

# **‘HEADS YOU WIN, TAILS I LOSE’: THE FATE OF BRUNEI’S LGBTQ RIGHTS IN FACE OF THE NEW SYARIAH PENAL CODE**

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## **ABSTRACT**

How often do States consider their international reputation being signatories to international human rights documents? Brunei’s nation- building project with a stricter penal code has met with a severe international backlash. State crackdown on propagating LGBT culture and lifestyle has been harsh, unjust, and unreasonable. It brings us to the forefront to resolve human rights practice in domestic politics within an international ‘soft’ law practice for advocates. The unbearable intolerance and forced marginalization of LGBTs arises from abnormally constructed gender norms. Even policies claiming good faith discrimination would not agree to stripping human dignity, at its worst. In this article, we examine the status of LGBT rights against the international response. We then look at social repercussions of LGBT culture and lifestyle within a religious legislative machinery. We also look at how far Islamic policymaking is in conformity with international human rights documents and its problematic provisions, phased implementation, and comparative criticism.

**Keywords-** Brunei, LGBTQ, international reputation, sexual orientation, gender identity

## ISLAMIC LEGISLATIVE MACHINERY IN BRUNEI

Brunei Darussalam, a Southeast Asian country, is one of the world's richest countries due to its extensive oil and gas resources. Brunei Darussalam is an Islamic monarchy ruled by a Sultan who wields ultimate power. The supremacy of the Islamic religion has been established by the 1959 Constitution. The incumbent Sultan, Hassanal Bolkiah was crowned in 1968 and has been in office since 1967. He holds unfettered executive powers as he is the Prime Minister, Minister of Finance, Minister of Defence, Minister of Foreign Affairs and Trade, and Head of Islam (or Caliph, i.e., “God’s vice-regent on earth”<sup>i</sup>). The Sultan is regarded as a descendant of Prophet Muhammad and the lineage of the ruling family dates back to the 14<sup>th</sup> century. The long span of the dynasty of the sultanate is portrayed as a distinctly Malay culture that must be protected.<sup>ii</sup> The official ‘state ideology’ of Brunei named ‘Melayu Islam Beraja’ (Malay Islamic Monarchy), or “MIB” is based on the historical, religious, and ethnic aspects of the ruling order reinforcing the monarchical framework.<sup>iii</sup> Brunei aspires to be a ‘Negara Zikir’, or a Nation that lives according to the teachings of Islam.<sup>iv</sup> MIB was declared as the official ‘national philosophy’ in 1984, which stated that Brunei shall ‘forever be a Malay Islamic Monarchy,’<sup>v</sup> upholding the ideal of a ‘Negara Zikir’. MIB is built on three pillars: Melayu (Malayness), Islam, and Beraja (Monarchy), which define the essence of mandated national identity (Monarchy). In this framework, the Islamic element is regarded as the most important.<sup>vi</sup> MIB is regarded as a sacred political and cultural obligation dictating the norms of good citizenship for citizens and institutions alike.

No Bruneian scholar would openly admit deconstructing the MIB as a ‘nation-building project’ carried out as an ‘ideological construct’ and exploited for legitimization<sup>vii</sup>. According to the MIB, only loyal non-Muslims and non-Malays can call themselves to be ‘protected minorities’<sup>viii</sup>. However, they cannot seek a national identity in Brunei- an act carried to crush dissent and express obedience. Perhaps, as per what is portrayed by Fortman as minority rights are ‘collectively exclusive elements’ and seeks reconceptualization of the role of law in protecting human dignity in collectivity.<sup>ix</sup> Ideals of a democratic setup in protecting human dignity aren’t always as fair as it may appear to be- as handed down in the case of *Sorensen and Rasmussen v, Denmark*<sup>x</sup>, the European Court of Human Rights Grand Chamber added that majority need not always prevail in a democracy. However, a balance should ideally resolve proper treatment of minorities and protect against dominant positions.

The Sharia law of Brunei is based on a dichotomous legal system, wherein Islamic and British derived laws coexist. During the colonial era, a systematic form of Sharia law had evolved which led to the codification of Islamic law starting in 1912 throughout the indirect British Rule. The colonial influence was perceived as a dangerous meddling in the existence of an erstwhile complete Islamic order.<sup>xi</sup> Nevertheless, the contribution of the British legal jurisprudence has led to the burgeoning of the current formidable Islamic bureaucracy.<sup>xii</sup> However, after independence, fueled by the Declaration of MIB and a revival of Islamic ideologies, Sharia law gained further accreditation in the legal system.<sup>xiii</sup> After the implementation of the Syariah Penal Code Order “SPCO”, in 2013, the dual legal system has been done away with. The objective of SPCO is to attain a complete implementation of Islamic law to Muslims and non-Muslims alike.

The Islamic governance in Brunei has conflicting views on its executive and media powers. For example, the Legislative Council was suspended in 1984 and re-established in 2004. It enjoys no substantial legislative powers and is only to advise the Sultan. It is the Sultan alone who shall appoint members of his own council- adopting legitimacy on ‘patron-client relationship.’<sup>xiv</sup> The media too, is drawn under the powerful influence of an ‘unelected monarch.’ The government portrays its rule through media propaganda instilling a strict regime to steer clear from dangerous foreign influences in their official state ideology. TIME reports Shahiran Shahrani, an activist and Brunei native, who is seeking asylum in Canada to escape intensive and arbitrary official outreach on LGBTQ+ crackdown. The police have been given enormous powers to carry out ‘unprecedented’ checks into lives of citizens suspected of breaking the law. The suspect could be drawn on anyone who is seen as a “political threat” and violating these laws. The last capital punishment in Brunei was carried out in 1957 and today, it has brought a rising intolerance as well as forced marginalization of the LGBTQ community<sup>xv</sup>.

Religious diversity is the characteristic feature of most of the “ASEAN” countries and besides, political controversies have spiraled the multiple normativity or “legal pluralism” within the Islamic framework of ‘universal’ human rights<sup>xvi</sup>. The call towards plural justification of human rights on the ground of cultural differences within the Sharia law has gained prominence across disciplinary boundaries. Could it be possible to ask governments to stretch their limit to adopt a “tradition-independent moral standard” only to refuse attention to inherent human

rights for fundamentally different cultures among countries? <sup>xvii</sup> In case there comes a paradigm shift in the attitudes of policymakers, it would do away with “overlapping consensus” and help re-unite contrasting doctrines.

Müller explains the position of Islamic policymakers. On one side, they must adhere to the limits stipulated in the Sharia and on the other, draw parallels of compatible conclusions between internationally recognized norms in the “UDHR”<sup>xviii</sup> and “AHRD”<sup>xix</sup>. The ASEAN Charter<sup>xx</sup> expresses strong commitment towards “human rights and fundamental freedoms” and the establishment of an ASEAN human rights body.<sup>xxi</sup> An institutionalized regional commitment is added under Article 23 AHRD<sup>xxii</sup> where ‘every person has the right to freedom of opinion and expression.’ Articles 1 and 2<sup>xxiii</sup> stipulates equality before the law in wide terms as religion, gender and political or “other opinion”. It does not create any speck of difference between the contradictory religious views of ASEAN States as in Article 6 where the “primary responsibility” of all ASEAN member-states is towards the promotion of human rights<sup>xxiv</sup>.

