

MEMORANDUM

on

JUSTICE FOR KARTIKA

STOP WHIPPING, END CORPORAL PUNISHMENT FOR ALL OFFENCES

to

YAB Dato' Sri Mohd Najib bin Tun Abdul Razak,
Prime Minister of Malaysia,

Submitted by

The Joint Action Group for Gender Equality (JAG)

25 August 2009

Sisters in Islam (SIS), 7 Jalan 6/10, Petaling Jaya, 46000 Selangor,
Malaysia. Tel: 60 3 77856121 Fax: 60 3 77858737
Email: sisters@sistersinislam.org.my

Women's Aid Organisation (WAO). P.O. Box 493 Jalan Sultan, 46760
Petaling Jaya, Selangor, Malaysia. Tel: 60 3 7957 5636 / 0636
Fax: 60 3 7956 3237 Email: wao@po.jaring.my

Persatuan Kesedaran Komuniti Selangor (EMPOWER), 13 Lorong 4/48E,
46050 Petaling Jaya, Selangor, Malaysia. Tel: 60 3 778449777
Fax: 60 3 77844978 Email: empower05@gmail.com

All Women's Action Society, 85 Jalan 21/1, Sea Park, 46300 Petaling
Jaya, Selangor, Malaysia. Tel: 60 3 78774221
Email : awam@awam.org.my

Women's Centre for Change (WCC), 24 Jones Road, 10250 Penang,
Malaysia. Tel: 60 3 2280342 Fax: 60 3 228578
Email: wcc@wccpenang.org

JUSTICE FOR KARTIKA

The Joint Action Group for Gender Equality (JAG) appeals to YAB Dato' Sri Mohd Najib bin Tun Abdul Razak to take immediate steps to address the issue of the sentence of whipping meted out to Kartika Sari Dewi Shukarno.

JAG also urges the government to review whipping as a form of punishment as it violates international human rights principles which regard whipping and other forms of corporal punishment as cruel, inhuman and degrading treatment. Moreover, research has shown that whipping is not an effective deterrent, even to violent or sexual crimes.

The court's decision to whip Kartika for consuming alcohol has led to a public outcry at the national and international levels, damaging Malaysia's reputation as a moderate Muslim country. It also fuels the widespread belief that Islam is a religion that discriminates against women. While civil law in Malaysia prohibits the caning of women, syariah law makes no such exception.

JAG believes there are compelling reasons why Kartika's case should be reviewed - on syariah, constitutional and legal grounds, international human rights principles, and based on sentencing guidelines. They include:

Syariah Grounds

- (i) Qur'anic teachings emphasise repentance, forgiveness and personal transformation. Even the verses on punishment for theft (Surah Al-Maa'idah 5:38-39) and robbery (5:33-34), emphasise that an offender who repents after his crime and amends his conduct, is redeemed, as God is forgiving and merciful.
- (ii) Kartika has repeatedly expressed remorse and repented for her action. She should be forgiven, instead of be given the maximum punishment.
- (iii) There is no consensus in Malaysia on the range of crimes for which whipping is prescribed,. Only Pahang, Perlis and Kelantan provide whipping for alcohol consumption under their Syariah Criminal Offences Codes.

Sentencing Guidelines

- (iv) Under normal sentencing guidelines, Kartika should not have been given the maximum punishment as she had pleaded guilty, was a first time offender and has shown and continues to show remorse.
- (v) The whipping sentence is also disproportionate to the gravity of the offence committed, especially since there was no violence involved in the commission of the offence.

- (vi) When an accused pleads guilty, it is a mitigating factor. Therefore, the judge should have taken that into consideration in favour of the accused, and should not have meted out the maximum sentences in terms of the fine imposed and number of strokes for whipping.

Constitutional and Legal issues

- (vii) Can the Kajang prison which is established under Federal law execute an order issued by the syariah court which is under state jurisdiction?
- (viii) Can a Federal authority execute a sentence of whipping against a Muslim woman when the Prison Regulations 2000 forbids corporal punishment to be applied to a female prisoner (of any age), or a male prisoner who is more than 50-years-old?
- (ix) Can the Pahang Syariah Court simply impose an additional sentence of imprisonment for seven days after the trial had ended and the case deemed closed, just for the punishment of whipping to be carried out?
- (x) The victimisation of Kartika violates constitutional guarantees of equality and non-discrimination under Article 8(2) of the Federal Constitution. Under federal law, a woman cannot be whipped, but under syariah, she can. Daily, thousands of Muslims violate the syariah law which forbids alcohol consumption. And yet, Kartika is victimised with the maximum punishment to set an example to others.
- (xi) Is it the duty of the state – in order to bring about a moral society – to turn all “sins” into “crimes against the state”? Or should this be private morality best left to the religious conscience of the individual, rather than be deemed public morality and turned into a matter of law? As practice shows, the enforcement of such moral policing laws has often led to controversies, abuses and public outcry. In the end the Federal Government intervenes and those arrested are released.

International Obligations

- (xii) As a signatory to the *United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* since 1995, Malaysia is committed to uphold respect and equality for women. This commitment is complemented by Malaysia’s obligations under the *Universal Periodic Review* whereby Malaysia’s delegation had during the UPR process in February 2009 reaffirmed Malaysia’s “respect for human rights long established given the country’s character as a melting pot of various cultures, religions and ethnicities”.

(xiii) Malaysia is also committed to the *1988 ASEAN Declaration on the Advancement of Women, the 2004 ASEAN Declaration on the Elimination of Violence against Women and the 2005 Putrajaya Declaration and Programme of Action on the Advancement of Women in Member Countries of the Non-Aligned Movement.*

In the long term, we urge the Government to conduct a comprehensive review of the Syariah Criminal Offences laws of this country, with a view to repeal such laws, thus enabling all Malaysians to be governed by a single Penal Code under federal administration.

In 2005, Sisters in Islam, a member of JAG submitted a memorandum to the Government to reiterate its call for the Syariah Criminal Offences laws to be repealed on the grounds that they have no basis in Islamic legal theory and practice; they conflict with the Federal Constitution and that they conflict or overlap with the Penal Code and other federal laws. SIS had commissioned two reviews by Professor Muhammad Hashim Kamali and Professor Shad Saleem Faruqi and these have been shared with the Government.

The Government must show the political will and courage to once and for all deal with the implications of such intrusive moral policing laws. The implementation of these laws continues to raise numerous profound and controversial issues at the Islamic, constitutional, and human rights levels. They also fail to reflect the changing realities of Malaysian life today. The continual public outrage over moral policing laws reflects the disconnect between state control of private lives and personal choices, and how Malaysians view their entitlements to these rights. This can no longer remain unresolved.

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