

## Casting the First Stone: The Significance of Brunei Darussalam's Syariah Penal Code Order for LGBT Bruneians

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*Long before Brunei enacted its controversial law allowing stoning to death for proven homosexual acts, the Sultanate was considered one of the most 'worrisome' states in South East Asia for LGBT individuals. In addition to s 377 of its secular criminal Penal Code, there were laws and policies which prevented LGBT people identifying as LBGT, publicly engaging in gender-non-conforming behaviour, and speaking out, either individually or collectively, for equality and rights recognition. The government's silencing strategy meant little was known about its small and hidden LGBT community until the stoning law was enacted, when suddenly Brunei, and all its discriminatory and repressive laws came under scrutiny. The Sultan, an absolute monarch, backed away from this law and decreed a moratorium on the death penalty, but the law was not repealed, and the symbolism of its retention, along with an increased punishment under s 377, still sends a clear message to LGBT Bruneians and residents. This article aims to provide an overview of the laws, secular and Islamic, that affect the lives of Brunei's LGBT people, and to analyse the factors which direct, inform and allow its uncompromising stance.*

The months of April and May 2019 were momentous for LGBT<sup>1</sup> people in Asia, with seismic, but opposite, developments. On 17 May Taiwan's Legislative Yuan passed Asia's first same-sex marriage laws, while to its south, on 3 April, Brunei Darussalam brought in its Syariah Penal Code Order 2013 (SPCO), including an ancient penal regime of stoning to death for proven homosexual acts (*liwat*) between men,<sup>2</sup> and a mix of whippings, fines and imprisonment for proven female same-sex intimacy (*mushahaqah*). Unlike so many of Brunei's laws that fly under the radar of the international media, this law, which had made Brunei the first Asian nation to punish homosexual acts with death, could not be ignored by Brunei's united, vigilant and vocal LGBT movement. The brutality and symbolism of the penalty fuelled dismay but, importantly, it also galvanised action.

The response across the globe was instantaneous and powerful. Human rights groups, such as Forum-Asia,<sup>3</sup> the United Nations (UN), Western celebrities, corporations and governments, including Australia's,<sup>4</sup> demanded Brunei's Sultan jettison laws, which they described as 'draconian' (OHCHR, 2019), 'barbaric',<sup>5</sup> 'pernicious' (HRW, 2019), and 'sickening and callous' (Amnesty, 2019). Two days before they came into force, the UN High Commissioner for Human Rights, Michelle Bachelet, appealed to the government to withdraw its 'draconian new penal code, which would mark a serious setback for human rights protections for the people of Brunei' (OHCHR, 2019). The Sultan and Brunei's second Minister for Foreign Affairs,<sup>6</sup> Yusuf, made an initial spirited defence in reply,

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<sup>1</sup> This paper adopts the acronym LGBT for two reasons. First, LGBT was used by the Grand Mufti in his explanatory book on the Syariah Penal Code Order (2013) as a pejorative acronym for 'unnatural' and 'forbidden' acts which he deemed as 'threats to the world' (Juned, 2013: 95-97). However, in official government communications and publications, 'sexual orientation and same-sex relations' are used in preference to 'LGBT'. Second, LGBT is the term adopted by the *Brunei Project* which is the main non-government initiative advocating (on its Facebook site) for human rights, including LGBT+ matters.

<sup>2</sup> If not proven to the required standard, the lesser punishment of whipping by 100 strokes and a year's imprisonment applies.

<sup>3</sup> Forum-Asia published a 'Joint Open Letter: Urgent Concern about 2013 Syariah Penal Code for Brunei Darussalam' on behalf of ASEAN SOGIE Caucus (ASC), the International Commission of Jurists (ICJ), Asian Forum for Human Rights & Development (Forum-Asia) and the Southeast Asian Press Alliance (SEPA) on 10 April 2019.

<sup>4</sup> Foreign Minister Marise Payne is reported as stating Australia 'raised our concerns with the Brunei government on the introduction of the full Syariah Penal Code'. See Massola, 2019.

<sup>5</sup> Letter signed by 99 human rights and LGBTI organisations to US Secretary of State (Mike Pompeo), 11 April 2019.

<sup>6</sup> Sultan Bolkiah holds the position of the Minister of Foreign Affairs I, and in 2018, appointed Erywan Yusuf Minister for Foreign Affairs II.

affirming the Sultanate's commitment to human rights but justified these laws as 'ordained by Allah', claiming they were intended to 'educate, deter, rehabilitate and nurture rather than to punish', and, more specifically, that the two stoning provisions for 'adultery and sodomy are designed to 'safeguard the sanctity of family lineage and marriage of individual Muslims', while emphasising there were very 'high threshold evidentiary requirements' needed for a conviction (Yusof, 2019). It did not stem the tide. Voices of opposition outside the Brunei warned of retaliatory economic consequences for businesses and threatened boycotts of properties owned by the Sultan and his government, even global Magnitsky<sup>7</sup> sanctions were raised. A bill<sup>8</sup> calling for America to impose such sanctions was tabled in the United States Congress on 2 May 2019.

In response to what the Sultan described as 'questions and misconceptions' arising from the SPCO, he used his Ramadan *titah* (royal speech) to announce a concession. He would extend the de facto moratorium on capital punishment already operating under the common law system to the Syariah system as well. This placated many critics. However, the SPCO law was not repealed, nor were the detailed means for conducting a stoning,<sup>9</sup> and the lives of LGBT Bruneians would therefore not become any safer or easier. The law stands, and sends a powerful message on how LGBT people must be viewed. How did it come to this in a nation that defines itself as Darussalam, an 'Abode of Peace'?

This article aims to answer this question but first provides a brief snapshot of the nation and an overview and impact of the dual or hybrid laws<sup>10</sup> that criminalised same-sex relationships and LGBT acts: the inherited colonial secular Penal Code, and the recent religious SPCO. This article considers how and why Brunei Darussalam took its distinctive path in contradistinction to wider global momentum towards decriminalisation and LGBT legal inclusivity (more in line with Taiwan's stance) and more extreme than its near-neighbours, Indonesia and Malaysia, which are also experiencing a backlash against their LGBT citizens.<sup>11</sup> This article will consider four key factors that shape and inform Brunei's different stance on LGBT issues: (1) the nature of the state, lawmaking and reform; (2) the role for religion and its state-imposed interpretative process; (3) the constitution, courts and the judiciary; and (4) limitations on media, debate and commentary.<sup>12</sup> These set the context from which the SPCO law could emerge and take its place alongside other restrictive and repressive laws, which generally escape scrutiny or international criticism. The paper argues that the criminalisation of homosexuality and the stigmatisation and marginalisation of LGBT people is better understood not in isolation, but in the broader context of an absolute Islamic monarchy in Brunei.

## Snapshot

Brunei is a small Sultanate<sup>13</sup> in the South China Sea situated on the northwest corner of the large island of Borneo, which it shares with the Malaysian states of Sabah and Sarawak and the Indonesian province of Kalimantan. With a population of 434,076 Brunei is the smallest nation in the Asia. (WPR 2018). The government of Brunei routinely uses its smallness to justify exemptions from international standards especially in relation to the lack of government accountability and systemic breaches of human rights (Black, 2019: 105). However, Brunei is also one of the wealthiest states in Asia, with a GDP per capita PPP of US\$ 71,809.30 (Trading Economics, 2019). Its wealth

<sup>7</sup> The sanctions, including the freezing of assets, can be imposed by the American government on foreign government officials implicated in human rights abuses anywhere in the world. The Magnitsky Act (HR 6156) was passed by the American Congress in December 2012, in response to the 2009 death in a Moscow prison of Magnitsky, an investigator of Russian government fraud.

<sup>8</sup> Congresswoman Omar tabled a Bill to 'authorize the imposition of sanctions on officials of Brunei responsible for implementing the newly revised penal code, and for other purposes'. See, the Omar Bill (2019)

<sup>9</sup> Sections 172 and 173, Syariah Courts Criminal Procedure Code Order, 2018.

