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His Royal Highness
Sultan Hassanal Bolkiah
Sultan and Yang di-Pertuan of Brunei
Darussalam

May 22, 2019

Re: Brunei's Syariah Penal Code

Dear Sultan Hassanal Bolkiah,

We write on behalf of Human Rights Watch concerning Brunei's recently enacted Syariah Penal Code, which poses grave threats to the fundamental rights and freedoms of people in Brunei.

Human Rights Watch is an international nongovernmental organization that monitors the human rights situation in more than 90 countries around the world, including Brunei Darussalam.

On April 3, 2019, all provisions (except for article 94) of the Syariah Penal Code (2013) went into effect. The provisions contained in the penal code pave the way for multiple violations of human rights, including the rights to life, freedom from torture and other ill-treatment, freedom of expression, privacy, and religion. The penal code discriminates against various populations in Brunei, in particular women, and sexual and gender minorities. It also endangers the rights of children.

Attached to this letter is a Human Rights Watch report, "[Brunei's Pernicious New Penal Code](#)." It provides a detailed legal analysis of the penal code including relevant international legal standards. We found that numerous provisions of the penal code violate Brunei's international legal obligations under core human rights treaties, as well as under customary international law.

In your statement dated May 5, 2019, you defended the penal code on the basis of the country's de facto moratorium on capital punishment. However, this informal death penalty moratorium is insufficient because it can be lifted at any time. The very existence of the death penalty for activities that should not be considered crimes in the first place violates Brunei's international legal obligations. Furthermore, the death penalty is only one problematic aspect of a penal code that raises many human rights concerns.

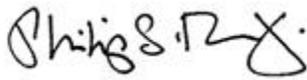


HRW.org

In light of the fundamental human rights implicated by the penal code and Brunei's international obligations, we therefore urge you to:

- Immediately repeal the Syariah Penal Code (2013);
- Ensure all penal law provisions are consistent with international human rights law; and
- Take necessary steps to ratify the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the International Covenant on Civil and Political Rights; and other core UN human rights treaties.

Yours sincerely,



Phil Robertson
Deputy Director
Asia Division
Human Rights Watch



Heather Barr
Acting Co-Director
Women's Rights Division
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Bede Sheppard
Deputy Director
Children's Rights Division
Human Rights Watch



Graeme Reid
Director
LGBT Rights Program
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Brunei's Pernicious New Penal Code*

Brunei's Syariah Penal Code (2013) went into effect on April 3, 2019.¹ The new code poses grave threats to fundamental human rights and discriminates against the country's most vulnerable groups, including children, women, and religious and sexual minorities.

Many of the code's provisions violate Brunei's obligations under international human rights conventions to which Brunei is a party and customary international law. Brunei is a state party to the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).² Brunei has signed, but not yet ratified, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.³ As a member state of the United Nations, Brunei has pledged to respect the Universal Declaration of Human Rights, whose provisions are considered reflective of customary international law.

In light of the fundamental rights implicated by the penal code, discussed below, and Brunei's international human rights obligations, we therefore strongly urge the Brunei government to:

- Immediately repeal the Syariah Penal Code (2013);
- Ensure all penal law provisions are consistent with international human rights law; and
- Take necessary steps to ratify the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the International Covenant on Civil and Political Rights; and other core UN human rights treaties.

This document highlights the penal code's most egregious violations of international human rights law.

Right to Life

The Brunei penal code imposes the death penalty (by stoning) for the so-called crimes of *zina*, or sex between unmarried couples (articles 68 and 69), and *liwat*, or anal sex (article 82). *Zina* is prohibited between Muslims or couples in which one partner is a Muslim,

* This report is authored by [Philippe LeDoux](#), an international law fellow at Human Rights Watch.

¹ See the full text of the Brunei Penal Code, available at: http://www.agc.gov.bn/AGC%20Images/LAWS/Gazette_PDF/2013/EN/S069.pdf

² See UN Treaties Depository Records on CRC, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en; see UN Treaties Depository Records on CEDAW, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en

³ Brunei became a signatory to the Convention against Torture on September 22, 2015, but it has yet to take any steps to ratify the treaty. See UN Treaties Depository Records available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&lang=en. [Under article 18 to the Vienna Convention on the Law of Treaties, a signatory state is](#) “obliged to refrain from acts which would defeat the object and purpose of a treaty.”

while the criminalization and the punishment of *liwat* applies to all persons regardless of their religious beliefs.

