



## **ASEAN SOGIE Caucus & Justice for Sister Joint Input to a thematic report: freedom of religion or belief (FoRB) and sexual orientation and gender identity (SOGI)**

This submission focuses on the use of Islam as a jurisprudence in limiting the human rights of LGBTQIA+ persons in Southeast Asia, particularly Indonesia, Malaysia and Brunei Darussalam, and is developed based on ASEAN SOGIE Caucus's previous publication on Sharia Law and the Principle of Non-discrimination on the Basis of Sexual Orientation.<sup>1</sup>

Patriarchal religious interpretation and pathologization of LGBTI people, among others, form the state's gender ideology, as evidenced in some countries. In Malaysia, for example, the state believes that LGBT people have a religious right to be 'advised and guided to the right path', while it does not agree with LGBT acts.<sup>2</sup>

**(Questions 1) What are the actual or perceived points of tension (if any) between the right to manifest one's freedom of religion or belief, and freedom from violence and discrimination based on sexual orientation and gender identity? Are there any areas in which they are mutually exclusive?**

Patriarchal religious interpretation is the basis for criminalization, pathologisation, exclusion and demonization.

LGBT identities are commonly perceived as incompatible with Islam. Government officials use arguments based on theological and juridical grounds to justify the prohibition of 'LGBT practices' in Islam. The most common theological argument is derived from the story of the people of Lot, who are believed to have been punished by Allah for such practices as mentioned in Quran sura 7:80-84.

Javaid Rehman and Eleni Polymenopoulou argue that the prohibition of homosexuality is rooted in the theologico-juridical corpus of Medieval Islam. This corpus consists mainly of

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<sup>1</sup> <https://aseansogiecaucus.org/news/asc-news/137-sharia-law-and-the-principle-of-non-discrimination-on-the-basis-of-sexual-orientation?>

<sup>2</sup> <https://www.hmetro.com.my/utama/2021/05/706415/jakim-santuni-golongan-lgbt>



jurisprudence of the major Islamic Schools of Thought (madhhab) or fiqh, within Sunni Islam, and is followed by most contemporary Islamic scholars. The prohibition of homosexual practices is rooted in embedded belief that the institution of marriage can only be made possible by a marriage contract. It goes without saying that, for that reason, most classical Islamic laws prohibit homosexual practices. “All the major doctrines within the Sunni and Shi’a traditions, and most notably the Shafi School, agree that homosexual intercourse (liwath) is analogous to heterosexual zina, and should therefore be rejected.”<sup>3</sup>

The Quran does not specifically address the issue of sexuality, nor does this holy book refrain from the discussion on sexuality. Some Quranic verses boldly explain sex as a reality (sunnatullah); however, most of this discussion revolves around sexual relations between a husband and a wife rather than sex as an individual’s right.<sup>4</sup>

### ***Criminalization***

Most Islamic countries or Muslim-majority countries in the world prohibit homosexuality to its citizens with various punishments from jail, public canning to death penalty. In Malaysia, Brunei Darussalam and Aceh, a semi-autonomous region in Indonesia, homosexuality or *liwat*<sup>5</sup> (anal sex and sexual relations between men), musahaqah, so-called ‘cross-dressing’ are criminalized under syariah codes at the federal or state levels. In Malaysia LGBT-related fatwas regulate and restricts rights.

Indonesia does not have a state religion, however the growing religious conservatism has culminated into the introduction of several laws at the provincial and state level.

### ***Religious pathologization***

The rise in SOGIE change efforts in Malaysia and Indonesia are grounded in patriarchal interpretation of religion and pseudo-science, where LGBT people are seen as, among others, having a ‘sexual addiction’ or facing a ‘test’.<sup>6</sup>

In general, conservative medical practitioners advocate for an holistic approach involving medical, social, religious and psychological approaches in addressing ‘homosexuality’ and transgender identities.

In Malaysia, Islamic psycho-spiritual methods are being pioneered to ‘rehabilitate’ LGBT people, using a combination of medical, psychotherapeutic and faith-based methods in

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<sup>3</sup> Javaid Rehman and Eleni Polymenopoulou, “Is Green a Part of the Rainbow? Sharia, Homosexuality and LGBT Rights in the Muslim World”, p. 10.