<sup>10</sup> Brunei's government is now describing its previously dual legal system as 'hybrid' to reflect greater Syariah compliance. See HRRRC, 2015: 57.

<sup>11</sup> See articles on Indonesia and Malaysia in this special issue of the *Australian Journal of Asian Law*.

<sup>12</sup> See Black, 2008: 105-42.

<sup>13</sup> Area is 5,770 square kilometres/2,226 square miles. Brunei is the third smallest nation in area in Asia, after Singapore and the Maldives.

comes from its petro-carbon resources and international investments and it was the latter that were susceptible to the international campaign against the introduction of the death penalty and additional criminalising LGBT relationships. Yet, although the nation's wealth flows to its citizens, it comes with the message that this is due solely to Sultan's benevolence. In return for his generosity, Bruneians are required to be grateful and loyal to their ruler. Of course, the Sultan personally benefits as well. At times he has been the richest person in the world (Bartholomew, 1990: 1) and, although a tiny country, the Sultan's royal family lives in the world's largest palace. Bruneians pay no income tax while enjoying a generous welfare system, known locally as 'Shellfare',<sup>14</sup> with free comprehensive medical and health care, free education, subsidised hajj pilgrimage, preferential government loans, well-paid government employment (Muller, 2015: 318), infrastructure, splendid public buildings, and even a free theme park. This 'welfare monarchy' (de Vienne, 2015: 285) takes care of its nationals from birth to death. The result is an affluent but government-dependent middle class content with their lot, supportive of the status quo, and unwilling to question their Sultan's vision for the nation. This, combined with strict censorship and sedition laws, ensures that opposition, even questioning of policies or law,<sup>15</sup> comes only from outside Brunei.

Brunei is a multi-ethnic and multi-religious nation. Brunei Malays comprise two-thirds<sup>16</sup> of the population, with Chinese, Indians, indigenous ethnic groups and expatriates roughly one-third (BEDB, 2013). There is also a large number of temporary immigrants estimated at 40 per cent of the workforce (Muller, 2015: 316) in retail, service, and construction jobs including what colloquially are known as the '3Ds' (dirty, dangerous and difficult). These foreign workers from Bangladesh, India, Indonesia and the Philippines take on low-paid work in the private sector, while Bruneians enjoy the better paid work with the government (Pennington, 2017).

Data on religious adherence varies a little, as it has been a decade since an official census on this, however the government data indicates the Muslim population is 78 per cent, Christians 9 per cent, Buddhist 8 per cent and indigenous and other religions 5 per cent (HRRC, 2015: 56). The Muslim population has increased from 63 per cent in 1981, with a decline in Buddhist and other categories, while Christian adherence remains relatively the same. Clearly, Muslims are in the majority but there is still a significant percentage of the population who are not (22 per cent or on some tallies and, when guest workers are included, maybe up to 37 per cent) (ADPAN, 2016).

LGBT people are not readily visible in Brunei. There can be no pride marches, rainbow symbols, or groups which openly support or identify with LGBT status, including online. Outright Action International described Brunei as 'the country with the most worrisome state of rights for LGBT people in Southeast Asia' (OAI, 2019). Individually and collectively, LGBT people in Brunei are afraid to actively canvas for the equality, recognition or basic rights that their nation, as a signatory to the UN Charter, is obliged to give.<sup>17</sup> The threat of criminal consequences looms large. This is at odds with the visibility of activism and human rights advocacy found elsewhere in Asia. As will be discussed later, the impact of both secular and Syariah criminal laws, discriminatory practices and publicly articulated disdain from the highest echelons of government has meant denial, shame, fear and anxiety for LGBT people in the Sultanate. Some choose to leave; some have been granted refugee status (Asia One, 2019); others enter heterosexual marriages to disguise their true orientation; but many stay quiet, lay low and rely on informal networks to connect with like-minded individuals. The Brunei Project,<sup>18</sup> run from Australia, provides an online forum in which issues can be raised and

<sup>14</sup> A large proportion of Brunei Malays either work for Shell Oil or the government, and it is on Shell that the nation's fortunes ride.

<sup>15</sup> Discussed later in this article.

<sup>16</sup> <<http://worldpopulationreview.com/countries/> 2018>. The largest ethnic minority is Chinese, however, as the World Population Review points out, there has not been an official census in Brunei since 2004. This is why there is variance in demographic data on ethnicity and religion in the Sultanate.

<sup>17</sup> As a State of the UN, Brunei Darussalam is obliged by the UN Charter to promote 'universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. Brunei has acceded to only three of the core UN human rights instruments: CEDAW, CRPD and CRC. Each contains reservations for the application of Syariah.

<sup>18</sup> See: <<https://www.facebook.com/thebruneiproject>>.

connections made. Another website, Globalgayz,<sup>19</sup> gives accounts of lives of ‘suppression and anxiety’, as gay men manage cultural expectations and the rules of their religion. The site also notes research undertaken at the University of Brunei Darussalam, based on interviews in 2008 with 29 men living in Brunei who self-identified as gay. However, this research was undertaken and the note written in 2011, before the commencement of SPCO.

## A Dual Legal System: Double Impact for LGBT Bruneians

When Negara Brunei Darussalam<sup>20</sup> became fully independent in 1984, there were two streams of law. The bifurcation of the legal system commenced eighty years earlier. In an agreement of 1905/6, between its Sultan and Great Britain, Brunei became a Residency of Britain.<sup>21</sup> The Residency was a form of colonisation in which the Sultan as ruler retained *de jure* authority but the British Resident, representing the British Crown, advised him. This advice had to be taken on all matters, except on the ‘Mohammadan’ religion. The British recognised Brunei’s ethnic and religious plurality and set up *Kathi*, later *Kadi*, Courts for Muslims, which allowed application of limited aspects of Islamic law, and the Natives’ Court for ‘Asiatics’ and non-Muslim indigenous people. However, foremost in the legal system of the Residency was the English-style common law and courts, which, for criminal law, was transplanted from the Penal Code of the Straits Settlements.<sup>22</sup> This included s 377, the now infamous and ubiquitous provision recurring throughout British colonial penal law, which criminalised carnal intercourse with ‘any man, woman, or animal against the order of nature’.

For most of the 20<sup>th</sup> century, the colonial criminal laws had supremacy. Islamic law in the Kadi Courts was mainly for family, inheritance and personal status matters, with some jurisdiction for minor offences against Islamic morality and breach of religious duties. At that time, same-sex intimacy was not included. Otherwise, criminal law was the province of the secular system. As independence dawned, British norms and influences waned, and the Syariah system, which was by then institutionalised, bureaucratised and professionalised, took ascendancy. The goal of the Sultan and his religious scholars and advisers was for Islamic courts to mirror the secular courts in which there were two parallel but equal streams of law. The religious courts were upgraded and reformed in 1998 as Syariah Courts.<sup>23</sup> In the Sultan’s birthday *titah* of 1996 he announced that the incoming Syariah Courts were not just for the implementation of family laws, but were to apply ‘*Qunan Jina’i Islam*’ (Islamic Criminal Law) in its entirety as required by Allah, the Almighty.<sup>24</sup> Since then the policy was to recalibrate the nation’s laws to reverse colonial legal dominance in criminal law. The Sultan tasked the Ministry of Religious Affairs (MoRA) to make this a reality.

It took 15 years, but in 2013, the Sultan, in his 66<sup>th</sup> birthday *titah*<sup>25</sup> made the surprise announcement that he had given his royal consent to the SPCO. The first phase of SPCO commenced in 2014 with *taz’ir* (general offences).<sup>26</sup> The controversial *hudud*<sup>27</sup> offences would follow in two phases after enactment of a companion Syariah Penal Procedure Order. The *hudud* offences included the ‘classic’ penalties of amputation, executions and whippings, including stoning for *liwat* (homosexual

<sup>19</sup> See: <<https://www.globalgayz.com/gay-life-in-brunei/2188/>>.