The right to life is enshrined in article 3 of the Universal Declaration of Human Rights. Arbitrary deprivation of life is absolutely prohibited under international law.⁴ In interpreting the right to life, the UN Human Rights Committee, in its General Comment No. 36, states that “under no circumstances can the death penalty ever be applied as a sanction against conduct whose very criminalization violates the Covenant” – including adultery and homosexuality.⁵ Under international law, retaining the death penalty for such “offenses” is considered a form of arbitrary deprivation of life.

In apparent response to the huge global outcry against the new penal code, on May 5, 2019, the sultan of Brunei said that Brunei had adopted a “a de facto moratorium on the execution of death penalty for cases” and this would also apply to the cases under its 2013 Brunei Sharia Penal Code, including anal intercourse and sex between unmarried couples, among others.⁶ Beyond not addressing the broader human rights concerns of the penal code, discussed below, the de facto moratorium on capital punishment would still allow for the sultan to restore the death penalty at any time.

During Brunei’s Universal Periodic Review at the UN Human Rights Council on May 10, 2019, the Foreign Minister of Brunei asserted that the prohibition on consensual same-sex conduct “is to ensure such acts are refrained and are limited to the private space.”⁷ This is a patently false claim, because the letter of the law clearly criminalizes same-sex sexual acts in private. The text of the penal code does not make any distinction between consensual same-sex acts in private and in public – the claim made by the Foreign Minister is inconsistent with the provisions of the penal code.

By retaining the abusive provisions in the law, Brunei is bluntly violating its international legal obligations, under human rights treaties and customary international law, to respect the right to life.

The Rights of the Child

The new penal code imposes criminal liability and corresponding punishment – including stoning, whipping, and imprisonment – upon children who have obtained puberty,

⁴ UN Human Rights Committee, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, October 30, 2018, U.N. Doc. CCPR/C/GC/36, at para. 2. See also Communication No. R 11/45, *Suarez de Guerrero v. Colombia*, Views adopted on 31 March 1982, at para. 13.1; Communication No. 146/1983, *Baboeram Adhin v. Suriname*, Views adopted on 4 April 1985, at para. 14.3.

⁵ UN Human Rights Committee, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, at para. 36.

⁶ The statement is available at:

<http://www.pmo.gov.bn/Lists/TITAH/NewDispform.aspx?ID=332&Source=http%3A%2F%2Fwww%2Epmo%2Egov%2Ebn%2FFPMO%2520Pages%2FTitah-View%2Easpx&ContentTypeId=0x0100422E821587FC974C9DFFAF38C117CE34>

⁷ The recording of the said UPR session is available at: <http://webtv.un.org/watch/brunei-darussalam-review-33rd-session-of-universal-periodic-review/6035136939001/?term=&lan=original#player>

referred to as “*baligh*.” Children who are over the age of 15 and are considered to be of sound mind (referred to as “*mulkallaḥ*”) are subject to death by stoning for adultery or rape. Children deemed old enough to know the difference between right or wrong, referred to as “*mumaiyiz*” and traditionally interpreted under Sharia to be around age 7, may be punished with whipping.

Article 40 of the Convention on the Rights of the Child requires states to “recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth.” Further, article 37 explicitly prohibits imposing any form of torture or other cruel, inhuman, or degrading treatment or punishment on children, and article 19 obligates states to “protect the child from all forms of physical or mental violence.” In particular, the CRC absolutely prohibits imposing the death penalty for actions committed by anyone under age 18.⁸ The Committee on the Rights of the Child, which provides authoritative guidance on the CRC, has also concluded that any form of corporal punishment violate the principles of juvenile justice set out in article 40 of the convention and the right of the child to freedom from all forms of violence.⁹

These penal code’s provisions that retain the death penalty for acts committed under age 18 are prohibited under the CRC and customary international law. Also prohibited are provisions permitting stoning, whipping, or flogging of children, as well as adults.

Prohibition of Torture and Other Ill-Treatment

Under the penal code, sex outside marriage and engaging in anal sex are both punishable by stoning to death (articles 69 and 82). The penal code also stipulates that robbery (“*hirabah*”) is subject to multiple amputations, including the right hand and the left foot (articles 62-63) and theft (“*sariqah*”) is subject to amputation of the right hand for first offense and the left foot for second offense (articles 52 and 55). These punishments amount to torture under international law.