<sup>4</sup> Husein Muhammad, et.al., Fiqh Seksualitas, p. 32.

<sup>5</sup> In some contexts liwat is used in a gender neutral context to criminalize anal sex. Liwat can also mean sexual relations between men

<sup>6</sup> <https://twitter.com/MyJAKIM/status/1366729767605608449/photo/2>



stages. The practitioners emphasise that the practices are different from western practices and are 'safe and harmless'.<sup>7</sup>

A paper notes Quranic recital classes as having the 'biggest therapy treatment effect', given the nature of the Quran as a remedy to "human illness from sins, spiritual diseases and ignorance."<sup>8</sup>

It also appears that 'LGBT rehabilitation' is a preferred method, although in both countries LGBT people have faced increasing criminalization in the last 5 years.

Malaysia's 'LGBT rehabilitation' programme which adopts a compassionate approach by the state to guide LGBT people to the right path has worked to its benefit. It has spared them from public scrutiny over violence and degrading treatment of LGBT people during arrests and detention and public criticism for misusing Islam and reinforcing the perception that Islam is punitive. It also rehabilitated the state's image and trust among LGBT persons, particularly among those who have experienced state violence, and continue to be in close proximity with state Islamic agencies. This includes Muslim trans women sex workers, transgender and Muslim gay, bisexual, queer and other men who have sex with men (MSM). For many who are vulnerable to arrest by the Islamic Department in Malaysia, the decrease of arrest is a significant improvement. Concurrently, the Islamic Departments provide quranic recital classes and offer incentives and economic opportunities, seemingly addressing gaps.

In the absence of government measures to address marginalisation and criminalization, some LGBT people are left with religious welfare aid that impose restrictions.

## Demonization

LGBT people are stereotyped as being morally bankrupt and demonised. It manifests along a spectrum of extreme hate and compassion. However, all of which, aims towards suppressing

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<sup>7</sup> LGBT and Spirituality: A Holistic Approach to Care, Samsul Draman, abstract for the 16th Congress of Asia-Oceania Federation for Sexology (AOFSS) "...Many countries ban conversion therapy because it is considered unethical and potentially harmful. However, a few of the LGBT community volunteer to join the therapy, without any external push. Even pro-LGBT teams didn't help the community when they were in a bad financial situation. Since 2012, at least 40 transgenders in Kuantan, Pahang have started a new life. A few have gotten married. About 60% of prostitution centres led by them have been closed. Our interventions also include non-Malaysians, for example from Thailand, Indonesia and etc. Transgenders can be treated and cured, even though the American Psychological Association claim they cannot be cured. About 20 transgenders have undergone breast implant removal surgery which was sponsored by Sultan Ahmad Shah Medical Centre or SASMEC in Kuantan. We also provide them with jobs so that they won't relapse to old habits. This means the spiritual approach and modern medicine or so-called conversion therapy (as some people call it) is safe and harmless."

<sup>8</sup> Wan Yusoff, W. F. Z. ', Mohd Amin, M. Z., & Mohd Ghazali, N. (2021). Model Terapi Psiko-Spiritual Islam Dalam Membimbing Komuniti Transgender: Sebelum Dan Selepas Perintah Kawalan Pergerakan (PKP) Akibat Ancaman Covid19. *7th International Conference on Quran as Foundation of Civilization (SWAT 2021) FPQS, Universiti Sains Islam Malaysia, 6-7 October 2021*. 7th International Conference on Quran as Foundation of Civilization (SWAT 2021), Malaysia.

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LGBT people's SOGI, and are intertwined with the notion of sin and complicity. Some common manifestation in Malaysia and Indonesia, include

- LGBT people as a moral threat.
- LGBT people must be saved with love and compassion
- Climate change, pandemic, etc are caused by LGBT people, or sign of God's wrath
- Weaponization of HIV and sex work to reinforce the notion of sin and duty to return LGBT people to right path

Research shows that these narratives shrink spaces, increase self censorship among LGBT people, and result in discrimination, namely boycotts, employment discrimination, restriction of access to health care, and exclusion from various spaces.<sup>9</sup> Introduction of PrEP has triggered LGBT panic and the moralization of prospective use taxpayer funds to provide access to PrEP for LGBT people<sup>10</sup>.