<sup>20</sup> This is the nation’s official title. *Negara* originates from Sanskrit and means nation. *Brunei* comes from the Sanskrit word *Varuna/Baruna* referring to a nation of seafarers and traders. *Darussalam* is an Arabic term for Abode of Peace.

<sup>21</sup> Brunei was first a protectorate from 1888 before becoming a British residency<sup>21</sup> to assure survival of the ruling dynasty. In 1959, it became a protectorate again until full independence in 1984.

<sup>22</sup> Section 25, Courts Enactment 1908, Brunei adopted the Penal Code of the Colony of the Straits Settlement (Rev Ed 1835-1900) as its applicable law.

<sup>23</sup> Syariah Courts Order, 1998. See generally Black, 2009: 327.

<sup>24</sup> *Titah* delivered 16 July 1996. Reported in *Borneo Bulletin* 17 July 1996.

<sup>25</sup> ‘In conjunction with my 66th birthday, with all gratitude, which will save us all, especially the king, from (what will be) demanded by *Allah Subhanahu Wa Ta’ala* on Judgment Day’.

<sup>26</sup> *Ta’zir* grants rulers/governments discretion to punish actions which are sinful, immoral or threaten the public order within a Muslim society. It is for acts that do not come under the Quran-derived classifications.

<sup>27</sup> *Hudud* (sing. *hadd*) means the limits prescribed by God. Sunni jurists agree on five *hadd* offences, and some, nations, like Brunei, extend it to include apostasy, rape, rebellion and other offences. See generally Peters, 2005: 53; Anwarullah, 1995: 78; Black, Esmacili and Hosen, 2013: 221.

intercourse) and also for adultery; *qisas* (retaliation) and *diyat* (blood money) for homicide<sup>28</sup> and bodily injury. In March 2018, the Procedure Order came into force. In December 2018, a law with the innocuous title of Notification of Commencement, was gazetted. It set out that, with one exception, namely for s 94,<sup>29</sup> all parts of the SPCO would commence on 3 May 2019. The Syariahsation of Brunei's criminal law called for by the Sultan in 1996 was now complete. Brunei joined a handful of autocratic Muslim nations with similar laws.

Before looking specifically at the direct consequences for LGBT Bruneians, there were significant ramifications of the SPCO that affected everyone in the Sultanate. First, it meant punishments never previously implemented in Brunei's history, such as stoning, amputations and death by public execution, were now the law of the land. Second, it brought in a raft of criminal offences including the same-sex intimacy offences of *liwat*<sup>30</sup> and *musahaqah*<sup>31</sup> which had not been offences in Brunei's prior Syariah system, plus *talion*, 'eye for eye' physical punishments for all forms of bodily harm, the death penalty for apostasy,<sup>32</sup> blasphemy<sup>33</sup> and causing death by black magic,<sup>34</sup> as well as whippings and /or imprisonment for new religious and morality offences. Third, there was duplication of criminal offences but with different elements, penalties and procedures, depending on which system applied, religious or secular. This included the LGBT-related offences, but also acts of theft, robbery and homicide.<sup>35</sup> Fourth, the religious law of Islam, which had applied only to Muslims, now applied to all, and Syariah courts had jurisdiction over non-Muslims.<sup>36</sup> It criminalised acts that were lawful in religions like Christianity, Buddhism and Animism, such as drinking alcohol.<sup>37</sup> Importantly, under the SPCO, acts were criminalised that went to the heart of religious freedom to worship and manifest religious beliefs. Wearing symbols of a faith other than Islam, celebrating religious events, possessing publications about another religion, including its holy texts (for example, the bible), or displays of it (such as a statue of Buddha or Shiva) became unlawful.<sup>38</sup> There was a list of words in the Schedule to SPCO reserved only for use by Muslims.<sup>39</sup> Fifth, the law became engendered: standards of proof, evidence and punishment vary according to a perpetrator's gender and marital status. The general principles are that women will be disqualified from being witnesses for certain offences including *hudud* offences;<sup>40</sup> their testimony is half that of a man's;<sup>41</sup> and women receive half the financial compensation given to a male for body injury and homicide in the *diyat* 'blood-money' rules.<sup>42</sup> There are also offences that apply only to women for example, an unmarried woman who leaves the custody of her parents or *wali*/guardian.<sup>43</sup> Musawah (2014) notes that because there is no age limit, it indicates that legally 'women are perpetual minors'.

<sup>28</sup> See Peters, 2009: 44; Anwarallah, 1995: 78; Black, Esmaeili and Hosen, 2013: 220; Black, 2012: 550-53.

<sup>29</sup> This offence applies to a Muslim woman who is pregnant outside of wedlock, or gives birth to a child out of wedlock.

<sup>30</sup> This is an Arabic word that references the sins at the time of the Prophet Lot/Lut, which is generally accepted to mean anal intercourse between adult men.

<sup>31</sup> Lesbian acts.

<sup>32</sup> Sections 112 and 113, Syariah Penal Code Order 2013.

<sup>33</sup> Sections 107 and 111, Syariah Penal Code Order 2013.

<sup>34</sup> Section 153, Syariah Penal Code Order, 2013.

<sup>35</sup> For theft and robbery see Ch XVII Penal Code Cap 22 and Part IV Ch 1 Syariah Penal Code Order, 2013. For homicide offences see Ch XVI Penal Code Cap 22 and Part IV Ch II of Syariah Penal Code Order.

<sup>36</sup> Section 3: (1) Save as otherwise expressly provided therein, this Order shall apply to Muslims and non-Muslims.

<sup>37</sup> Section 104(5), Syariah Penal Code Order, 2013.

<sup>38</sup> Section 209, Syariah Penal Code Order, 2013 A public display of an aspect of any another religion amounts to propagating a religion other than Islam to a Muslim.

<sup>39</sup> Section 217 and Fifth Schedule lists twenty or so words. Penal sanctions apply to their use in connection with another religion. They include *azan*, *fatwa*, *hadith*, *haji*, *hukum syaria*, *imam*, *solat*, *wali* and Allah. 'Allah', both in Arabic and Malay languages, is the word for 'God', that is, the 'Abrahamic' God of Muslims, Christians and Jews.

<sup>40</sup> Section 106 Syariah Courts Evidence Order, 2001.

<sup>41</sup> Section 106(6) Syariah Courts Evidence Order, 2001.

<sup>42</sup> Anwarullah, 1995: 102. Syariah Courts Criminal Procedure Code Order, 2018.

<sup>43</sup> Section 203 Syariah Penal Code Order, 2013.

## Laws with Direct Impact on LGBT People in Brunei

### Secular Laws: Penal Code Cap 22

#### Section 377: Against the order of nature

As noted earlier, from 1906 Brunei's Penal Code contained the s 377 offence: 'voluntary carnal intercourse against the order of nature' by which 'penetration' is sufficient to constitute the element of carnal intercourse (chapter XVI 'Offences affecting the human body' in a section dealing with 'Rape, unnatural offences and incest'). For the revised edition, the maximum penalty was reduced from life imprisonment to ten years and/or a fine. In the first Universal Periodic Review of Brunei in 2010, and again in 2014, there were recommendations to decriminalise consensual sexual activity between persons of the same sex. Brunei rejected these.

Instead, in July 2017, s 377 was amended to increase the maximum penalty from ten to 30 years, with whippings.<sup>44</sup> A new sub-section (3) set out a penalty for cases where the victim is under 14 years, by which a minimum of 15 years imprisonment is set with a maximum again of 30 years. For a second offence, the maximum increases to 50 years. Section 354, an assault which 'outrages the modesty of a person', is used in some cases in conjunction with s 377. This would be a provision used for lesbian acts but there are no reported cases online of this. A review of the online reported cases from the courts shows that neither section is used often and convictions are generally for acts against young boys,<sup>45</sup> essentially acts of paedophilia, indicating that s 377(3) may be intended to deter and prevent paedophilia through incarceration. However, a maximum term of 50 years is not used elsewhere in the Code and in most other offences, for example, incest the maximum penalty remains at ten years,<sup>46</sup> with Malays and indigenous people excluded.<sup>47</sup> The rarity with which s 377 is used against consenting adults accords with the findings of Panditaratne (2016: 187). Panditaratne also comments that because it is not enforced, s 377 is viewed as relatively harmless and thus many people feel there is no need for *de jure* decriminalisation. This is arguably deceptive as there can be 'significant informal enforcement, by way of arbitrary arrest and detention and other forms of harassment on the basis of these provisions'. Throughout all the former Asian colonies of the United Kingdom, the retention of s 377 contributes to stigmatisation and marginalisation for LGBT persons (Panditaratne, 2016: 188).