% range (out of 4,60,000)	RELIGIOUS DIVERSITY IN POPULATION OF BRUNEI
78.8	MUSLIMS
8.7	CHRISTIANS
7.8	BUDDHIST
65.7	MALAY
10.3	CHINESE
24	Other ethnicities (including indigenous people)

*Figure 1.1 – Table showing religious diversity in population of Brunei(as of December 2020)*

<sup>xxv</sup>

### **A. Homosexuality in Brunei and its interpretation in Sharia**

The heteronormative ideals are prevalent in Islam, wherein traditional marriage amongst consenting heterosexual men and women is considered as the only lawful and religiously valid

form of sexual contact. Any form of sexual contact outside of a traditional heterosexual marriage is prohibited. According to the Sharia, any sexual relations that are extramarital are unlawful and therefore attract criminal sanctions.<sup>xxvi</sup> Unlawful sexual intercourse is called “zina” and is considered to be an offence under Sharia law.<sup>xxvii</sup> Non-compliance to the Islamic heteronormative principles not only results in harsh criticism and backlash but also leads to ostracization from the Muslim community.<sup>xxviii</sup> Therefore, while homosexuality is forbidden (*haram*),<sup>xxix</sup> it is also considered to be a moral, physical, and psychological disorder.<sup>xxx</sup>

The constitutional religion of Brunei is the Shafi’i school of jurisprudence of Sunni Islam. And thus, Brunei has strictly followed the Shafi’i school in implementing Islamic Law.<sup>xxxi</sup> The Shafi’i school considers homosexual intercourse (*liwat*) and heterosexual extramarital sexual intercourse (*zina*) to be analogous activities that are prohibited.<sup>xxxii</sup> Homosexual relations among men, especially the act of *sodomy* invites the *Hadd* punishment according to all the Islamic schools of law.<sup>xxxiii</sup> Female homosexuality (*musahaqa*) is placed on the same ground for condemnation as are the offences of bestiality, or necrophilia.<sup>xxxiv</sup> However, the punishment prescribed for homosexual activities under the Shafi’i school is the death penalty.<sup>xxxv</sup> The four facets for the administration of the state of Brunei Sultanate are – Brunei Legislation (*Brunei Kanun Law*), Islamic religious teachings (*Sharak*), Brunei Customary laws (*Istiadat Custom*), and things outside of customs (*Resam*).<sup>xxxvi</sup> The Islamic jurisprudence has further been entrenched into the corpus of the criminal justice system of Brunei with the introduction of the *Syariah Penal Code Order, 2013*.

### ***1. Intersectionality of colonial impositions, State, and other political interests***

Homophobia, by now is clearly a game- stroke pawn, inflamed for political reasons- to demarcate state sanctioned conduct, boundaries of citizenship and a sense of national belonging. Stychin points out a ruthless interest of the State in denying equal rights to lesbian, gay, bisexual, and transgender people for ‘compelling state interests’<sup>xxxvii</sup>. South African leaders, for example, in framing their social and scientific construct of homo/heterosexuality as well as any arbitrary law prohibiting homosexual misconduct, bear their roots from South Africa’s colonial imposition- hence insist to keep sodomy laws in place<sup>xxxviii</sup>. It’s not the case with hesitant states, even at the U.N. General Assembly’s Special Session, for ‘members to decide’ to speak for three minutes at the International Gay and Lesbian Human Rights

Commission was met with surprise- even though the issues were as fundamental as HIV/AIDS and not any rhetoric bluster. Coupled with reluctance from states, to recognize the principle in the Brazil Resolution, the term ‘sexual orientation’ is not a recognized category of discrimination<sup>xxxix</sup>. Further on, there are issues of privacy and non- discrimination- in *Dudgeon v. U. K.*<sup>xl</sup>, where the Court argued that ‘decriminalization does not imply approval.’

Treaty bodies, in their concurring opinion in *Toonem*<sup>xli</sup>, have failed to deliver anything concrete as result of lack of clarification about reading ‘sexual orientation’ into ‘sex.’ And it is this plagued reluctance that dwells a norm-like discrimination, notably seen at the time when *Juliet Joslin* case happened. *Grant v. South West Trains*<sup>xlii</sup>, is cited as an authority, where the European Court of Justice called it ‘discrimination’ when ‘sex’ becomes a ground to deny State benefits. Besides, the South African Constitution, holds hope to include specific provision on sexual- orientation discrimination to bring honour to historic injustices suffered by sexual minorities- apartheid and to put sexual orientation at par with discussions on race or gender<sup>xliii</sup>.

Deconstructing sex labels is just not easy, and its other discriminatory counterparts- race and gender too suffer the same ignominy. But there are seemingly impossible challenges in the face of reinforcing protection for sexual identity and lay them as ‘sexual dissent’ for internationally recognised standards, comes with uncertain and instable categories to sort into<sup>xliv</sup>. But most of all, violence and discrimination are ‘gender-based’ where aims of ‘gender mainstreaming’<sup>xlv</sup> as a protocol for campaign could come in handy, to deal with the separation between socially constructed roles of women and men<sup>xlvi</sup>.

## **2. What is it like to be ‘gay’ in Brunei Darussalam?**

Among the ASEAN Islamic Nations, Brunei has grown more conservative over the years<sup>xlvii</sup>. The new penal code has wreaked havoc and chaos in the lives of Muslims and non-Muslims alike. The keen demonization of religious pluralism is evident in the Sultan saying that his government does not expect other people to agree with it.<sup>xlviii</sup> Brunei Darussalam’s sovereign Islamic status like all other independent countries, allows for free implementation of their own “rule of law.” The U.S. State Department calls for serious concern over the new law which on the face of it, seems inconsistent with internationally accepted standards of international human rights. The UK Secretary of State for international development calls it ‘barbaric’ and tweets LGBTQ+ rights as human rights<sup>xlix</sup>. The rights of sexual minorities in Brunei are nonexistent.

Homosexuality is not just illegal but also a criminal offence. Marriage within the same gender is a utopian reality let alone be recognized by law.

There are no protections offered to these vulnerable groups about discrimination in employment opportunities, denial of housing facilities, and adoption matters. Members of the LGBTQ+ community are also banned from donating blood and are forced to undergo conversion therapies.<sup>1</sup> There are no constitutional safeguards to protect the life, liberty and dignity of the sexual minorities and their identities. The Penal Code of 1951 contains section 377 which relates to “Unnatural Offences”. This provision finds its roots in the colonial era law borrowed from the Indian Penal Code, 1860 imposed by British authorities.<sup>li</sup> Section 377 criminalizes “carnal knowledge against the order of nature”, punishable with up to ten years imprisonment and a possible fine. The law is only applicable to men.<sup>lii</sup> The implementation of the Syariah Penal Code, 2013 has remarkably aggravated the severity of punishments as well as extended criminalization to same-sex intimacy between women. Brunei has a dual legal system wherein both common law and Muslim law function together. Thus, the Penal Code, 1951 and the SPCO will operate parallelly.

Section 82 of the Syariah Penal Code is related to “liwat” or sexual intercourse between men, which is a criminal offence punishable in a few circumstances with death by stoning, or otherwise with whipping and imprisonment. Section 92 of the same code is related to criminalization of “musahaqah” or sexual activity between women.<sup>liii</sup> If a woman is found guilty of private or public sexual intimacy with another woman, the punishment is applicable to both Muslim and non-Muslim women alike regardless of consent. If convicted, the punishment for “musahaqah” is imprisonment for up to 10 years and/or a fine of 40,000 Brunei dollars (about USD 32,000). The code also criminalizes gender-non-conforming behaviour, i.e., people dressing up or behaving differently from their biological gender.<sup>liiv</sup> The provision is applicable to all Muslims and non-Muslims alike. The punishment, if convicted of appearing in public as “a man posing as a woman or vice versa” is subject to a fine of 1000 Brunei Dollars (about USD 780) and/or imprisonment for three months.