Other provisions include forms of corporal punishment that violate the prohibition against cruel, inhuman, and degrading treatment or punishment, and may amount to torture. Relevant provisions include:

⁸ Article 37(a) of the CRC provides, in relevant part, “Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.”

⁹ See UN Committee on the Rights of the Child, General Comment No. 10: Children’s Rights in Juvenile Justice, U.N. Doc. CRC/C/GC/10 (2007), paras. 71, 89; see also Committee on the Rights of the Child, General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, U.N. Doc. CRC/C/GC/8 (2007), para. 32 (noting that the CRC requires repeal of provisions that allow children to be sentenced to corporal punishment using canes or whips). As the committee has observed: “There is no ambiguity: ‘all forms of physical or mental violence’ does not leave room for any level of legalized violence against children.” *Ibid.*, para. 18.

- sex outside marriage – 100 strokes by whipping, in addition to possible death by stoning (articles 68 and 69)
- alcohol consumption – 40 strokes by whipping (only applicable to Muslims) (article 74)
- rape – 100 strokes by whipping, in addition to possible death by stoning (articles 75 and 76)
- lesbian sex – 40 strokes by whipping (article 92)
- false accusation – 80 strokes by whipping (articles 95 and 98)

The prohibition under international law of torture and other cruel, inhuman, or degrading treatment or punishment is absolute. Enshrined in article 5 of the Universal Declaration of Human Rights and multiple international and regional human rights treaties, the prohibition of torture reflects customary international law and is considered a *jus cogen* norm, meaning no treaty can supersede the prohibition. The use of stoning or amputation as a punishment constitutes a form of torture and amounts to cruel, inhuman, or degrading treatment or punishment.¹⁰

Freedom of Expression

In the Brunei penal code, several provisions impose criminal punishment for acts that violate the right to freedom of expression. The code imposes the death penalty for insulting or defaming the Prophet Mohammad (articles 63, 76 and 220) by both Muslims and non-Muslims.

The law also punishes and imposes criminal liability for “indecent” dressing and cross-dressing (articles 197 and 198), which arbitrarily restricts freedom of expression and freedom of association, as well as privacy rights, and constitutes a form of discrimination on the basis of gender expression.

The penal code also criminalizes apostasy (referred to as “*irtidad*”) – including acts such as declaring oneself to be god or a prophet; showing contempt towards the prophet; deriding (through mocks, mimicking, ridicules, and insults) the Quran, the *hadith* (narrative record of the sayings and customs of Muhammad), and obligatory matters in relations to *ijma* (usually referring to consensus and agreement in relation to Islamic laws); and renouncing Islam (articles 108, 109, 110, 111 and 112). The penal code criminalizes the act of issuing any publications contrary to *hukum syara* (laws of any sect

¹⁰ UN General Assembly, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 9 August 2012, U.N. Doc. A/67/279, paras. 31, 77; UN General Assembly, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 30 August 2005, U.N. Doc. A/60/316; see also Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture – Yemen, 5 February 2004, U.N. Doc. CAT/C/CR/31/4; see also UN Commission on Human Rights, Commission on Human Rights Resolution 2003/67: The Question of the Death Penalty, 24 April 2003, E/CN.4/RES/2003/67, para. 4(i); UN Commission on Human Rights, Commission on Human Rights Resolutions 2004/67: Question of the Death Penalty, 21 April 2004, E/CN.4/RES/2004/67, para. 4(i); and UN Commission on Human Rights, Human Rights Resolution 2005/59: The Question of the Death Penalty, 20 April 2005, E/CN.4/RES/2005/59, para. 7(i).

that the court considers valid) (article 213); punishes any acts of “delivering or giving publications relating to religion other than Islam” – even if a person only requests it, that person is subject to a penalty (article 214); and punishes the use of words reserved for Islam to express any “fact, belief, idea, concept, act, activity, [or] matter” related to other religions (article 217).

Under international law, the right to freedom of expression guarantees everyone’s right to “hold opinions without interference to seek, receive, and impart information and ideas through any media and regardless of frontier.” This fundamental human rights norm, reflective of customary international law, finds its expression in article 19 of the Universal Declaration of Human Rights and many other human rights instruments.

International law prohibits any law from discriminating against certain religions or beliefs, or their adherents over another, or religious believers over non-believers.¹¹ It is also impermissible for prohibitions in domestic laws to be used to “prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.”¹²

The above provisions in the penal code constitute arbitrary interference with the right to freedom of expression and discrimination against non-Muslims in violation of Brunei’s international legal obligations.

