

## Submission in the UPR review of: Malaysia

### Legal and Statutory framework:

Malaysia maintains **criminal sanctions against sexual activity between consenting adults**. Malaysia' *Penal Code* (Act No. 574) (Consolidated Version with amendments as of November 15, 1998) provides:

#### Unnatural Offences

Section 377A. Carnal intercourse against the order of nature.

"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."

#### Explanation

Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section."

Section 377B. Punishment for committing carnal intercourse against the order of nature.

"Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping."

Section 377C. Committing carnal intercourse against the order of nature without consent, etc.

"Whoever voluntarily commits carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping."

Section 377D. Outrages on decency.

"Any person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years."

Moreover, several states in Malaysia have instated Islamic Sharia laws, applying to male and female muslims, criminalizing homosexual and lesbian acts with up to three years imprisonment and whipping. The Sharia Penal law in the Malaysian state of Penang prescribes penalties for sodomy (Liwat) and lesbian relations (Musahaqat) with fines of RM5,000.00, three years imprisonment and 6 lashes of the whip. All these penalties can be combined.

### Malaysia's international human rights obligations:

Provisions against sexual activity between consenting adults have been found to constitute a **clear violation of international human rights law**.

In *Toonen v Australia*, the **UN Human Rights Committee** in March 1994 confirmed that laws criminalizing consensual same-sex activity violate both the right to privacy and the right to equality before the law without any discrimination, contrary to articles 17(1) and 26 of the International Covenant on Civil and Political Rights.<sup>1</sup>

The Committee further considered that such laws interfere with privacy rights, whether or not they are actively enforced, and "run counter to the implementation of effective education programmes in respect of HIV/AIDS prevention" by driving marginalised communities underground.

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<sup>1</sup> *Toonen v Australia*, CCPR/C/50/D/488/1992, April 4, 1994.

The UN Human Rights Committee has affirmed this position on many occasions, either urging States to repeal laws which criminalize consensual same-sex activity or commending them for bringing their legislation into conformity with the Covenant by repealing such provisions.<sup>2</sup>

This position is consistent with other **regional and national jurisprudence**, including decisions of the European Court of Human Rights<sup>3</sup> and of the Constitutional Court of South Africa.<sup>4</sup>

States' international obligations to respect the human rights of all persons, irrespective of sexual orientation and gender identity, were recently articulated in the "**Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity**". The Principles were developed and unanimously adopted by a distinguished group of human rights experts, from diverse regions and backgrounds, including Asia-Pacific. These experts included judges, academics, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, members of civil society and others.

Principle 2 of the Yogyakarta Principles affirms the right of all persons to equality before the law without discrimination on the basis of sexual orientation or gender identity, and specifically confirms the obligation of States to "repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity."

Principle 6 of the Yogyakarta Principles affirms the right of all persons, regardless of sexual orientation or gender identity, to the enjoyment of privacy without arbitrary or unlawful interference, and confirms States' obligation to "repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity."<sup>5</sup> The Principles also call on States to "ensure that criminal and other legal provisions of general application are not applied to *de facto* criminalise consensual sexual activity among persons of the same sex who are over the age of consent."

The **UN High Commissioner for Human Rights** has welcomed the Yogyakarta Principles as a "timely reminder" of the basic tenets of universality and non-discrimination, and noted that "respect for cultural diversity is insufficient to justify the existence of laws that violate the fundamental rights to life, security and privacy by criminalizing harmless private relations between consenting adults."<sup>6</sup>

#### **Recommendation:**

We therefore recommend that the Human Rights Council, in its upcoming review, urge Malaysia to bring its legislation into conformity with its international human rights obligations by repealing all provisions which criminalise sodomy or other sexual activity between consenting adults.

#### **This information is submitted jointly by:**

<sup>2</sup> See Human Rights Committee Concluding Observations: United States of America, A/50/40, October 3, 1995; Cyprus, CCPR/C/79/Add.88, April 6, 1998; Ecuador, CCPR/C/79/Add.92, August 18, 1998; Chile, CCPR/C/79/Add.104, March 30, 1999; Lesotho, CCPR/C/79/Add.106, April 8, 1999; Romania CCPR/C/79/Add.111, July 28, 1999; Australia, A/55/40, July 24, 2000; Egypt, CCPR/CO/76/EGY, November 28, 2002; Kenya, CCPR/CO/83/KEN, March 28, 2005; United States of America, CCPR/C/USA/CO/3, September 15, 2006; BARabdos, CCPR/C/BRB/CO/3, May 11, 2007; Chile, CCPR/C/CHL/CO/5, May 18, 2007.

<sup>3</sup> *Dudgeon v United Kingdom*, Series A no. 45., 1981; *Norris v Ireland*, 1991; *Modinos v Cyprus*, 1993.

<sup>4</sup> *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others*, 1998.

<sup>5</sup> Available in all 6 UN languages at: [www.yogyakartaprinciples.org](http://www.yogyakartaprinciples.org).

<sup>6</sup> Statement of UN High Commissioner for Human Rights, Launch of the Yogyakarta Principles, 7 November, 2007, United Nations, New York.

- **ILGA** (International Lesbian and Gay Association), a global federation of over 600 lesbian, gay, bisexual, transgender and intersex (“LGBTI”) groups in over 90 countries – including 20 in Asia;
- **ILGA-Europe**, an NGO with ECOSOC consultative status that is recognized by the EU, COE and OSCE;
- **International Gay and Lesbian Human Rights Commission**, a non-profit NGO which seeks to secure the full enjoyment of the human rights of all people and communities subject to discrimination or abuse on the basis of sexual orientation or expression, gender identity or expression, and/or HIV status;
- **ARC International**, an NGO with a full-time presence in Geneva which engages with the UN Human Rights Council and related mechanisms to advance respect for human rights, including on the grounds of sexual orientation and gender identity.