These laws intrude into the private spheres of the citizens and are political armaments to constrict anyone who is seen as a threat to the “morality” of the society as outlined by the Shariat. The police can under Section 294 (Obscene acts and songs) or Section 294A (Loitering

or soliciting for purposes of prostitution, etc.) to arrest homosexuals, merely if they suspect them. The wording of these sections is very vague, which is usually left to the police personnel's distorted interpretations, leading to arrest, torture, and deprivation of the “suspected” people of their rights, in the absence of any constitutional safeguards. In addition, the Societies Order, 2005 also bans LGBTQ+ people from forming organizations and registering them in Brunei. Violation of this would attract a fine of \$5000 and a maximum fine of \$500 per day in case of continuous violation.<sup>lv</sup> As a result, the interests of the community are completely sidelined, their voices are suppressed, and such laws are enforced, which put the people in a very vulnerable state.

It is not a mere coincidence that the people who form a part of the LGBTQ+ community are also the ones that comprise the socially, economically, and educationally backwards and additionally deprived of employment opportunities, food security and personal safety. Therefore, it is safe to assume that sexual minorities form the periphery of Brunei's society and live on the “outside” as subaltern groups.<sup>lvi</sup>

Homosexuality in Brunei	Illegal-Death penalty as a punishment			Gay Marriages in Brunei	Not legal
<b>Censorship</b>	Other punishment	<b>Changing gender</b>	Illegal	<b>Non-binary gender recognition</b>	Unknown
<b>Discrimination</b>	No protections	<b>Employment Discrimination</b>	No protections	<b>Housing discrimination</b>	No protections
<b>Adoption</b>	Illegal	<b>Military</b>	Illegal	<b>Donating Blood</b>	Banned for an infinite deferral
<b>Conversion therapy</b>	Ambiguous	<b>Age of Consent</b>	N/A		

*Figure 1.2- Status of LGBT Rights in Brunei (2022)* <sup>lvii</sup>

## **B. Implementing Sharia law against homosexuals in Brunei**

The country first led the introduction to Sharia law in 2014 later which it was heavily condemned. Yet, it was brought into ‘full force’ over the years. A Brunei researcher at Amnesty International, Rachel Chhoa-Howard calls the Code ‘a deeply flawed piece of legislation containing a range of provisions that violate human rights.’ The United Nations in its concern, called the law ‘cruel, inhuman and degrading.’ Mr. Woolfe, from the Brunei Project told the BBC that there are several underlying reasons shadowing the implementation of capital punishment- one theory could be the government trying to strengthen its hold over its declining economy in a bid to increase attention from the Muslim world. Oil and gas are the major sources of revenue which account for more than 90% of the country’s GDP. Brunei’s economy has slowed after the rise in oil prices<sup>lviii</sup>. Alongside, more investments could be drawn from Islamic tourists into Brunei’s appealing markets. He also said that the government had hoped to bring changes after the first phase of implementation without anyone realizing it. The BBC also reports through Mr. Woolfe changes which were posted on the website of the attorney general which only came to public attention late in March without any public announcement<sup>lix</sup>. TIME reports on the statement of Joshua Roose, a Senior Research Fellow at the Institute for Religion, Politics and Society at Australian Catholic University that the introduction of this new law is to help the 72-year-old Sultan catch a grip on the country to safeguard from unrest<sup>lx</sup>.

In 2013, Brunei became the first East Asian country to adopt Islamic Sharia law despite international criticism. Phase one of the implementation of the Syariah Penal Code began in May 2014.<sup>lxi</sup> The Syariah Penal code was to be implemented in three phases:<sup>lxii</sup>

- The first phase covered misdemeanors, non-hudud offences and other general offences with minor fines and penalties, and prison terms. It came into effect on May 1, 2014
- The next two phases covered fixed criminal punishments and sentences under the “hudud” and “qisas” and were generally more severe—the range of offences covered murder, adultery, sodomy, and apostasy. Introduced in April 2019, this code faced widespread international condemnation and critique.

Under the earlier code, civil and criminal laws were uniform for all citizens, i.e., Muslims and Non-Muslims. But the new code prescribes that some provisions will only apply to Muslims

whereas some only apply to the Non-Muslims and the rest apply to both.<sup>lxiii</sup> The controversial punishments covered under hudud laws are applicable to all citizens include six areas, namely:

- Theft
- Illicit sexual relations
- Making unproven accusations of illicit sex
- Drinking intoxicants
- Apostasy
- Robbery

The punishments specified for these offences are quite extreme and harsh. They include: -

- Death by stoning for adultery and sodomy.
- Severing of limbs for theft
- Caning for various violations<sup>lxiv</sup>

The Sultan has currently placed a moratorium on the implementation of the later phases of the Syariah Penal Code mainly due to the intense backlash and condemnation by the international community, Human Rights organizations, celebrities, Governments, corporations, etc.<sup>lxv</sup> These laws exacerbate the already precarious condition of the LGBTQ+ community in Brunei, as they have long been discriminated against, subjected to torture and inhuman treatment, stripped of their human rights, solely because they do not conform to the gender binary narrative. Criminalizing personal choices people make to punish them for expressing their identity, the laws are excessively discriminatory in their treatment of people belonging to the LGBTQ+ community who are seen as less than human.

### ***3. Brunei's reputation in complying with human rights documents and other treaties.***

Treaty bodies, or the committees set up under seven international human rights treaties- the International Covenant on Civil and Political Rights<sup>lxvi</sup>, the International Covenant on Economic, Social and Cultural Rights<sup>lxvii</sup>, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women<sup>lxviii</sup>, the Convention against Torture<sup>lxix</sup>, the Convention on the Elimination of All Forms of Racial Discrimination<sup>lxx</sup> and the International Convention on the Protection of the Rights of All

Migrant Workers and Members of their Families<sup>lxxi</sup> – for monitoring compliance, often in the light of information from non- governmental organisations by issuing Concluding Observations and Recommendations to governments, although they aren't legally binding.

Had they been it would not remain an unresolved case of torture in *K.S.Y. v. The Netherlands*<sup>lxxii</sup>, where an attempt sought to protect persecution of fleeing refugees<sup>lxxiii</sup> and arbitrary deportation of non- nationals<sup>lxxiv</sup>. As in this case, the complainant raised his claim that he would be at risk of torture as his homosexual tendencies were known to the authorities if he returned from Netherlands to Iran, yet did it stand a chance? The problem doesn't end up here- all along addressing sexuality or gender identity, its country- monitoring or complaints<sup>lxxv</sup>, find greater expression in anti-discrimination legislation<sup>lxxvi</sup> – one reason is to ensure an effective implementation, but to what end are its outcomes positive? Human Rights Committee<sup>lxxvii</sup>, in *Juliet Joslin et al. v. New Zealand*<sup>lxxviii</sup>, barred same- sex marriage, calling it 'deviant others' and reaffirmed a marriage construct to be 'inherently and naturally heterosexual.' Perhaps, the European Court of Human Rights did bring out a positive outcome, with progressive interpretation of right to marry as 'dynamic'<sup>lxxix</sup>. Besides, Canada proposed a draft resolution<sup>lxxx</sup> which expressed 'deep concern' for marginalization of sexual orientation and called out for a stern response from U.N. human rights bodies. But even if a response does come, it will fall short of being 'not dynamic'- let alone a louder call for change in proposing any new international standards or mechanisms to protect sexuality- related abuses, done neither by Canada nor the U.N. human rights bodies.