However, this does not explain the increase to 30 years for consensual sexual acts between adults and goes against the global trend of *de jure* decriminalisation. What it clarifies is the official position to reinforce condemnation of same-sex relations between consenting adults in private, pairing its degree of 'heinousness' with rape<sup>48</sup> and robbery<sup>49</sup> which also have a 30-year maximum. It also sends the message that the two sets of laws, secular and Syariah, are consistent in the hybrid mode when dealing with gay sexual relations.

#### Societies Order 2005

The Societies Order requires all organisations, whether commercial, religious, political, service, advocacy or supportive of a community sector, such as LGBT individuals, to be registered. Any group with five or members requires registration. Such registration is refused if its purpose is 'unlawful' or 'incompatible with the peace, public order, security or public interest' of Brunei. For this reason, LGBTIQ organisations are not permitted to register in Brunei. Groups can be deregistered if deemed

<sup>44</sup> Penal Code (Amendment) Order 2017. The application of s 258 is affirmed in the amendment which has the effect that whipping cannot be used for a female, a male sentenced to death, or a male more than 50 years of age.

<sup>45</sup> *PP v Zainal Abidin bin Jahad*, High Court, Criminal Trial 22, 2010; *PP v H.N bin H.M.Z*, High Court Criminal Trial 21 of 2006.

<sup>46</sup> Section 377A Penal Code Cap 22.

<sup>47</sup> Section 377A(2) Penal Code Cap 22.

<sup>48</sup> Section 375, Penal Code Cap 22.

<sup>49</sup> Section 390, Penal Code Cap 22.

contrary to the laws, policy or direction of MIB ideology or the Sultan.<sup>50</sup> Members of an unregistered group face various forms of punishment including imprisonment for up to three years and fines of up to B\$ 10,000.<sup>51</sup> There are no registered organisations in Brunei, nor have any government spokespersons members publicly argued for the basic human rights of LGBT people (HRRC, 2015: 76). To disallow LGBT groups to form and work for the well-being of their members de-legitimises, their existence in Brunei. Outright (OAI, 2018) argues that a range of positive effects flow from registration, including improved standing with the general public and opportunities to meet with officials and political stakeholders to enhance advocacy on behalf of LGBTIQ people.

### Religious laws: Syariah Penal and Procedural Codes, 2013 and 2018

#### Liwat

There are three *liwat* offences in SPCO (Part IV Ch 1), which target gay sexual acts. Section 82 creates the offence, and defines *liwat*; s 83 deals with the proof requirements for *liwat*; s 84 sets out attempt to commit *liwat*; and s 85 is for abetting the commission of *liwat*. It is contained in the chapter which covers seven *hudud* offences<sup>52</sup> and a series of offences related to each. *Hudud* (*hadd* singular) offences are crimes against God's limits and, as such, have both their foundation and punishment in the Quran (the direct word of God) and the *Sunnah*<sup>53</sup> of the Prophet. For this reason, they cannot be varied. There is juristic consensus that *zina* (wilful sexual intercourse outside of lawful marriage) is a *hadd* crime, but for reasons discussed below, there is a range of juristic opinions on whether *liwat* can meet the criteria for a *hadd* offence, or whether it is more aptly a *ta'zir* offence. *Ta'zir* offences are sinful acts<sup>54</sup> that warrant punishment but, because the form of punishment is not fixed in the *Quran* or *Sunnah*, there is considerable discretion on what it can be. *Musahaqah*, lesbian acts, which in Islamic criminal jurisprudence are traditionally not a *hadd*, but a *ta'zir* offence, are included in this part of the SPCO because of their connection with same-sex conduct. The relevant provisions are set out below (with a rough translation<sup>55</sup> in parentheses of the Arabic terms used) to aid understanding. It is significant that *liwat* has the same punishment as *zina*/adultery for a proven offence<sup>56</sup> and an attempted offence.<sup>57</sup> *Liwat* and *zina* are also the same in their requirements for: proof;<sup>58</sup> aiding and abetting the commission of an offence;<sup>59</sup> withdrawal of a confession to negate the *hadd* penalty;<sup>60</sup> and witness withdrawal of evidence whereby the *hadd* penalty will be substituted with another punishment.<sup>61</sup>

#### Commission of *liwat*:

##### Section 82(1) SPCO:

- (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* (adultery).

<sup>50</sup> MIB (*Melayu Islam Beraja* or Malay Islamic Monarchy) is Brunei's official national ideology, which privileges Malay ethnicity, Islam and the monarchy (Müller, 2018). When a political party, the Brunei National Development Party, announced a policy calling for parliamentary democracy, elections and repeal of emergency laws, it was immediately de-registered and its leader arrested and imprisoned under the Internal Security Act Cap 133.

<sup>51</sup> Sections 41 and 42 Societies Order 2005.

<sup>52</sup> They are *Sariqah* (theft), *hirabah* (robbery) *zina* (adultery), *zina bil-jabar* (rape), *qazaf* (false accusations of rape), drinking alcohol, and *irtidad* (apostasy). It included *liwat* as a form of *zina*.

<sup>53</sup> *Sunnah* is the legal ruling that comes from verified *hadiths* (sayings, teachings, acts, approvals and practices) of the Prophet Mohammad. It is the second most authoritative source of law in Islamic law.

<sup>54</sup> It also includes acts that would be *hudud* or *qisas* except one of the substantive or evidentiary requirements was not met.

<sup>55</sup> These terms are variously defined in s 3 Syariah Evidence Order, 2001 and some in s 2 Syariah Penal Code Order, 2013.

<sup>56</sup> Sections 69 and 70 for *zina*, s 83 for *liwat*, Syariah Penal Code Order, 2013.

<sup>57</sup> Sections 71 and 72 for *zina*, s 84 for *liwat*, Syariah Penal Code Order, 2013.

<sup>58</sup> Section 69 for *zina*, s 83 for *liwat*, Syariah Penal Code Order, 2013.

<sup>59</sup> Sections 73 and 74 for *zina*, s 85 for *liwat*, Syariah Penal Code Order, 2013.

<sup>60</sup> Section 86 Syariah Penal Code Order, 2013.

<sup>61</sup> Section 87 Syariah Penal Code Order, 2013. For example, if one of the four *syahids* (credible Muslim male witnesses) withdraws his evidence, then a stoning would not take place, but whipping or imprisonment could be substituted, in line with s 69(2), s 69(4) or 76(2).

- (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.

Section 69 Punishment for *zina*

- (1) Any Muslim who commits *zina* and it is proved either by *ikrar* (confession) of the accused, or by *syahadah* (eyewitness testimony) of at least four *syahid* (credible male Muslims) according to *Hukum Syara* (Syariah law); after the Court is satisfied having regard to the requirements of *tazkiyah al syuhad* (an enquiry by the courts as to the credibility of the witnesses), is guilty of an offence and shall be liable on conviction to had punishment as follows –
- (a) if he is *muhshan* (married), stoning to death, witnessed by a group of Muslims; or
  - (b) if he is *ghairu muhsan* (not married), whipping with 100 strokes, witnessed by a group Muslims and imprisonment for a term of one year.