#### **Exclusion from gendered spaces and ability to practise and participate in religious activities.**

A story of a gender diverse person being excommunicated by the Prophet Muhammad for divulging information about bodies of cisgender women to men. This is used to often justify 'single sex spaces'. In Malaysia, while the classical Arabic term mukhanthan is used by the state Islamic departments, it is largely to distinguish between trans and intersex people.<sup>11</sup>

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<sup>9</sup> Justice for Sisters (2022) Freedom of Expression and Gender Identity. Pg 69

[https://static1.squarespace.com/static/5e2fb70868966a1c84c7e258/t/6156fb9848b86e3bf6013ad3/1633090508281/Empower\\_JFS\\_FOEGI\\_Report.pdf](https://static1.squarespace.com/static/5e2fb70868966a1c84c7e258/t/6156fb9848b86e3bf6013ad3/1633090508281/Empower_JFS_FOEGI_Report.pdf)

<sup>10</sup><https://justiceforsisters.wordpress.com/2023/01/03/efforts-to-restrict-prep-for-lgbt-people-affects-malaysia-health-goals-to-end-hiv-by-2030/>

<sup>11</sup> <https://twitter.com/MyJAKIM/status/1366729767605608449/photo/2>



**(Question 5) Has the State adopted, in public policy, legislation or jurisprudence, norms purportedly based on protecting freedom of religion or belief that promote, enable and/or condone violence and discrimination against individuals based on sexual orientation or gender identity? If so, please give examples, with commentary as needed to explain context, scope, and application.**

As explained above, several countries in Southeast Asia target and discriminate against people based on their SOGIE through an Islamic lens.

### **Aceh, Indonesia**

Aceh, a special autonomous province in Indonesia, institutionalised the Shariah Law (Aceh Qanun No. 6 Year 2014 on Jinayat Law) in 2014, which came into effect in October 2015. The said provincial law expounds on the concept of Jarimah, acts prohibited by Islamic Shariah and can be punishable by law, including Liwath and Musahaqah.

Liwath is defined as consensual anal sex between adult men, punishable by a maximum of 100 lashes, or a maximum fine of 1,000 grams of pure gold, or a maximum imprisonment term of 100 months.

Musahaqah is defined as a consensual act between two women or more by rubbing body parts to gain sexual arousal (or satisfaction). It is punishable by a maximum of 100 lashes, a fine of 1,000 grams of pure gold, or imprisonment for 100 months. Increased punishments could be meted out for repeated 'offenders' and for those who commit musahaqah with a child. Since the enforcement of the Shariah law, at least one lesbian couple was arrested in 2011.<sup>12</sup>

### **Brunei Darusaalam**

In Brunei, the discriminatory regulations directed at repressing LGBT practices were formalized into Islamic Criminal Law in 2014, and its Procedural Law was later adopted in early

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<sup>12</sup> "Indonesian Shariah police separate Aceh lesbian couple." BBC News, August 25, 2011, <https://www.bbc.com/news/world-asia-pacific-14667232>.



2019. However, Brunei maintains dual legal and judicial systems. Islamic takes primacy over sharia. Many civil laws have been harmonised and amended in compliance with sharia laws.<sup>13</sup>

According to Brunei's Report to the UPR in 2014, the Sharia Penal Code Order is an Order that relates to laws in respect of Sharia crimes and any matters connected therewith and is aimed at providing basic human rights.<sup>14</sup> The Order will be implemented in three phases to ease the public into it and ensure effective enforcement. The Order generally applies to both Muslims and non-Muslims, and its applicability to: i) Muslims only; ii) non-Muslims only; and iii) both Muslims and non-Muslims, depends on the types of offences as stated in the Order.