But the story doesn't end there itself. Brazil's commitment to U.N. resolution on homosexuality met with shuddering OIC threats which called it off too soon<sup>lxxxi</sup>. While there are highs and lows in this process- a recent 'higher up' made in the draft "CHR" resolution tabled on the report of the Special Rapporteur, with emphasis laid on several Islamic countries – 'all killings committed for any discriminatory reason' shall be stopped. But on the other 'lower down' side, the Director of the World Family Policy, held a contrary 'anti- family movement'<sup>lxxxii</sup> in her perspective as an outcome. Culture and religious practices cannot be done away with, and to adopt newer practices as 'custom' in the U.N. will result in a takeover of human rights mechanisms by radical feminists, population control ideologues and homosexual rights activists.

It must be a clear road to ascertain the objectives of sexual orientation- gender identity that ‘right to a safe and satisfying sex life’<sup>lxxxiii</sup> is not meant for mere counselling and care given during reproductive crises but should also seek an enhancement of sexual health, life and in general, of personal relations. In *Hertzberg v. Finland*<sup>lxxxiv</sup>, airing a debate on homosexuality cannot be a ground for criminal persecution on breach of “ICCPR”. Encouragement is essential- for focusing on other important aspects, namely sexual violence, coercion around partner choice, and the criminal regulation for consensual sex<sup>lxxxv</sup>. It gets slightly better when looking at the workings of the Sub-Commission on the Promotion and Protection of Human Rights – a body of 26 independently elected experts elected by the Commission on Human Rights. Their work- consists of, broadly, recommending prevention of discrimination of ‘any kind’, not particularly that of chosen sexual identities and its conformism to non- conformism. But it’s regrettable to note that these ‘independent experts’ often at times, act in their personal capacities- in vital matters of sexual orientation, discrimination, health, and human rights<sup>lxxxvi</sup>. Such broad categories in discrimination leave gaps, such as racism, which is seen more important than studying the links between sexual orientation and discrimination. One such Sub-Commission member, Louis Joinet, proposed discussion of same-gender attraction in preparation for the World Conference<sup>lxxxvii</sup>.

The Beijing Conference changed a lot of rights- based perspectives. It marked a turning point when Palesa Beverlie Ditsie<sup>lxxxviii</sup> made a statement by including ‘engagement’ and ‘visibility’ of lesbian rights activism with the U.N. process, to incorporate the words ‘sexual orientation’ in the Platform for Action<sup>lxxxix</sup>. If we are to delete the reference, as interjected by Switzerland, it would fail to protect the class or category it is intended to protect. At the Durban Conference, where member- states- Brazil, Canada, Chile, Ecuador, and Guatemala, together set out for an in-depth discussion to re-create a worldwide development map on this matter<sup>xc</sup>. Amendments are a fair move- countries such as Saudi Arabia, Pakistan, Egypt, Libya, and Malaysia deleted words disrespecting sexual orientation in the Brazilian resolution to the CHR, 2003. Further, they inserted ‘cultural diversity,’ ‘cultural pluralism,’ and the preservation of ‘cultural heritage and traditions’<sup>xc</sup>.

***(a) ASEAN Human Rights Declaration***

Association of Southeast Asian Nations ASEAN was founded in 1967 by the governments of Indonesia, Malaysia, the Philippines, Singapore, and Thailand for the promotion of intergovernmental economic growth and through that social progress and cultural development in the region. ASEAN now comprises of the states of Brunei, Cambodia, Laos, Myanmar, and Vietnam. The ASEAN Charter had expressed the need for the establishment of an ASEAN human rights body to protect ‘human rights and fundamental freedoms.’<sup>xcii</sup>

State Islamic institutions in Malaysia have expressed their concern over the inter-mingling of religious pluralism and liberalism which would increase numerous ‘sins’ such as same sex marriages, apostasy, and deviant behaviour. In Malaysia, the Jabatan Kemajuan Islam Malaysia, Department of Islamic Advancement of Malaysia “JAKIM” have opposed liberalism as a recourse- like that of the Islamic State of Syria/Iraq mentioning *jihad* for both<sup>xciii</sup>. There are, however, several reform groups such as Sisters in Islam and the Islamic Renaissance Front, are fighting for tolerance, religious plurality, and equal rights within Islamic Sharia-based normative framework<sup>xciv</sup>.

Today, ASEAN is spearheading progress in recognizing fundamental human rights- Taiwan’s Apex Court ruled that stereotypical binary marital union was against their constitution which effectively means that Taiwan is the first country to legalize gay marriages<sup>xcv</sup>. In 2018, India took progressive steps to legalize gay marriages within their civil law. While Taiwan is the first country to legalize same-sex marriage, Vietnam on the other hand, decriminalized it in 2015. Later that year, they passed a law which provided legal recognition to transgender people-undergoing sex re-assignment surgery to register under their new gender. It would become easier for them to avail access to state-sponsored health and public services.

There is still a long way to go- barriers of marginalization and discrimination have made huge strides in ASEAN countries. An LGBT rights group SOGI Foundation- uses ‘corrective rape’ to cure lesbians of their sexual orientation. Besides such unlearning, there is a large population facing discrimination in jobs, targeted harassment for being homophobic and transphobic. There is little attention given to redress the problem of hate crimes in the region. In January 2018, Indonesia made headlines when policeman in Aceh shaved the head of a trans woman and made her wear male clothes.<sup>xcvi</sup> In 2012, the ASEAN Human Rights Declaration was presented by the ASEAN Intergovernmental Commission on Human Rights and was

unanimously adopted by all the member states. Articles 1 and 2 of the AHRD provide for equality before the law without distinction of any kind, such as “religion,” “gender,” and “political or other opinion.” Article 6<sup>xcvii</sup> states that it is “the primary responsibility of all ASEAN member states to promote and protect all human rights” that are stated in the AHRD. However, Article 7<sup>xcviii</sup> adds emphasis on the cultural relativism aspect for the realization of human rights in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical, and religious backgrounds.

However, AHRD can be reduced to merely being an ornamentation of a framework providing lip service in the name of a custodian of the human rights in the region. The Declaration has enunciated the rights wrapped in the ASEAN norms of non-intervention and sovereign equality.<sup>xcix</sup> There is no mention of any mechanisms in the Declaration for the protection of rights and the “AICHR” focuses more on the future promotion and not on protecting individuals whose rights have been violated. The dichotomy of the protection of human rights on one hand and the commitment to traditional ASEAN norms on the other brings about the member states getting away with flagrant violations of human rights.<sup>c</sup>

The “old”<sup>ci</sup> ASEAN has to a degree emphasized on national sovereignty, restricting the full application of human rights under cultural exceptions and differences. The limitation to the full enjoyment of human rights under ASEAN found in Articles 7 and 8<sup>cii</sup> reduce the universal and indivisible nature of these rights. The realization of these human rights cannot be made in contexts of a specific region or nation.<sup>ciii</sup> Brunei’s commitment towards human rights is largely symbolic of international diplomacy<sup>civ</sup>. The ASEAN-synthesis<sup>cv</sup> among the member-states follow a traditionalist position in religious affairs, commitment to human rights, sovereign equality, and policy of non-intervention. ASEAN’s concern with policy of non-intervention is majorly responsible for rendering a relentless terrain for implementation of human rights practices. One of the more progressive steps taken under the ADHR have culminated in the discussion about rights for the first time. However, these discussions are empty negotiations merely set to satisfy international pressure to acknowledge human rights than the moral weight of the documents itself<sup>cvi</sup>.