Freedom of Religion

The Brunei penal code now imposes criminal punishment upon acts of propagating any religion other than Islam to Muslims or persons with no religion (article 209), exposing Muslim children to other religions (article 212), persuading Muslims to change religion (article 210), persuading a non-believer to follow a religion other than Islam or to dislike Islam (article 211), and neglecting or opposing Islamic religious authorities (article 230), among others. The penal code also punishes any attempts to, or assistance offered, to the conduct mentioned above. All these provisions place non-Muslim religious believers and non-believers in general in a disfavored status, and severely limits their freedom of religion in violation of international human rights law.

International human rights law obligates governments to afford the right to freedom of religion to all. This right, enshrined in article 18 of the Universal Declaration of Human Rights, includes the freedom to change one’s religion or belief and to manifest one’s religion or belief in teaching, practice, worship, and observance. This right also includes the right to be a religious believer or non-believer.

¹¹ UN Human Rights Committee, General Comment No. 34 on article 19 of the International Covenant on Civil and Political Rights, on the right to freedoms of opinion and expression, 12 September 2011, U.N. Doc. CCPR/C/GC/34, para. 48.

¹² UN Human Rights Committee, General Comment No. 34 on article 19 of the International Covenant on Civil and Political Rights, on the right to freedoms of opinion and expression, 12 September 2011, U.N. Doc. CCPR/C/GC/34, para. 48.

In 2010, during Brunei's appearance at the Universal Periodic Review (UPR) at the UN Human Rights Council, the government pledged to fully respect the freedom of religion and that "the importation of religious materials or scriptures regardless of any faiths is not banned in the country."¹³

The UN Human Rights Committee has stated in a general comment that "all forms of opinion are protected under the right to freedoms of opinion and expression, including opinions of a 'political, scientific, historic, moral, or religious nature.'"¹⁴ Therefore, in addition to infringing upon freedom of religion, these restrictive provisions also violate the rights to freedom of opinion and expression.

Women's Rights

The new penal code has a wide range of provisions that discriminate against women and girls. It punishes extramarital sex and imposes death by stoning as punishment (articles 61-81). The CEDAW Committee has noted its concern that women in Brunei "are disproportionately affected by punishment for 'crimes' involving sex, and are at a higher risk of being convicted of adultery and extramarital relations, owing to discriminatory investigative policies and provisions on the weighing of evidence."¹⁵ Furthermore, the narrow evidentiary standards required to prove rape may dissuade rape survivors from approaching authorities since they could risk being accused of *zina*.¹⁶ Hence, in addition to violating the prohibition against torture and other cruel, inhuman, and degrading treatment or punishment, imposing death by stoning for extramarital sexual relations also violates Brunei's legal obligations to ensure equality before the law under CEDAW and customary international law.

The penal code further criminalizes having an abortion or intentional miscarriage, or performing or "abetting" an abortion or intentional miscarriage, punishable by fines and prison time of up to 10 years (articles 158-163). Committing "close proximity" (referred to as "*khalwat*") – cohabiting or living together in an extramarital context – is also criminalized and punishable by prison terms (article 196).

Many other provisions in the penal code infringe on women's rights. Relevant provisions include:

¹³ UN Human Rights Council, Report of the Working Group on the Universal Periodic Review - Brunei Darussalam - Addendum - Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, 18 March 2010, U.N. Doc. A/HRC/13/14/Add.1.

¹⁴ UN Human Rights Committee, General Comment No. 34 on article 19 of the International Covenant on Civil and Political Rights, on the right to freedoms of opinion and expression, 12 September 2011, U.N. Doc. CCPR/C/GC/34, para. 9.

¹⁵ See UN Committee on the Elimination of Discrimination against Women, Concluding observations on the combined initial and second periodic reports of Brunei Darussalam, 14 November 2014, U.N. Doc. CEDAW/C/BRN/CO/1-2.

¹⁶ See UN Committee on the Elimination of Discrimination against Women, Concluding observations on the combined initial and second periodic reports of Brunei Darussalam, 14 November 2014, U.N. Doc. CEDAW/C/BRN/CO/1-2.

