



ASEAN SOGIE Caucus 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.¹

(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?

Homosexuality is 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 Prophet Loth, who is 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 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."²

As a result, most of 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 Southeast Asia itself, Malaysia and Brunei Darussalam where Islam is used as a

¹ Please see annex A

² Javaid Rehman and Eleni Polymenopoulou, "Is Green a Part of the Rainbow? Sharia, Homosexuality and LGBT Rights in the Muslim World", p. 10.



ground base to govern the states, homosexual is a criminal act. In Indonesia, as Muslim-majority country there is no existence of national law to criminalise homosexual persons but there are some areas where local autonomy apply Islam as the basic local law is punishing homosexual persons such as in Aceh province, a semi-autonomous province on the northwest tip of Sumatra Island, Indonesia.

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.³

(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.

At the regulation level, countries in Southeast Asia also target and discriminate their citizens based on their SOGIE, and some of them are using islam in their policy/ legislation enforcement. In Indonesia, campaigns, policies and practices that discriminate against members of LGBT communities tend to be prevalent in places where Sharia law is enforced, such as Aceh. 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 2019.

- **Aceh, Indonesia**

Aceh is one of the special autonomous provinces in Indonesia. It is a province that has institutionalized the Shariah Law (Aceh Qanun No. 6 Year 2014 on Jinayat Law) back in 2014, which took into effect in October 2015. The said provincial law expounds on the concept of Jarimah, which are acts prohibited by Islamic Shariah and can be punishable by law. Among the act considered as Jarimah are Liwath and Musahaqah. Liwath is defined as an act of a man inserting his penis to the anus of another man with mutual consent. Liwath is 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.

³ Husein Muhammad, et.al., Fiqh Seksualitas, p. 32.



ASEAN SOGIE CAUCUS

Musahaqah an act of two women or more by rubbing body parts to gain sexual arousal (or satisfaction) with mutual consent. Musahaqah is 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. Severe punishments may be provided for repeat offenses and for those who commit musahaqah with a child. Since the enforcement of the Shariah law, at least one lesbian couple was arrested.⁴

- **Brunei Darussalam**

Brunei is the first country in Southeast Asia to declare the implementation of Sharia law through the announcement made by Sultan Hassanal Bolkiah in October 2013 (No. S69). The implementation came six months after His Majesty announced the gazette of Sharia Penal Code Order on October 22nd, 2013.

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.⁵ The Order will be implemented gradually in three phases to ensure sufficient time to introduce the Order to the public and to allow for its proper and 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.

In a royal decree, Sultan Brunei said: *"With faith and gratitude to Allah the almighty, I declare that tomorrow, Thursday, 1 May 2014, will see the enforcement of sharia law phase one, to be followed by the other phases"*.⁶ According to the Sultan in his decree that *"the move was 'a must' under Islam, dismissing 'never-ending theories' that sharia punishments were cruel*

⁴ "Indonesian Shariah police separate Aceh lesbian couple." BBC News, August 25, 2011, <https://www.bbc.com/news/world-asia-pacific-14667232>.

⁵ 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.

⁶ "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>.



ASEAN SOGIE CAUCUS

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’⁷

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 is governed under 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.

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.

During the country’s 3rd Cycle UPR in 2019, the government of Brunei 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”.⁸ They added that the protection of morality and public decency was done “while respecting the privacy of individuals”.⁹

⁷ “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>.

⁸ UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Brunei Darussalam, June 25, 2019, A/HRC/42/11.

⁹ UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Brunei Darussalam, June 25, 2019, A/HRC/42/11.



In the government's letter to UN Special Procedures, religious and cultural discourses were reflected in their rationale in support of the Shariah law. First, the assertion of a country's sovereignty as basis in enforcing "own rule of laws reflecting our own cultural and religious values."¹⁰ 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" as basis behind the criminalization of "adultery" and "sodomy".¹¹ Third is the religious yet patriarchal basis in setting high standards of proof that can be used in litigation, i.e. "requiring no less than two or four men of high moral standing and piety as witnesses".¹²

- **Malaysia**

Malaysia has been inherited by the British colonial prohibiting male same sex consenting adults in their federal penal code which is well known as section 377A: Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature. This penal code has also been adopted in Malaysia's Syariah Criminal Offences Act 1997 which federal territories as follow:

Section 25 (Liwat) - Any male person who commits *liwat* shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

Section 26. (Musahaqah) - Any female person who commits *musahaqah* shall be guilty of an offence and shall on conviction be liable to a fine not exceeding five

¹⁰ 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?gId=34613>. The letter is a document that is publicly accessible from OHCHR Special Procedures database.

¹¹ 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?gId=34613>. The letter is a document that is publicly accessible from OHCHR Special Procedures database.

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ASEAN SOGIE CAUCUS

thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

Section 28 (Male person posing as woman) - Any male person who, in any public place, wears a woman's attire and poses as a woman for immoral purposes shall be guilty of an offence and shall on conviction be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding one year or to both.

The recent case in Malaysia that is using the Act 1997 is the halloween party raid in Kuala Lumpur. The raid took place on October 29, 2022 resulted in the arrests and interrogation of at least 24 gender-diverse persons. Those arrested were being alleged to have committed unclearly defined violations such as "encouraging vice" and "indecent acts"; the use of 'illegal substances'; and for freely exercising one's gender expression. The raids were segregated based on religion and gender: gender diverse persons identified as Muslims were targeted, vilified, mistreated, misgendered, and slapped with charges for violating the Syariah Criminal Offences Act. Trans and gender diverse people reportedly experienced degrading and humiliating treatment while undergoing urine tests by the federal police.

The raid and subsequent filing of charges, although not specifically alleged violations of Section 377A, were heavily informed by social stigma association with LGBTQIA+ persons. Charges such as "encouraging vice" and "indecent acts" due to person's gender-diverse expression reflects the country's conservative stance on maintaining a heteronormative and gender-binary social norms of what is acceptable to Muslim persons

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