Brunei had become a signatory to the AHRD in November 2012 at a leaders’ summit in Phnom Penh. Considering the actions of Brunei and its implementation of inhumane punishments such

as stoning to death and flogging, the shortcomings of ASEAN are glaringly brought to light. During the Phnom Penh Declaration, concerns were expressed by the US State Department stating that certain principles enshrined in the Declaration “could weaken and erode universal human rights and fundamental freedoms.”<sup>cvii</sup> The State Department also criticized the “cultural relativism” of the Declaration and the implication that “individual rights are subject to group veto.”<sup>cviii</sup> ASEAN has been seemingly absent from taking a stand or giving out any statements about Brunei’s new pernicious penal laws. However, representatives from ASEAN NGOs have written a letter to Dr. Amara Pongsapich, Chair of AICHR, expressing the graveness of the situation and highlighting the disastrous impacts of the law not only in Brunei but also on its neighboring nations.<sup>cix</sup>

***(b) Convention on the Elimination of all forms of Discrimination Against Women***

Human rights documents are apparently a farce! It is- and more so, when its nature and assortment of rights turn to be outrightly provisional, or at best open-ended with temporary promises. A judge in this cause, has a highly incentivizing role to play, he could either choose to stick within the boundaries of his traditional doctrinaire discourse or challenge his own subjective instincts. But the bigger question is- why should a judge continually reinvent “CEDAW” discourses in a domestic court? <sup>cx</sup> That would follow a *ceteris paribus*- where international reputation, is forged and formulated on compliances to international law. Least adhered to are human rights, because of little incentives received in compliance, but it is higher in trade and security issues, or environmental issues for that matter.<sup>cxii</sup> The question of human rights does not ‘shock’ this central aspect.

Damaged reputations in human rights would eventually take on some degree of deviance among other trading and securitizing nations around the world, it would be just a matter of time. Deviance to human rights documents, one such as CEDAW, reflects a general sense of non-abidance<sup>cxiii</sup>. The international system works on the principle of mutual compliance, lest severe costs shall hinder prospects of mutual co-operation, international goodwill, and a loss of general interest in a state’s community<sup>cxiii</sup>. India’s once failure to adhere to the Comprehensive Test Ban Treaty, as Richard Williamson remarks, ‘severe costs to the nation’s reputation and perception as a trustworthy member of the international community’<sup>cxiv</sup>. It is a presumptuous ‘good’ reputation that brings some form of ‘expected’ reliability among partners

to trust other world nations within a multifarious international system. For us as international lawyers, we couldn't set out to agree more on this- it is truly a principal mechanism which governs a high rate of treaty compliance and cannot be put to negotiable terms.

The questions for resolution in this paper, are quite hard to put. The challenge put to LGBTQ rights at the forefront of human rights discussion is even bigger. It is because, 'gay rights' as a class, does not fall within traditionally contextualized categories of human rights discussion. Thanks to the liberationist front, which has encouraged a call for better understanding the nature and reformulation of human rights perspectives within its designed 'categories'. Such a categorical interpretation of human rights would be inevitably dangerous as it would lack amendment procedures. Changing circumstances will naturally out-do primary obligations within a society, let's say at a given space and time ratio. It can be made even by 'deliberately adapting'- by either 'eliminating the old rules or introducing new ones'<sup>cxv</sup>. And it's all in the interest of reputation. Recounting Hobbesian reasons, if one nation 'rationally' limits or expands its rules, all other nations would follow suit till it creates 'one superpower world'. And we don't want that, do we? In realpolitik terms, such exchange of prerogatives might end up giving world nations power to internalize some sort of 'international rule-making power'<sup>cxvi</sup>.

No matter if an 'international rule of law' is kept in place – it would put a greater pressure on the sole remaining superpower who could disbalance newly formed international rules and obligations. Besides, does an international rule of law really stand to be a good chance? The answer lies mostly within a dismal scope- no one would legislate it, rather its growth through disparate judgements without a central lawgiver would play in. In the future, an international rule of law, at least in the governance of human rights would question any Nation on its 'internalized normative constraint'<sup>cxvii</sup>. Treaty compliance and international reputation can be directly complimented as there is a 'minimalist sort of international rule of law'<sup>cxviii</sup>. For an even bigger implementation of international rule of law- one Nation must accept the consequences of one's breach<sup>cxix</sup>. To prevent what would be analogous to international civil disobedience, it is essential that there is some form of international rule of law or 'institutionalization of soft law'<sup>cxx</sup> to guide the behaviour of people and states. It would alleviate a class of 'queer rights' as human rights.

While speaking of legitimacy within an international rule of law, it brings out a complex yet thriving relationship between globalization and global justice. If Hobbesian view is correct, and there is one central law giver or any coercive institution, there must be some critical engagement in the first place. Such coercive institutions must be legitimate, should empower their subjects with sufficient autonomy, to even dissent, to secure needs of its subjects and strive to bring cooperation among other coercive international institutions<sup>cxix</sup>.

***(c) Problematic implementation of CEDAW***

Being a signatory to CEDAW isn't all glorious and overwhelming for a high international reputation. And it's not Brunei alone. Nations like Brunei itself, frequently lack 'specific and sufficient' information on the status of implementation of CEDAW, for example, as a hugely contested human rights document. There exists a sort of intersectionality among other categories of discrimination, if its CEDAW. Being a woman brings out furthering grounds of discrimination such as- 'race, nationality, religion, sexual orientation, age, and immigrant status' <sup>cxixii</sup> Therefore, one of the key factors of addressing discrimination must be made out for women.

With addressing 'gay rights' as a class of discrimination and human rights violation, it is essential to initiate a pressing attempt at decriminalizing homosexuality across world jurisdictions. There should a solidly planned strategic direction and must address barriers in providing equality status to LGBT persons, developing legal principles for equality of LGBT persons, an equality-based jurisprudence for LGBT persons with further attempts made on unification of such concepts<sup>cxixiii</sup>. Considering Brunei- it is not a party to the International Covenant on Civil and Political Rights; however, it joined Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That doesn't solve much of the problem either- while given the 'soft law' nature of international law; human rights for that matter, where much of the public space for at least the non-Muslim population is largely regulated or at best- monitored, by a range of religious and administrative activities. International obligations are represented by Brunei's government organizations- the Ministry of Religious Affairs "MoRA", the State Mufti Department, and the Islamic Religious Council- or to say, Brunei's international reputation is largely formulated and regulated by officials in Islamic positions<sup>cxixiv</sup>.

On the first look of Brunei's Syariah Penal Code Order, there appears different sentences and varying degrees of burden of proof<sup>xxxv</sup>. Is it that the Sharia's applicability is disproportionately met to hold non-Muslims accountable for their interactions with Muslims and other non-Muslims alike? And is it also that death penalty would be met out to Muslims changing their fate, as per the moratorium? These are still questions with unclear answers. And to Islamic policy makers in Brunei's official Islamic positions, how far have the compliances towards the 'Convention on the Elimination of All Forms of Discrimination against Women' been enforced? Given Brunei's recent crackdown on LGBT, as a class of their religious non-conformism tendencies, look at how far Brunei is along CEDAW's monitoring compliances.