- instigating a Muslim man or woman to divorce or to neglect marital duties (article 199)
- preventing a legally married Muslim couple from cohabiting (article 200)
- enticing a Muslim woman to leave the matrimonial home (article 201)
- enticing a Muslim woman to leave her parents or guardian (article 202)
- enticing an unmarried Muslim woman to leave custody of her parents or guardian (article 203)

The Attorney General's December 2018 [notice](#) currently excluded from implementation [article 94, which](#) punishes pregnancy or giving birth out of wedlock with a prison term.

These provisions discriminate against women and violate a wide range of their rights under international human rights law. As a party to the Convention on the Elimination of All Forms of Discrimination against Women, Brunei has an international legal obligation to take all necessary measures to eliminate all forms of discrimination against women and 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.”¹⁷ CEDAW mandates governments to take all necessary measures to eliminate “prejudices and customary and all other practices” that contravene equality between men and women.¹⁸ Furthermore, CEDAW obligates governments to guarantee equality between men and women before the law and in the context of marriage and family life.¹⁹

Rights of Sexual and Gender Minorities

The Brunei penal code discriminates against and poses grave threats to lesbian, gay, bisexual, and transgender (LGBT) people.

Any form of anal intercourse is punishable by stoning to death (articles 82, 85 and 86). This provision is applicable to both Muslims and non-Muslims. Any form of sexual conduct between women (lesbianism, referred to as “*musahaqah*”) is punishable with up to 40 strokes with whips and prison terms up to 10 years (article 92). The article applies to lesbian acts between Muslims or between a non-Muslim and her Muslim partner.

These provisions violate the rights to privacy and equality before the law, and the punishments violate the rights to life, and to be protected from torture and other ill-treatment.²⁰

¹⁷ United Nations General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, United Nations Treaty Series, vol. 1249, p. 13, articles 2 and 3.

¹⁸ *Ibid.*, article 5.

¹⁹ *Ibid.*, articles 15 and 16.

²⁰ See UN Human Rights Committee, Concluding observations of the Human Rights Committee – Libyan Arab Jamahiriya, 6 November 1998, U.N. Doc. CCPT/C/79/Add.101; see also Consideration of Reports Submitted by States Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture – Yemen, 5 February 2004, U.N. Doc. CAT/C/CR/31/4; see also UN General Assembly, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or

The penal code also criminalizes nonconforming gender expression, punishing “any man who dresses and poses as a woman or any woman who dresses and poses as a man in any public place” (article 198) with prison time and a fine. “Indecent behaviour” in public, which includes any act that could “bring bad influence” (article 197), is also prohibited. Both articles are applicable to both Muslims and non-Muslims. These provisions, in addition to infringing on freedoms of expressions and association, threaten the rights to privacy of transgender and gender non-conforming people.

At a time when many countries are decriminalizing consensual same-sex conduct, Brunei has joined seven countries that punish consensual homosexual acts with the death penalty. These provisions not only violate the prohibition on torture and other cruel, inhuman, or degrading treatment or punishment, but also violate the fundamental rights of sexual and gender minorities.

Application of the Penal Code to Non-Muslims and Non-Brunei Nationals, and Extraterritorial Application

In some legal systems derived from the Quran, Sharia law applies only to Muslims. In contrast, most of the articles in Brunei’s Syariah Penal Code are applicable to both Muslims and non-Muslims.

For example, articles 82 and 84, punishing anal sex between two men or a woman and a man, applies to both Muslims and non-Muslims. Punishments for extramarital sex (article 69), and sexual relations between women (article 92), apply in instances in which the accused persons are two Muslims or a Muslim and a non-Muslim. Non-Muslims who commit “*khalwat*” – living together, cohabiting, or being in close proximity to another in private – is punished with imprisonment and a fine (article 196). Anyone, regardless of whether they are Muslim or not, who publicly consumes food, drink, or tobacco before sundown during the Islamic holy month of Ramadan faces imprisonment and a fine (article 195).

These criminal offenses also apply to foreign nationals in Brunei, subjecting them to the death penalty, torture, and other ill-treatment, as well as discrimination on the basis of their age, gender, religious belief, or sexual orientation. Article 184 of the penal code also sets out that offenses committed abroad by a citizen or permanent resident of Brunei may be prosecuted in Brunei.

punishment, 30 August 2005, U.N. Doc. A/60/316; see also *Winston Caesar v. Trinidad and Tobago*, Inter-American Court of Human Rights, Series C, No. 123, judgment of 11 March 2005.