The significance of establishing a nexus between consensual adulterous and homosexual acts comes from a need to establish a Quranic foundation for *hadd*, as a right of Allah, for classification and for the penalty, particularly for stoning. The Quran 24:2 is clear in its condemnation of consensual acts of adultery (a married person) and fornication (unmarried person) when it sets out:

The [unmarried] woman or [unmarried] man found guilty of sexual intercourse - lash each one of them with a hundred lashes, and do not be taken by pity for them in the religion of Allah, if you should believe in Allah and the Last Day. And let a group of the believers witness their punishment.

There is no equivalent prohibition in the Quran of consensual same-sex intercourse. There are several passages which deal Allah’s message and warning given by the Prophet Lot (*Lut* in Arabic), condemning the people of Sodom and Gomorrah for their debauchery, and commenting that the ignoring of this debauchery had led to their destruction.<sup>62</sup> The Quran emphasises divine retribution but falls short of decreeing an earthly punishment. For this reason, there is not juristic consensus that *liwat* should be classified as a *hadd* offence with Hanafi, and contemporary scholars put *liwat* in the *ta’zir* or discretionary category.<sup>63</sup> Aceh’s Syariah Code, for example adopts the *ta’zir* position<sup>64</sup> and Abu Hanifa, the founder of Hanafi school, reasoned that as a homosexual relationship could not produce children, it was not a variant of adultery/*zina* (Hamzic, 2016: 105). However, as both share lexical and functional roots the majority of Sunni schools, including Shafi,<sup>65</sup> argue that equal punishment is required, and because Islam prohibits sexual relations outside of a lawful marriage, then, by analogy, *liwat* falls directly within the *zina* rubric. This is a contested area of law with consequentially diverse legal outcomes.<sup>66</sup>

There is no verse in the Quran that endorses stoning as a punishment, but there are *hadiths* (verified accounts which were written several centuries after the death of the Prophet) that the Prophet Mohammad prescribed stoning for married adulterers (Anwarullah, 1995: 146).<sup>67</sup> There are no similar records of the Prophet actually having anyone stoned or punished for homosexual acts. Some of the main hadith collections do not make reference to *liwat* at all. Others do,<sup>68</sup> including the frequently cited hadith that states that the Prophet said: ‘may Allah curse the one who does the action of the people of Lot’ (Musnad Ahmad:1878) and one of the prophet’s companions, his younger paternal cousin, Abdullah ibn Abbas said: ‘if a man who is not married is seized committing sodomy he will be stoned to death’ (Dawood 38:4448). Similarly, the inclusion of anal sex between a man and a women as *liwat* and equally punishable is again based on a series of *hadiths* (Abu Dawood (3904); al-Tirmidhi (1165)) not the Quran.<sup>69</sup> Sunni jurists consider consensual anal intercourse *haram* (prohibited) between a husband and wife and make it a ground for a wife to seek a divorce from her husband (Al-Qaradawi, 2009).

<sup>62</sup> Quran 26:161-174; Quran 29:29-32.

<sup>63</sup> See Lipmann, McConville and Yerushalmi, 1988: 53; Rehman and Polymenopoulou, 2013: 8-12.

<sup>64</sup> Qanun on Criminal Law, Qanun No 6 of 2014, art 1(28).

<sup>65</sup> This Sunni school of law is adopted in Brunei. See Art 3 Constitution.

<sup>66</sup> See Hamzic, 2016: 105-08.

<sup>67</sup> See Anwarallah relies on Abu Daud Volume II, 218-19; Muslim Vol II, 212; Bukhari, 332.

<sup>68</sup> See Rehman and Polymenopoulou, 2013 for a detailed analysis of *hadith* on LGBT issues, 18-23.

<sup>69</sup> Shia Muslims classify this as undesirable but not forbidden (*haram*). See, for example, fatwa of Sayyid Sistani: <www.alulbayt.com/rulings/11.htm>.



The result is a range of valid interpretative possibilities. The SCPO has taken the most restrictive, and the least literalist, Quranic position. Given the resultant variation across the Muslim world on same-sex relations, doubt has to be cast on the minister's claim that SCPO provisions for *liwat* and stoning are 'not man-made laws but are *ordained by Allah in the Al-Quran* and in the hadiths of the Prophet' (emphasis added) (Yusof, 2019). The approach to Syariah interpretation is discussed later, but it needs to be noted that because the jurisprudential basis is weaker than for *zina*, their linking bolsters the authority for the *liwat* punishments. Minister Yusof justified the equal criminalisation of both *zina* and *liwat* as necessary to 'safeguard the sanctity of family lineage and marriage.'

One other point regarding *liwat* is that s 82 and its related offences specify that the law applies to 'any person', which is defined in s 3 as 'Muslim and non-Muslim'. Minister Yusof either misleadingly or mistakenly claimed in his letter to the HCHR that the offence would not apply to non-Muslims, except when an 'act of sodomy was committed with a Muslim' (Yusof, 2019). Yet the words in the SPCO are unambiguous.

Minister Yusof's letter also explained that there is an extremely high evidentiary threshold: there would need to be a 'very high standard of proof' and two or four male witnesses would be required. The witnesses must be 'men of high moral standing and piety' and, he opines, it would be 'difficult to find one in this day and age' (Yusof, 2019: point 8). He therefore infers convictions will be difficult, if not close to impossible, because, owing to the near impossibility of obtaining reliable witnesses, conviction would depend upon a confession which could, in any case, be withdrawn at any time. It supports his contention that the SPCO is for 'prevention rather than punishment': to deter and educate Bruneians against such relationships. Yet, even if no prosecutions or convictions occur for *liwat*, the resultant social stigma remains. It makes all LGBT individuals vulnerable to blackmail and extortion and facilitates discrimination in a range of settings: employment, especially government employment, education, housing, and healthcare. (IGLHRC, 2014: 5) As Stephen Cockburn, for Amnesty International stated: 'merely enacting such laws creates a toxic and threatening environment. (Amnesty, 2019).

### **Musahaqah (lesbian acts)**

*Musahaqah* is defined in s 92(3) as 'any physical activities between a woman and another woman which would amount to sexual acts if done between a man and a woman, other than penetration'. Any adult woman committing *musahaqah* with a Muslim woman, if convicted, can be: fined B\$ 40,000; imprisoned for not more than 10 years; whipped up to 40 strokes; or a combination of any two.<sup>70</sup> However, there is however no offence in either the SPCO or the secular Penal code for a lesbian relationship between two non-Muslim women. As with *liwat*, the offence applies to citizens of Brunei whether in, or outside, Brunei and includes visiting tourists and migrant workers. The report from the International Gay and Lesbian Human Rights Commission to CEDAW found that in 2014 there were '100,000 migrant workers from the Philippines, Indonesia and Thailand, among whom are lesbians, bisexual women and transgender women' (IGLHRC, 2014).

The same report noted that when lesbian and non-conformity gender expressions are criminalised, the consequential social stigma 'tends to encourage mistreatment by police, healthcare services, religious enforcement officers, and exploitation by employers, landlords and members of the community' (IGLHRC, 2014: 5). Examples include police extorting LBT persons, and military or other security forces officers demanding sexual favours in exchange for not arresting LBT individuals (IGLHRC, 2014: 6). Brunei lacks legislation to protect women, and also men, from discrimination. Based on IGLHRC's experiences and research in other countries with Syariah criminal law, LBT individuals are more likely to suffer family violence on revealing their sexual orientation or gender identity to family members, or having it discovered by them. The organisation predicts that following enforcement of SPCO there will be 'even tighter family control and increased violence to force Bruneian lesbians, tomboys, masculine-looking women, bisexual women and transgender women to conform to social norms (and now criminal law) on sexuality and gender' (IGLHRC, 2014: 6).

<sup>70</sup> For a Muslim woman with a Muslim woman, s 92(1); for a non-Muslim woman with a Muslim woman, s 92(2).

Additionally, the report shows that criminalisation on the basis of sexual orientation and gender expression is a major obstacle to reporting violations and accessing redress, because they may be blamed for bringing the violence on themselves by their conduct and can therefore be shamed, dishonoured or ostracised. The added vulnerability in reporting violence towards them is that they too could be charged with a criminal offence under the SPCO.