<b>U.N. DEVELOPMENTS IN PROTECTION OF THE RIGHTS OF SEXUAL MINORITIES</b>	
<b>Year of Change</b>	<b>U.N. Resolutions, Joint Statements and Reports</b>
<b>2002</b>	Resolution 2002/77 was passed to ensure that no death penalty should be imposed on non-violent sexual relations between two consenting adults by the Commission on Human Rights, Geneva.  Resolution A/RES/57/214 was passed to ensure no arbitrary, extrajudicial or summary killings were exercised by the government, labeled at the General Assembly, New York.
<b>2003</b>	Introduced, and then later withdrawn in 2004 at the Commission of Human Rights, Geneva (Brazilian Resolution)- on sexual orientation and human rights.
<b>2005</b>	New Zealand delivered a Joint Statement on behalf of 32 states at the Commission of Human Rights, Geneva.
<b>2006</b>	Joint Statement delivered by Norway on behalf of 54 states at the Human Rights Council, Geneva.
<b>2011</b>	Joint Statement delivered by Colombia on behalf of 85 states at the Human Rights Council, Geneva.
<b>2011</b>	Human Rights Council's 19 <sup>th</sup> Session adopted the Resolution A/HRC/17/L.9/Rev.1. called as the South African Resolution- on sexual orientation and gender identity (SOGI)
<b>2011</b>	Report of the U.N. High Commissioner for Human Rights (A/HRC/19/41) on SOGI-violence and discrimination.
<b>2012</b>	Resolution A/RES/67/168 was adopted without a vote by the General Assembly in New York that dealt calls on government to investigate killings because of SOGI.
<b>2014</b>	Resolution A/HRC/27/32 adopted by the Human Rights Council at Geneva, called as the LAC4 Resolution.
<b>2015</b>	Report A/HRC/29/23 of the U.N. High Commissioner for Human Rights which analyzed discrimination and violence against individuals on SOGI.
<b>2016</b>	Resolution A/HRC/32/2 was adopted by the Human Rights Council at Geneva for protection against violence and discrimination on SOGI, called as LAC7 Resolution.
<b>2018</b>	Joint Statement delivered by Argentina on behalf of 67 states at the General Assembly, New York.

Figure 1.3 – An overview of developments to protect sexual minorities by the U.N (as of 2018)<sup>cxvii</sup>.

Article(s)	How far along compliances with CEDAW	Imposed Government Obligations (if any)
Article 2 (d)	To 'engaging in any act or practice of discrimination against women'	An obligation on public authorities and institutions
Article 2 (g)	To 'repeal' all national legislations which are in discrimination to women	How far along is Brunei in repealing Islamic tendencies within their legislative machinery?
Article 4 (1)	To take 'temporary special measures'	Has Brunei taken any special measures to bring in equality of opportunity and treatment (especially to the LGBT class?)
Article 5 (a)	To 'modify social and cultural patterns of conduct'  To 'elimination of prejudices and customary'.....'all other'	Has Brunei shown ready willingness since then to change stereotyped roles of men and women?  If 'all other' can be interpreted to include religious patterns of social interaction by Brunei and if it would be willing to bring in such interpretation?
Article 7 (b)	To participate in the formulation of government policy at 'all levels of government'	Has Brunei been acceptable to change? Only 3 official Islamic positions regulate and formulate government policy- Ministry of Religious Affairs (MoRA), the State Mufti Department and the Islamic Religious Council
Article 13	To take 'appropriate measures' in giving- (a) 'right to family benefits' (b) 'right to bank loans' (c) 'right to participate in recreational activities'	Has Brunei authorities shown to be willing to take these 'appropriate measures' for LGBT as a class of discrimination ?
Article 16 (d)	To allow in taking rights 'as parents irrespective of marital status'	Has Brunei allowed such reformative rights, not necessarily as men and women but simply based on equality between men and women?

Figure 1.4 – An overview of Brunei's obligations as imposed by CEDAW<sup>cxviii</sup>

## RELEVANCE OF COMPARATIVE DEVELOPMENTS IN INTERNATIONAL LAW

Uganda, an example of a complex labyrinth of precolonial practices of homosexual relationships, is set against its present troubling political and discriminatory socio-economic atmosphere. Numerous studies have shown the existence of traditional practices of homosexuality, and these include- Marc Epprecht's 2008 study of San group in Guruve, Zimbabwe<sup>cxxviii</sup>, E.E. Evans- Pritchard's 1970 study of the Azande in Central Africa<sup>cxxix</sup>, and John Faupel's 1962 study of the Ugandan kingdom of Buganda.<sup>cxxx</sup>

But what is an 'un-African' rationale for a LGBT class? Earlier, Uganda's non-conformism to accepted norms of sexual conduct and sexual identity was not frowned upon until the arrival of forceful elements of western imperialism in tandem with Christian conservatives - it served homophobia as a political tool<sup>cxxxi</sup>. It led to the introduction of state-sanctioned homophobia in the form of religious laws. The point is that Uganda must realize its sovereign status to try to take a lead role in the treatment of sexual minorities, sexual rights, its traditional and cultural values. Bahati's Anti- Homosexuality Bill<sup>cxxxii</sup> is a notorious reminder of the Nazi's treatment of homosexuals that gave rise to xenophobia during high rate of unemployment and low wages<sup>cxxxiii</sup>.

### A. Notable developments in Sexual Orientation and Gender Identity

Despite differing opinions on same-sex partnerships and adoption rights across nationalities, India too, holds a painful trajectory of precedents- one being that of *Queen Empress v. Khairati*<sup>cxxxiv</sup> in 1884, around proposed variants of gender. Gender identity is where a person feels a deep sense of conformity or non-conformity between their gender and biological sex. The Court was to decide if a *eunuch*, if habitually wears women's clothes, constitutes an offence under section 377 of Indian Penal Code<sup>cxxxv</sup>. In another case, *Nowshirwan v. Emperor*<sup>cxxxvi</sup>, the Judge was not convinced that Nowshirwan had forced carnal intercourse with Ratansi- on the ground that she visited the appellant's hotel and had tea. In fact, appellate decision gives us a clue that the Judge was convinced of a consensual rather than forced relationship. A petition challenging the constitutional validity of section 377 was filed by the Lawyers Collective for it to exclude criminalization of same sex consenting adults in private. Besides, it bred hope to limit the section's use to cases of child sexual abuse<sup>cxxxvii</sup>.

## **B. Global importance of international criticism in domestic affairs**

It's a simple solution really, but with hugely unacceptable social consequences within a predominant religiously- oriented legislative machinery. And to begin with, there really isn't any 'good moral reason'<sup>cxviii</sup> for exempting 'gay rights' as a class or category of human rights from seeking protections mandated in international human rights documents. Every Nation around the globe, in its international relations with and among other world nations, plays 'two-level games', a metaphor on differing game pawning between domestic politics and foreign affairs<sup>cxix</sup>. Does the politics of shaming hold any significance internationally? And if that can question reasonable government function, then global developments in gay rights should be of legitimate State interest. And why shouldn't it be so- there is no individual genetic or psychological control over one's sexual orientation. Besides, there is also no amount of societal influence which can be traced out, yet sexual orientations manifest with largely unaccounted public consequences<sup>cxl</sup>. In that case, shouldn't Brunei's policymakers be urged to look at good faith discrimination? And especially one that does not lead to outright public outrage, bigotry, and other prejudices.

A 'good moral standing'<sup>cxli</sup> for a good faith discrimination does not look socially relevant between two consenting adults, lest their understanding shall end up to be trivial. Being openly gay in Brunei is seen to be an obvious reason for 'sanction' as Brunei's policymakers bring on alleged consequences which aren't internationally acceptable. It is rather a self-fulfilling prophecy<sup>cxlii</sup>.

