRC, by which it is bound.

³⁰ Ak Md Khairuddin Pg Harun (11 March 2015). “Brunei Civil Servant Fined \$1,000 for Cross-dressing”. Brunei Times. Retrieved from <https://btarchive.org/news/national/2015/03/11/bruneian-civil-servant-fined-1-000-cross-dressing>.

³¹ Ak Md Khairuddin Pg Harun (11 March 2015). “Brunei Civil Servant Fined \$1,000 for Cross-dressing”. Brunei Times. Retrieved from <https://btarchive.org/news/national/2015/03/11/bruneian-civil-servant-fined-1-000-cross-dressing>.

³² *Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, UN Doc. A/73/152 (2018), paras. 25-26.

³³ *Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, UN Doc. A/73/152 (2018), para. 17.

³⁴ *Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, UN Doc. A/72/172 (2017), para. 59(g).

Taking into consideration the mandate and functions of the AICHR, as laid out in its Terms of Reference, we therefore urge you to:

- (a) To obtain information from the Government of Brunei Darussalam on how it envisions to implement the 2013 Syariah Penal Code, while still complying with its obligations under the CEDAW and the CRC (See Section 4.10 of the AICHR Terms of Reference);
- (b) To encourage the Government of Brunei Darussalam to fully implement its obligations under the international human rights instruments it has acceded to or ratified, e.g. the CEDAW and CRC (See Section 4.5 of the AICHR Terms of Reference);
- (c) To consult with relevant national authorities in Brunei Darussalam on the promotion and protection of human rights in the country (See Section 4.9 of the AICHR Terms of Reference);
- (d) To dialogue with key stakeholders with an intention to promote best practices of States with similar legal systems and cultural and religious backgrounds, where more progressive interpretations of Islamic law have been codified and practiced (See Sections 4.8 and 4.9 of the AICHR Terms of Reference);
- (e) To consult with the UN human rights bodies as to the best way to respond to the situation (See Sections 4.9 of the AICHR Terms of Reference);
- (f) To develop strategies to protect vulnerable communities especially women and LGBTIQ group (See Sections 4.1 of the AICHR Terms of Reference); and
- (g) To issue an immediate statement expressing concern about the situation and calling for the protection of human rights (See Sections 4.3 of the AICHR Terms of Reference). This should include the harmful impact of certain provisions in 2013 Syariah Penal Code to the nation itself, as well as other ASEAN member states.

Sincerely,

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