### **Men posing as women and vice versa**

Section 198 of the SPCO criminalises gender-non-conforming behaviour. It makes it a criminal offence for ‘any man’, Muslim or non-Muslim, to dress or pose as a woman in any public place, or for ‘any woman’ to dress or pose as a man. Conviction results in a fine not exceeding B\$ 1,000 or a term not exceeding three months in prison. If it is done for an ‘immoral purpose’ the fine increases to B\$ 4,000 or up to a year in prison.

Shortly after phase one of the SPCO came into operation, several cases involving s 198 were heard in the Syariah Courts. One case, *Rosiani Hj Metasan* (Harun, 2015), which was reported in the local media, concerned a named, young, unmarried Muslim Brunei Malay man who was found by ‘authorities’ to be carrying female personal items in his bag. He was convicted and received the maximum penalty of B\$ 1,000, which, if he could not pay, would be converted to 60 days imprisonment. The Syariah Prosecutor’s argument to the court gives insight into the rationale underpinning this offence. Not only is the act of wearing women’s clothing sinful in Islam,<sup>71</sup> but reflects what the prosecutor described as a broader moral decline that could damage the ‘Malay traditional way of life and Islam’ (Harun, 2015). Prevention of greater sins was cited, with the prosecutor warning that if ‘cross-dressing’ was not dealt with, it ‘can lead to the spread of social disorder such as homosexuality, free sexual relations, drug abuse and so on’ (Harun, 2015). The offender was warned to return to ‘the right path and to Allah SWT’, with the prosecutor issuing a further veiled threat that as ‘the offender works for the government (he) should be wary of Brunei laws’ (Harun, 2015). This is one of the intended consequences of such laws. Manifest an LGBT identity and your secure position in the government bureaucracy is under threat. This wider message is more powerful than a B\$ 1,000 fine.

The ILGA, Trans Legal Mapping Report, shows neither name change nor gender marking change is legally possible in Brunei (ILGA, 2017). Gender reassignment surgery is prohibited.

There are online reports that since the implementation of the SPCO and reported convictions of transgendered people, some are fearful and have decided to leave Brunei, requesting asylum in Canada (Asia One, 2019).

### **Indecent behaviour s 197**

This is a catch-all vague provision prohibiting ‘indecent’, which the section defines as ‘tarnishing the image of Islam’. Initial educative programs on the SPCO explained it would result in a dress code applicable to Muslims and non-Muslims (Brunei Times, 2014). As yet it is not clear how s 197 will be interpreted, or applied (HRRC, 2015: 65).

## **Factors Impacting on LGBT Issues:**

### **The Nature of the State and Lawmaking in Brunei: How the Syariah Penal Code Order Became Law.**

All the international media coverage surrounding the introduction of the SPCO in 2013 and the commencement of the death penalty for homosexual acts in 2019, centred on the image of one man: the Sultan of Brunei. Rightly so, as Sultan Bolkiah is an absolute and autocratic monarch and Brunei is not a democracy. There are no elections and only one political party, the National Development

<sup>71</sup> From a *hadith* that the Prophet cursed men who imitate women and women who imitate men. Narrated by al-Bukhari, 5546.

Party, is currently permitted. To operate, this party is required to express loyalty to the Sultan. It enthusiastically supported the introduction of the SPCO and labelled Muslims who did not support it as akin to infidels (*kafir*) (HRRC, 2015: 88). As mentioned, Syariah criminal law, including the *hudud* and the other laws outlined above, were imposed on Brunei's Muslims and non-Muslims, on its LGBT and heterosexual people, without consultation, without input from its Legislative Council (LegCo) and without any vote of its people.

Brunei's LegCo, which in the Constitution 1959 is a partially-elected representative body, was suspended in 1962 when the Sultanate first entered a state of emergency. This was in response to a small armed uprising led by the members of the left-leaning Brunei People's Party (Parti Rakyat Brunei, PRB). This political party had won all the seats in the first LegCo election and attempted with force to take their seats in the LegCo (Black, 2019: 85-87). The state of emergency instituted 58 years ago continues to be renewed every two years,<sup>72</sup> mostly recently in 2019.<sup>73</sup> In this 'Abode of Peace' where there are no threats of public danger, external aggression, war, or international disturbance, which the Constitution requires for a state of emergency, the Sultan continues to appropriate the emergency power to make any '[O]rders whatsoever which he considers desirable in the public interest.'<sup>74</sup> SPCO was enacted as an Emergency Order, as was the Syariah Procedure Code Order in 2018. They are amongst hundreds of Orders<sup>75</sup> enacted through this mechanism. It is a top-down approach that avoids any commentary, questions or scrutiny prior to enactment.

The LegCo remained suspended until 2004, when it was reconstituted as a fully Sultan-appointed advisory body. It now meets once a year, with considerable pomp and ceremony, but is a show chamber without genuine legislative power. As its members<sup>76</sup> are appointed and removed 'at the Sultan's pleasure',<sup>77</sup> they are subservient to his wishes and their loyalty to the Sultan is required by the Constitution.<sup>78</sup> Laws he enacts do not require the LegCo's 'advice or consent'.<sup>79</sup> The role played by the LegCo was limited to the practicalities of implementation of the SPCO. At LegCo's 9<sup>th</sup> session it was decided that officials would need to be trained overseas in order to give effect to the incoming provisions for 'caning, cutting off a thief's hand and stoning to death (World Observer, 2013). The LegCo was advised that 'caning in accordance with Syariah law is different from the civil law' and that suitable public venues for punishments involving executions and stoning were required (Othman, 2014). If a member at the 9<sup>th</sup> session had questioned or criticised SPCO or the original *titah*, not only could it result in suspension but it could lead to criminal charges. Comments that are 'directly or indirectly' derogatory of the national philosophy of 'Malay Islamic Monarchy' (MIB)<sup>80</sup> of which Islam is a central tenet, are seditious.<sup>81</sup>

Although in 1996 the Sultan had foreshadowed a complete Syariah criminal code, the length of time that elapsed before fruition gave rise to doubts locally and internationally that it would in fact ever happen. Bruneians awoke to the news in his 66<sup>th</sup> birthday *titah*.

The Ministry of Religious Affairs (MoRA) took 15 years to draft the Order. MoRA commenced a well-planned immediate widespread campaign to explain the new law and reassure Bruneians. The Minister of Religious Affairs reassured that Islamic law is the 'most just law in the world' and all who abide within Brunei 'will be forever safe, blessed with peace and well-being' (Rahman, 2013: xix). The Grand Mufti of Brunei, Awang Abdul Aziz bin Juned, the nation's most senior religious

<sup>72</sup> Article 83(2) Constitution and the Emergency (Continuation and Validation of Emergency Provisions) Order 2004.

<sup>73</sup> <[www.agc.gov.bn/AGC%20Images/LAWS/Gazette\\_PDF/2017/EN/S012.pdf](http://www.agc.gov.bn/AGC%20Images/LAWS/Gazette_PDF/2017/EN/S012.pdf)>.

<sup>74</sup> Article 83(3) Constitution.

<sup>75</sup> For example, the [Emergency] Arbitration Order 2009; the [Emergency] Beauty and Health Establishment Order 2016.

<sup>76</sup> The 33 members include the Sultan, the Crown Prince, 13 cabinet ministers [ex officio members], with 18 other appointed members, two titled persons, seven prominent citizens, and eight representatives from the four districts who are indirectly elected but approved by the Sultan. See, Constitution, Schedule 2.

<sup>77</sup> Article 31(1) Constitution.

<sup>78</sup> Article 32(5) Constitution.

<sup>79</sup> Prior to 2004, the Constitution stated that the Sultan's 'power to make laws for the peace, order, security and good government of Brunei Darussalam' was to be 'with the advice and consent of the Legislative Council.' With his reconvening of the LegCo in 2004, the 'advice and consent' requirement was deleted.