### ***(a) Moratorium on the last phase of enforcement***

The international outcry faced by Brunei Darussalam's administration had temporarily resulted in the government placing a moratorium on the implementation of the Syariah Penal Code. But was this step enough? What was the rationale behind placing the moratorium? The moratorium was in response to a letter by the Human Rights High Commissioner which included a caveat that Brunei was in clear violation of the 1948 Universal Declaration of Human Rights, ratified by the country in 2006.<sup>cxliii</sup> Brunei's foreign ministry then released a statement saying that the Sultan was firmly committed to the international obligations and would adhere to all the treaties and conventions which Brunei is a party to. He also expressed his caution and said that there might have been a misconception about the Syariah Penal Code Order and made clarifications

that the code focused mainly on “prevention” and not “punishment.” He also explicitly stated that the provisions relating to sodomy would not apply to Non-Muslims unless the act was committed against a Muslim.<sup>cxliv</sup>

Brunei has defended its new SPCO and expressed belief that it is in line with the Islamic tenets. It has time and again clarified how the penalty would be carried out and the high standard of proof required for a conviction. The Prime Minister’s Office of Brunei issued a statement stating that Brunei has been practicing a dual legal system, one based on Sharia law and the other on common law. Moreover, noting that with the implementation of SPCO, the country aims to further integrate the tenets of Islam into the legal system, criminalizing deterring acts that are against the teachings of Islam.<sup>cxlv</sup> The administration of Brunei Darussalam seems to turn a blind eye towards the deeply problematic wording of the law and its adverse impact on the rights of the LGBTQ+ community, which is already in a precarious state in Islamic countries like Brunei. Ordering a moratorium can in no way be seen as a triumph of human rights organizations as the government has made clear its intention to implement the provisions at some point. Bruneian authorities have explicitly denied repealing the law which has exponentially worsened the conditions of the members of the LGBTQ+ community in the nation.

### ***(b) Social repercussions of the Code***

The implementation of the Syariah Penal Code Order in Brunei, if not halted, would have led to overcriminalization, and meting out of harsh and severe punishments for a variety of offences, such as sex outside marriage, alcohol consumption, renouncing Islam etc. But the worst affected would be the members of the LGBTQ communities, which are sexual minorities. The new code was disproportionately biased against LGBTQ+ people. It considered them as lesser humans than heterosexuals.

Brunei Darussalam's constitution does not bar the government from implementing the Syariah Penal Code Order as the official religion of Brunei is Islam.<sup>cxlvi</sup> If the code were imposed on the population in letter and spirit, the consequences would have been adverse. The law is most often than not developed and created by people who are powerful and dominant. Hence, it usually fails to consider the lived experiences of minority groups. The law assumes that all its subjects are neutral and objective, hence acting contrary to the less protected group's

interests.<sup>cxlvii</sup> Such legal classifications of genders have practical consequences, and it becomes more and more difficult when gender delineates individuals' opportunities, dignity, inclusion, and personal safety.<sup>cxlviii</sup>

The Syariah Penal Code Order weighs the life experiences of sexual minorities on a different scale from the experiences of the “mainstream,” thus normalizing the latter while criminalizing the choices of the former. If implemented it would have been a serious desecration of human rights, individual liberty and privacy and social equality. The Sultan and Yang Di-Pertuan of Brunei Darussalam, Sultan Haji Hassanal Bolkiah Mu'izzaddin Waddaulah, is the world's second longest-reigning monarch after Queen Elizabeth II, and one of the wealthiest people in the world. Once during a public address, he emphasized stronger Islamic teachings and said that Brunei has always devoted itself to Allah.<sup>cxlix</sup>

Such statements by powerful authorities usually misguide people, and so it happened in this situation as well. The orthodox public associated the new Penal Code as upholding the tenets of Islam and preserving the faith. Even before the power of law was attached to code awaiting implementation, Brunei's atmosphere became delicate. The right to life of the people and children belonging to the LGBTQ community has been put in danger where once the only punishment for homosexual activities was imprisonment up to 10 years. People from these groups could feel the rising hostility against them.<sup>cl</sup>

In the garb of inculcating religious, moral values, what the code did was to criminalize actions and choices that did not fall in line with the teachings. Such inhuman and degrading punishments contravene human rights.<sup>cli</sup> The Sultan, although despite giving reassurances in his speeches, implicitly supported such a law by calling it “special guidance from God” and a “part of the great history of Brunei.”<sup>clii</sup>

Social repercussions were not only felt in Brunei but in other parts of the world as well. In Indonesia, the largest Muslim majority in the world, some people said that these were the “laws of Allah” and would be a “savior for the next generation.” People from Bangladesh and Pakistan also had some mixed reactions ranging from applauding the law and calling modernity as “vulgar” to calling it “laughable.”<sup>cliii</sup>

## CONCLUSION

The Amnesty International puts forward its concern over Brunei's Penal Code and urges an "immediate halt"<sup>cliv</sup> than implement death by stoning for gay marriages. However, the Brunei Project, another Rights group propagates a no-boycott of Brunei-owned businesses as it shall be counter-productive to an underemployed population. Rather, a change should be drawn along the policies and laws that are implemented. Human rights in Brunei are "essentially Islamic"<sup>clv</sup>. This is clearly lacking in flexible approaches to determine a human right "fit" for Brunei- majorly to accusations that a westernized "man-made" doctrine shall be incompatible with God's legislative commandments or should be given an inferior position. Brunei has annotated multiple meanings to their human rights discourse within regional and religious diplomacy.

After discussing the controversial provisions of the new Syariah Penal Code, their validity with respect to the constitution of Brunei Darussalam and the International norms, the International criticism it attracted worldwide, the repercussions felt in the country, and the fragile status of LGBTQ+ rights in the country, we can conclude that it is important to improve awareness and sensitize people about these issues. There are wide disparities around the globe. On the one hand, countries are recognizing the rights of the LGBTQ+ community and accepting them as a part of our society, whereas in some countries even talking about these issues is taboo. It is important to place emphasis on the importance of human rights, irrespective of nationality, gender, class, or caste. It is important to increase the threshold of basic human rights and make them available to the least advantaged global society sections.

Brunei's Sharia has long been a part of Islamic criminal offenses, and the 2013 law is a result of Sultan Hassanal Bolkiah's hard stand for a stricter religious penal code. Brunei's Syariah Penal Code Order, 2013 forces a harsh version of Islamic law which imposes religious sanctions even for those individuals who choose to convert their faith. The international crackdown has been severe since the moratorium on death penalty yet there has been no revival or removal from the penal code<sup>clvi</sup>.

## SUGGESTIONS

International law is not a dismal hope, at least not yet! Its rules provide an organizational structure which justifies government actions at domestic levels. Moreover, domestic political interests and belief about international legal instruments are also shaped.<sup>clvii</sup> Hathaway's article<sup>clviii</sup> would argue that treaties, for example, do little to ensure internationally acceptable behaviors. That can't be entirely true as states have developed a greater sense of democratic accountability<sup>clix</sup>, let alone for the sake of maintaining 'two-level games' for a goodly international reputation, least of all in human rights matters. Human rights accountability is seen highest among nations which harbor a strong civil society<sup>clx</sup>. But on a global scale, is homosexuality a ground of discrimination in religious and secular law? If so, our strategies to address grounds of commonality in legal cultures seems to be an immediate resolve. This agenda brings out an intersectionality among constitutional courts, popularity of certain legal systems, and cultural, religious, and political contexts within the national constitutional jurisprudence<sup>clxi</sup>.

## STRATEGIES TO CHALLENGE CRIMINALIZATION OF HOMOSEXUALITY ACROSS JURISDICTIONS

### (a) By invoking equality as a clause in national constitutional jurisprudence<sup>clxii</sup>

A sign of progressive constitution is its readiness to adapt to social situations quickly. The public consequence of homosexuality is not a social derivative and is neither genetic nor psychological. Therefore, civil societies must *pro tanto* check such behaviour as soon as they emerge lest they shall fall into colonially interpreted constitutional principles. It would be detrimental to the relief provided by international human rights lawyers and international organizations.