According to the Sultan in his decree that *"the move was 'a must' under Islam, dismissing 'never-ending theories' that sharia punishments were cruel in comments clearly aimed at detractors. 'Theory states that Allah's law is cruel and unfair but Allah himself has said that his law is indeed fair'"*.<sup>15 16</sup>

Matters pertaining to liwath are covered in Part I of the Brunei Sharia Penal Code of 2013 and Part IV on the Offences, Chapter I on the Sariqah, Hirabah, Zina, Zina Bil Jabar, Liwat, Qazae Drinking Intoxicating Drinks and Irtidad.

Specifically, Liwath Section 82-85 of the Brunei Sharia Penal Code of 2013 as follows:

Liwat (Section 81)

- (1) Any person who commits liwat is guilty of an offence and shall be liable on conviction to the same punishment as provided for the offence of zina.
- (2) For the purposes of this Order, "liwat" means sexual intercourse between a man and another man or between a man and a woman other than his wife, done against the order of nature that is through the anus.

Proof of liwat (Section 81): Liwat shall be proved in the same manner as provided for the offence of zina.

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<sup>13</sup> A paper written by Profesor Dr. Abdul Mohaimin bin Noordin Ayus titled Shariah Penal Code Order, 2013 of Negara Brunei Darussalam: Its Implementation and Challenges.

<sup>14</sup> UN Human Rights Council, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Brunei Darussalam, January 30, 2014, A/HRC/WG.6/19/BRN/1.

<sup>15</sup> "Sultan of Brunei imposes Sharia law despite international condemnation", April 30, 2014, South China Morning Post, <https://www.scmp.com/news/asia/article/1501138/sultan-brunei-imposes-sharia-law-despite-international-condemnation>.

<sup>16</sup> "Sultan of Brunei imposes Sharia law despite international condemnation", April 30, 2014, South China Morning Post, <https://www.scmp.com/news/asia/article/1501138/sultan-brunei-imposes-sharia-law-despite-international-condemnation>.

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Attempt to commit liwat (Section 84): Any person who attempts to commit liwat or attempts to cause the commission of liwat is guilty of an offence and shall be liable on conviction to the same punishment as provided under the section 71 or 72, as the case may be.

Abetting commission of liwat (Section 85): Any person who abets the commission of liwat is guilty of an offence and shall be liable on conviction to the same punishment as provided under the section 73 or 74, as the case may be.

In Brunei's 3rd Cycle UPR in 2019, the government provided a rationale behind the legislation and imposition of the Syariah Penal Code Order 2013. It explained that the Sharia law "did not criminalize a person's status based on sexual orientation or belief, nor did it victimize persons".<sup>17</sup> They added that the protection of morality and public decency was done "while respecting the privacy of individuals".<sup>18</sup>

In the government's letter to UN Special Procedures, Brunei firstly asserted its sovereignty in enforcing "own rule of laws reflecting our own cultural and religious values."<sup>19</sup> In relation to this, the government emphasised the preservation of its own cultural and religious identity that reflects "strong religious values". Second, the cultural and religious mandate to "preserve the sanctity of family lineage and marriage of individual Muslims particularly women" is the basis for criminalization of "adultery" and "sodomy".<sup>20</sup> Third, the setting high level of burden of proof for prosecution, i.e. "requiring no less than two or four men of high moral standing and piety as witnesses".<sup>21</sup>

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<sup>17</sup> UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Brunei Darussalam, June 25, 2019, A/HRC/42/11.

<sup>18</sup> UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Brunei Darussalam, June 25, 2019, A/HRC/42/11.

<sup>19</sup> Ministry of Foreign Affairs Brunei Darussalam, [Letter addressed to UN Special Procedures Mandate Holders], April 7, 2019, accessed from <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gld=34613>. The letter is a document that is publicly accessible from OHCHR Special Procedures database.

<sup>20</sup> Ministry of Foreign Affairs Brunei Darussalam, [Letter addressed to UN Special Procedures Mandate Holders], April 7, 2019, accessed from <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gld=34613>. The letter is a document that is publicly accessible from OHCHR Special Procedures database.