<sup>80</sup> Article 53 (1A) Constitution. On the role played by the National Ideology MIB in Brunei, see, Black, 2008: 105-42.

<sup>81</sup> Section 4 Seditious Act Cap 24.

figure, refuted what he called, ‘the assumption in some quarters that Syariah criminal law is “obsolete and unfit for implementation”’ (Juned, 2013: xiv) and promoted its many benefits and ‘blessings’. He lamented that many parts of the world and, in particular, the UN, recognised ‘rights of LGBT’ people noting the 2011 UN resolution (Juned, 2013: 95) but emphasised that

Allah made sodomy unlawful, Allah made lesbianism unlawful...and there is no denying that the people of today are worse than the people of the Prophet Lut’s time. During his time there was only the crime of sodomy. But now there are lesbianism, bisexuality and transsexuality ... all are threats to our world. (Juned, 2013: 96).

Without democratic institutions and checks on unfettered lawmaking power, the wishes of one man, who has the financial resources and a large bureaucracy of religious traditionalists to fulfil them changed the legal landscape for so many Bruneians and ‘made it more dangerous for people whose choice of partners and gender expression do not conform to State norms’ (IGLHRC, 2014: 7).

### The role for religion and its state-imposed interpretative process

Islam is the state religion of Brunei and the Sultan is head of religion.<sup>82</sup> The Constitution and other statutes define Islam as Sunni Islam ‘according to the Shafeite sect’.<sup>83</sup> The rigor with which this is applied in Brunei negates Islam’s inherent interpretive plurality. Only one school of thought and one conservative Islamic interpretation is permitted. The Religious Council, whose members are appointed by the Sultan, is the ‘chief authority’ in all matters relating to religion.<sup>84</sup> The *Aqidah* (Doctrine/Faith) Control Section is the arm of government that monitors compliance with the ‘correct’ practice of Islam. The Mufti can issue *fatwas*, which are binding rulings for Muslims in Brunei,<sup>85</sup> and writes the weekly sermons under the Sultan’s supervision (de Vienne, 2015: 272), which all Imams must give. Eradication of deviance is a MoRA priority, and the Sultan frequently warns against it.<sup>86</sup> Many Muslim groups such as Shia, Ahmadiyyah, Sufi groups, Al-Arqam, Ba’hai, are banned as heretical. Even when the accepted interpretative tools of Islamic jurisprudence (*fiqh*) are employed, a reasoning that differs from the Religious Council’s Shafeite ruling will be deemed deviationist or heretical. The SPCO, as well as the Sedition Act Cap 24, impose criminal sanctions on any person who accepts, cites, or practices in conformity with another non-state sanctioned interpretation of Islam. Islamic liberalism is considered deviationist. Liberal Muslims, the Sultan argues, ‘divert Muslim thinking... [they] want Islam to always change in accordance to the time they pass through’ (Othman, 2013 a). This restrictive approach has consequences for Brunei’s LGBT people.

In Brunei, one cannot take a liberal interpretation of the Quranic passages from which the crime of *liwat* is deducted. Muslims in Turkey and in 18 other Muslim-majority where consensual same-sex intimacy is not criminalised (HDT, 2015: 5) can do so. Just eight of the 49 Muslim majority nations (including Brunei) have the death penalty for consensual same-sex acts, with only five<sup>87</sup> implementing it fully (ILGA, 2015: 29). Yet, no Muslim, or person in Brunei can lawfully question the Islamic veracity of any the SPCO offences, including *hudud* penalties in the case of *liwat* where as noted earlier, the Quran does not set a punishment. Shortly after commencement of the SPCO, an opinion letter published in the *Brunei Times* in which its author accepted Syariah criminal law but posited that 100 lashes based on the Quranic verse 24:2 was theologically preferable to stoning for consensual private sexual acts. He was charged with heresy, subsequently confessed and repented in the Syariah Court and agreed to counselling in a faith purification program (Brunei Times, 2013). To refute the opinion writer’s reasoning against stoning, the Mufti responded that it was warranted as the acts were ‘damaging and despicable, dirty, not civilised’ (Borneo Bulletin, 2014).

<sup>82</sup> Article 3 Constitution.

<sup>83</sup> Article 3 Constitution and s 43, Religious Council and Kadi’s Courts Act Cap 77.

<sup>84</sup> Section 38, Religious Council and Kadis Courts Act Cap 77.

<sup>85</sup> Fatwas are generally advisory but in Brunei it is a criminal offence to disobey a fatwa of the Mufti. See generally on fatwas, Black and Hosen, 2009: 405-27.

<sup>86</sup> The Sultan’s *titah* for New Year of Hijrah 1439 reminded the country to be wary of Akidah deviation. See Borneo Post, 2017.

<sup>87</sup> Iran, Mauritania, Saudi Arabia, Sudan and Yemen.

The SPCO specifically counters interpretative democracy with the criminal offence of apostasy/*irtidad* for denying a *hadith* of the Prophet or *ijma* (consensus of jurists) as a source or authority for a particular teaching of Islam.<sup>88</sup> Conviction can result in imprisonment for up to 30 years and whipping of up to 40 strokes. Given that all Syariah criminal offences pertaining to LGBT acts are grounded in *hadith* and the writings of jurists (*ijma*), this law makes it impossible to counter opinions or apply alternative juristic reasoning. The Sultan called on the authorities to act strictly enforce this law (Othman, 2013b). Heading the call, Imams in their Friday sermons condemned people:

...who are anti-hadith and prefer their interpretations of Quranic verses without understanding the laws of hadith. They should repent and 'come back to the right path according to correct Islamic teachings. If they are committed to the Al-Quran, they should be the first to defend the hadith. (Othman, 2013 b)

### The Constitution, human rights and the courts

Unlike the Constitutions in other jurisdictions, including Taiwan, where LGBT groups used constitutional rights and guarantees to challenge their legal position, Brunei's Constitution contains no bill of rights nor provisions for the protection of fundamental liberties, with the exception that religion can be practised in peace and harmony.<sup>89</sup> The Constitution was also amended in 2004 to remove judicial review from all courts.<sup>90</sup> There is no Constitutional Court and the secular system's Court of Appeal, the highest court, cannot consider the constitutionality of any law because interpretation of the Constitution is not for the courts but for an Interpretation Tribunal. The Tribunal is an ad hoc body, whose members are to be appointed by the Sultan at the time he decides an interpretation is required.<sup>91</sup> The Sultan also has the exclusive authority to amend the Constitution.<sup>92</sup>

Brunei defends its human rights record by asserting that 'as Muslims, we uphold human rights with the Quran as our foothold.'<sup>93</sup> The consistent theme is that Allah-granted human rights are superior to fallible 'man-made' rights. Only when there is no compromise or contradiction with Islam are provisions of 'man-made' international rights instruments considered. Musawah (an organisation which advocates for equality and justice in Islamic laws) challenges this assumption. In critiquing Brunei's CEDAW reservations, Musawah advocated that diversity of opinion was well accepted in Islamic jurisprudence and means there is not a unified, monolithic 'divine law'. In fact, Brunei's codified Islamic laws are not God-given per se but enacted by men serving in the Religious Council, which means they are 'man-made' and can change to be more equal and just (Musawah, 2014),<sup>94</sup> to better reflect Quranic values of 'equality, justice, compassion and mutual respect', and also correspond with contemporary human rights principles (Musawah, 2014).

As noted earlier, Brunei has signed three international treaties: the Convention on the Rights of the Child (CRC); the Convention of the Rights of Persons with Disabilities (CRPD); and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Each was ratified with reservations for any provisions 'contrary to the Constitution or the beliefs and principles of Islam'. Brunei did not ratify the CEDAW Optional Protocol.<sup>95</sup> The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) was signed in 2015 but is not yet ratified, while the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR) remain unsigned.

<sup>88</sup> Section 111(b) Syariah Penal Code Order, 2013.

<sup>89</sup> Article 3(1) Constitution, but note its limited operation in practice as outlined in HRRC, 2015: 61.