### (b) Reading 'sodomy' as 'not applying'<sup>clxiii</sup>

In more recent judgements, in India for example, *Naz Foundation* case creates a progressive way forward in reading down language which could deter secular laws, as against religious laws. Neutralizing 'unnatural offences' and 'carnal knowledge of any person against the order of nature' can serve to be a ground for human rights advocates to challenge secular laws carrying offensive and discriminatory terms to gays and lesbians.

**(c) Arguing violations of equal enjoyment of other rights because of criminalization<sup>clxiv</sup>**

Decriminalizing homosexual tendencies could bring better applicability to other international human rights documents, and curate social disadvantage and discrimination. Healthcare, family rights, bank loans, mortgages and other financial credit would become an autonomous right on principles of equality. It would also overcome any political opposition, public criticism to homosexual conduct and innate forms of violation of human dignity.

**(d) Allowing LGBT as a class to claim equal enjoyment of right to be free from torture and other cruel, inhuman, or degrading treatment or punishment <sup>clxv</sup>**

To claim equality shouldn't be an opportunity. It should be independently swayed by national leader's minds and national capacities. The role of democracy is undermined here. Brunei has not yet ratified the Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment- hence it can be that treaty commitment have no independent effects on State's repressive human rights behaviour. To learn protection of human rights- 'consensual homosexual conduct'- 'abuse and punishment', 'imprisonment and civil fines and 'harassment' of LGBT is unreasonable and unjustified.

**(e) Indirect forms of discrimination should be corrected, if not ignored <sup>clxvi</sup>**

Potential attention of policymakers must be drawn in here. Ambiguous legal language and wrong application of legal provisions will leave courts and law enforcement officer to 'target' persons of different sexual orientation. Full and effective equality among LBGT should be sought with neutral language- addressing indirect discrimination against the community, as a separate class of human rights attention.

**(f) Allowing ready remedy against harassment and rampant criminalization <sup>clxvii</sup>**

To improve and advance conditions of homosexuals across the world, several national and international concerted efforts are required. Harassment<sup>clxviii</sup>, on a specific note, is defined as a form of discrimination. Therefore, workplace, schools, universities, and hospitals must develop their constitutional jurisprudence to further protection for homosexuals against discrimination. Towards the making of a 'universal decriminalization' policy for homosexuals, human rights

advocates should strategize their claims for homosexuality to lead to a successful litigation. Conceptual frameworks for equality law provide strategies made to challenge barriers faced by homosexuals, terms of violation of equal rights, invoking legal principles related to equality, if best put across specific local circumstances.

## ENDNOTE

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- <sup>i</sup> CONSTITUTION OF BRUNEI DARUSSALAM, Part II, art. 2; Abdul Latif bin Haji Ibrahim, HAJI, *Issues in Brunei Studies*, 1<sup>st</sup> ed. (Bandar Seri Begawan: Akademi Pengajian Brunei, Universiti Brunei Darussalam, 2003) at xii + 238. Awang Md. Zain Haji, SERUDIN, Z. TAHIR, N.H. MAJID, “*The Malay Islamic Monarchy: A Closer Understanding*” (Bandar Seri Begawan: MTMIB, 2013) at 23.
- <sup>ii</sup> MÜLLER Dominik M, “Paradoxical Normativities in Brunei Darussalam and Malaysia” (2016) 56 *Asian Survey* 3 at 422.
- <sup>iii</sup> *Ibid.*
- <sup>iv</sup> THAMBIPILLAI Pushpa, “Brunei Darussalam: A Time for Stock Taking” (2015) *Southeast Asian Affairs* 75.
- <sup>v</sup> THAMBIPILLAI Pushpa, *supra* note ii at 83.
- <sup>vi</sup> Abdul Latif bin Haji Ibrahim, HAJI, *supra* at 206; *Melayu Islam Beraja: Suatu Pendekatan* by Abdul Latif bin Haji Ibrahim, HAJI, Zain SERUDIN. Bandar Seri Begawan: Dewan Bahasa dan Pustaka, 1996. xxxiii + 11.
- <sup>vii</sup> TSUNG HangTey, “Brunei: Entrenching an Absolute Monarchy” in ed MENZEL Clauspeter Hilland Jo`rg, *Constitutionalism in Southeast Asia* (Singapore: Konrad Adenauer Stiftung, 2008), 34.
- <sup>viii</sup> “Call to Shun Deviant Beliefs, Follow Prophet’s Teachings” *Brunei Direct* (15 November 2012), online: Bandar Seri Begawan [http://www.sultanate.com/news\\_server/2012/15\\_nov\\_1.html](http://www.sultanate.com/news_server/2012/15_nov_1.html). “Muslims Urged Not to be Swayed by Guises of Islamic Liberalism” *Brunei Times* (9 February 2013), online: Human Rights Resource Centre <http://hrrca.org/wp-content/uploads/2015/09/02.-FOR-Brunei.pdf>.
- <sup>ix</sup> FORTMAN Bas de Gaay, “Minority Rights: A Major Misconception?” (2011) 33 *Human Rights Quarterly* 2 at 265.
- <sup>x</sup> *Sorensen v. Denmark*, [2008] Eur. H. R. Rep. 46 at 29.
- Rasmussen v. Denmark*, [2008] Eur. H. R. Rep. 1 at 58.
- <sup>xi</sup> Abdul Latif bin Haji Ibrahim, HAJI, *supra* at 101; OTHMAN Mahmdud Seadon, *Ke Arah Perlaksanaan n Undang-Undang Islam di Negara Brunei Darussalam*, 1<sup>st</sup> ed. (Bandar Seri Begawan: UBD, 2001) at 2ff.
- <sup>xii</sup> MANSURNOOR Iik Arifin, “Formulating and Implementing a Sharia Guided Legal System in Brunei Darussalam: Opportunity and Challenge” (2009) 1 *Sosiohumanika* 2 at 219-48.
- <sup>xiii</sup> MÜLLER Dominik M, “Sharia Law and the Politics of ‘Faith Control’ in Brunei Darussalam: Dynamics of Socio-Legal Change in a Southeast Asian Sultanate” (2015) 46 *Internationales Asienforum* 3/4 at 313-45.
- <sup>xiv</sup> SERUDIN Mohd. Zain, *The Malay Islamic Monarchy: A Closer Understanding* (Bandar Seri Begawan :MTMIB, 2013) at 23.

<sup>xv</sup> GUNIA Amy, “This Is What It’s Like to Be Gay in Brunei, Where Homosexuality Is Now Punishable by Being Stoned to Death” *TIME* (April 5, 2019), online: *TIME* <https://time.com/5563308/what-its-like-gay-brunei/>

<sup>xvi</sup> GRIFFITHS John, “What is Legal Pluralism?” (1986) 19 *Journal of Legal Pluralism* pp. 1-47.

<sup>xvii</sup> MÜLLER Dominik M, *supra* at 416.

<sup>xviii</sup> *Universal Declaration of Human Rights*, GA Res. 217 (III), UN Doc. A/810 (1948).

<sup>xix</sup> *Ibid.*

<sup>xx</sup> *ASEAN Human Rights Declaration (AHRD) and the Phnom Penh Statement on the Adoption of the AHRD and its translations* (2013), Preamble, General Principles 2, online: AHRD [https://asean.org/wp-content/uploads/2021/01/6\\_AHRD\\_Booklet.pdf](https://asean.org/wp-content/uploads/2021/01/6_AHRD_Booklet.pdf)

<sup>xxi</sup> *Charter of the Association of Southeast Asian Nations* (2007), at 1, Preamble, online: The ASEAN Charter <https://asean.org/wp-content/uploads/images/archive/publications/ASEAN-Charter.pdf>

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