<sup>21</sup> Ministry of Foreign Affairs Brunei Darussalam, [Letter addressed to UN Special Procedures Mandate Holders], April 7, 2019, accessed from <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gld=34613>. The letter is a document that is publicly accessible from OHCHR Special Procedures database.

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## Malaysia

LGBT and gender diverse persons are criminalised through laws at the Federal and state level. Additionally, although only gazetted fatwas have legal force, many ungazetted LGBTI-related fatwas have systemic impacts on trans people's access to health and legal gender recognition and LGBTI' persons freedom assembly and association. A 2021, a Guide on interaction with Mukhannath, which has no legal effect, among others prohibits entry into mosques in the state of 'gender confusion', performing hajj and umrah.

At the federal level, Section 377A & B under the Penal Code, a British colonial legacy, prohibits carnal intercourse between consenting adults. It imposes mandatory prison sentences and whipping. 14 jurisdictions (13 states and 1 Federal Territory) have syariah laws. The state syariah laws, except for Federal Territory Syariah Acts, are enacted at the state level. The Federal Territory Syariah Acts fall under the Parliament.

As of January 2023, there are at least 55 (including 4 sub-sections) state syariah laws that criminalize LGBT people

- 13 states criminalise *musahaqah* or sexual relations between women;
- 2 states criminalise attempt of musahaqah
- 11 states criminalise *liwat*, which is defined as sexual relations between men or sodomy (gender-neutral);
- 3 states attempt of liwat
- 1 state criminalises sexual relations between persons of the same gender;
- 4 states criminalise sexual intercourse against the order of nature;
- All 14 states criminalise male person posing as a woman;
- 6 states criminalise female person posing as a man. Of which, 3 were introduced 2019 onwards
- 1 state criminalizes changing gender. This law criminalizes service providers too

Of the 55 laws, 8 were introduced between 2018 - 2022. Two of the new laws include the attempt of liwat and musahaqah as well as changing gender.

While the Federal Constitution allows the state to enact syariah laws, their jurisdiction is limited. The [Federal Court's 2021 decision on the constitutionality of Section 28<sup>11</sup>](#) of the Selangor Syariah Criminal Offences Enactment, which criminalises sex against the order of nature affirmed the Federal and state law-making areas demarcated in the constitution.

The Court affirmed that the state government is bound by the preclusion clause in the ninth schedule of the Federal Constitution - "creation and punishment of offences by persons

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professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List”.

While the decision applies to all laws that criminalise sodomy and sex against the order of nature, the decision has not been fully realised. New anti-LGBT laws have been introduced since.

Additionally, the state syariah laws can only impose a maximum of RM 5,000 in fine, 3 years of imprisonment and 6 lashes. Of the 55 state laws, at least 11 musahaqah, liwat, sexual relations between persons of the same gender, sexual intercourse against the order of nature, carry the maximum sentence. The rest mostly carry a fine between RM 5,000 - RM 1,000 and imprisonment sentence between 3 years to 6 months.<sup>22</sup>

In the state of Kelantan and Terengganu, through their newly introduced enactments, one can also be subjected to additional and alternative punishment, including community service, counseling and rehabilitation, based on the judges’ discretion.

In 2018 and 2019, at least six people were subjected to caning for [attempt to musahaqah<sup>1</sup>](#) and [sex against the order of nature<sup>2</sup>](#). Between January and February 2022 alone, 5 cases of *musahaqah* and an arrest case of a trans person were reported.

Additionally, other laws that gendered, broad and vague in nature are used to curb freedom of expression and assembly, e.g, insulting Islam, encouraging vice, and failure to perform friday prayers, among others, are used against LGBTQ persons and event organisers regardless of their SOGIE if their events include the participation of trans people, resulting in restriction of public life and freedom of expression, assembly and association.

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<sup>22</sup> [https://www.queerlapis.com/legal-resource-laws-part-1-laws/#In\\_the\\_beginning\\_State\\_Syariah\\_laws\\_did\\_not\\_criminalise\\_same-sex\\_acts](https://www.queerlapis.com/legal-resource-laws-part-1-laws/#In_the_beginning_State_Syariah_laws_did_not_criminalise_same-sex_acts)