<sup>90</sup> Article 84 C(1) Constitution.

<sup>91</sup> Article 86 Constitution.

<sup>92</sup> Article 85(1) Constitution.

<sup>93</sup> Titah outlined in Borneo Bulletin, 2013.

<sup>94</sup> See also Black, Esmaceli, Hosen (2013) 253-259.

<sup>95</sup> <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8-b&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en)>

**LGBTIQ issues off the agenda: limitations on media, debate and commentary**

Censorship prevails across all sectors in Brunei. This makes it impossible for any LGBT perspectives or information to enter the public domain. The Sedition Act Cap 24 makes seditious any ‘derogatory statements’ about Islam (which includes its laws and impact for LGBT persons), or about the Sultan who brought in SPCO, and MoRA who drafted it, and the government that implements it.<sup>96</sup> The Internal Security Act Cap 133, criminalises any act, ‘speech or publication done with the intention of inciting disaffection’ for the Sultan and criticism of the government.<sup>97</sup> The Undesirable Publications Act, Cap 25, allows government authorities to seize ‘any publication prejudicial to public safety or public interest’ (s 13). The Newspaper Act, Cap 105 gives the Minister of Home Affairs discretion to grant or revoke a publishing license, to shut down a newspaper, and to bar distribution of foreign publications, from which no appeal to a court or judicial review is possible. Significant censorship provisions are also included in the SPCO, such as a prohibition on ‘printing, disseminating, importing, broadcasting, and distributing publications contrary to Islamic law’,<sup>98</sup> which would catch any pro-LGBT publication. It also mandates imprisonment for up to five years for ‘any person who in any manner contempts, neglects, contravenes, *opposes* or insults any *titah* of His Majesty’ (italics added).<sup>99</sup> The Sultan’s *titahs* in support of the SPCO, and his stance on *liwat*, *mushadqah* and ‘cross-dressing’, therefore cannot be opposed, or contravened.

There was no immediate media coverage in Brunei when in April 2019, the Western media condemned the coming into force of the *hudud* penalties, especially legalising the stoning for homosexual acts. Learning of support beyond the shores of Brunei, from famous individuals like George Clooney or from international organisations, may have given heart to LGBT Bruneians and let them know of attempts to put pressure on the Sultan for the law to be changed. The first article in the daily *Borneo Bulletin* to mention reaction from outside to the SPCO did not appear until 14 April, with a headline: ‘MoFA shoots down UN criticism of Syariah Penal Code Order’. The article essentially affirms the Minister’s response (discussed earlier) that the aim of SPCO, including stoning, is for ‘prevention, not punishment’; and that Brunei remained committed to ‘promoting and protecting human rights’ (Hayat, 2019). Any concerns raised by the UN’s Office of the High Commissioner for Human Rights (OHCHR) were dismissed as misconceived.

Censorship though this net of secular criminal and regulatory laws is patronisingly said by a former Attorney-General to be crucial to ‘shield Bruneians from negative or incorrect information’ (Yayha, 2007). It also guarantees a compliant, obsequious media.

Now added to the mix of secular laws are the SPCO restrictions. The case of Shahrani shows this new interaction. Shahrani,<sup>100</sup> a government employee, made a post on Facebook in July 2017. He was secretly a gay man but his post raised an economic concern. Shahrani, using another name, criticised a newly released halal regulation and certification policy of MoRA. He expressed the view that for small businesses the requirement to hire halal supervisors was too financially onerous. He went further and described MoRA as a ‘stupid useless’ ministry and ended the post asking why ‘Bruneians let them (MoRA) destroy our lives and our kids’ future?’ The post was deleted very quickly. Shahrani was charged with one count of sedition under s 4(1)(c) of the Sedition Act Cap 24 for posting ‘inflammatory comments about the Ministry’s halal certification policy’. The following month an online crowdfunding site was set up to assist Shahrani’s defence. After two days of questioning by the Religious Enforcement Unit of MoRA ‘without legal counsel’ additional charges were laid against Shahrani under Syariah law on 2 August.<sup>101</sup> These charges included insulting (with intention to insult) Islamic law and insulting members of the Islamic Council, which, if proven, could result in a

<sup>96</sup> Section 4 Sedition Act, Cap 24.

<sup>97</sup> Section 3(1)(i) Sedition Act, Cap 24, and Internal Security Act (Cap 133), which allows detention without trial for up to two years with indeterminate extensions, specifically ousts judicial review of detention orders.

<sup>98</sup> Sections 213, 214, and 215 Syariah Penal Code Order 2013.

<sup>99</sup> Section 320 Syariah Penal Code Order 2013.

<sup>100</sup> There is no reported judgment on this case and the information presented is from local and international news reports including Amnesty International: <https://www.amnesty.org/en/countries/asia-and-the-pacific/brunei-darussalam/report-brunei-darussalam/>

<sup>101</sup> The Brunei Project <[www.facebook.com/thebruneiproject](http://www.facebook.com/thebruneiproject)>.

lengthy prison term. The religious proceedings would be initiated after his sentencing hearing for sedition. Shahrani fled Brunei and received asylum in Canada. Since arriving in Canada he has come out as a gay man.

Year after year, organisations such as Freedom House categorise Brunei as ‘not free’ along with nations such as Cambodia and North Korea,<sup>102</sup> ranking it 152 out of 180 countries on the World Press Freedom Index in 2019.<sup>103</sup> The lack of freedom of speech goes beyond the media to civil society and academia, where it is not possible for individuals to ‘critically discuss or openly challenge government policies. Nor are there independent bodies or national human rights institutions where individuals can file complaints’ (HRRC, 2015: 77).

## Conclusion

Brunei may not have, and may never, cast the first stone as the punishment for consensual sex between gay men, but the legislation setting down this cruel punishment with detailed steps on the stoning process<sup>104</sup> remains in force in Brunei. In order to deflect world attention and minimise retributory economic consequences for Brunei, Sultan Bolikiah pragmatically announced a moratorium, not because he reflected, revisited, or re-assessed the *liwat* law and its jurisprudential Syariah foundations, but to manage Western ‘misperceptions’ (AFP, 2019). At any time, this Sultan or his successor can counter with a different *titah* or just implement the law as it stands. As has been outlined, there are no constitutional, legislative, judicial, religious or democratic constraints on the rule of this absolute monarch. Keeping the SPCO just as it is adds another level of condemnation for LGBT people on top of the long-standing s 377 of the Penal Order, Cap 22, but now increased penalties can be applied. Both systems were designed to run together, as a legal hybrid to ‘preserve our religion, life, family and individuals’ (Yusof, 2019).

A moratorium falls short of a repeal. Even if never invoked, the rationale for each of the laws discussed in this article that criminalise consensual same-sex intimacy and gender non-conformity, is to stop LGBT individual relationships and to end the threat Bruneians are told they pose to them and the world. The mufti warned, ‘Beware! Due to all of these, malediction and misfortune will descend’ (Juned, 2013: 97), and the Minister of Foreign Affairs, Dato Erywan Pehin Yusof, restated the aim of the laws as being to protect the ‘rights of victims and their families’ (Yusof, 2019). But who are the victims in consensual adult same-sex intimacy? For the LGBT people of Brunei, it is difficult to accept these laws are ‘blessings’ to nurture, rehabilitate and educate (Yusof, 2019). Instead, they have cumulatively created a ‘toxic and threatening environment’ (Amnesty, 2019), one which ‘paints LGBTIQ people as less than human, makes them feel unsafe, and will undoubtedly increase discrimination, violence and harassment, while also forcing them to choose between being LGBTIQ and being Muslim’ (OAI, 2019).

It was not an actual stone but this year a symbolic one nonetheless was cast against LGBT people in Brunei. It is to be hoped that it does not have a ripple effect across the water to Malaysia and Indonesia, where statements lauding the Sultan’s God-serving courage in implementing *hudud* and SPCO (HRRC, 2015: 92; Othman, 2014) have already been heard.

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