

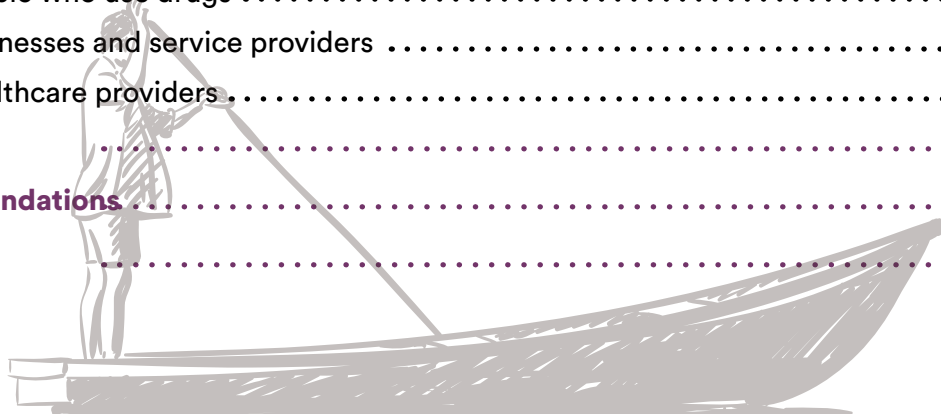
Analysis of the Kelantan Syariah Criminal Offences Enactment

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Glossary

Act 355	Syariah Courts (Criminal Jurisdiction) Act 1965
AIDS	Acquired Immune Deficiency Syndrome
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CERiA	The Centre of Excellence for Research in AIDS (CERiA)
CEDAW	Convention on the Elimination of Discrimination against Women
CRC	Convention on Rights of the Child
FRHAM	Federation of Reproductive Health Associations, Malaysia
LAC	Legal Aid Centre
LGBTIQ	Lesbian, Gay, Bisexual, Transgender, Intersex and Queer persons
HIV	Human Immunodeficiency Virus
MSM	Men who have Sex with Men
NLAF	National Legal Aid Foundation
SDG	Sustainable Development Goals
VNG	Voluntary National Review
UNAIDS	Joint United Nations program on HIV/AIDS



Executive Summary

The Kelantan Syariah Criminal Code (I) Enactment 2019 (2019 Enactment or the Enactment) was passed by the Kelantan State Legislative Assembly in 2019 and came into force on the 1st of November 2021. It replaces the old 1985 Enactment. It also supersedes the Kelantan Syariah Criminal Code (II) Enactment (1993) 2015 on hudud laws which were not enforceable as it supersedes the maximum punishment set for the syariah court under the Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355) and other glaring contravention with the Federal Constitution.

The 2019 Enactment expanded acts that are considered criminal under the syariah law. 33 new sections have been added from the 1985 Enactment of 35 sections, with a total of 68 sections making up the 2019 Enactment.

It also modified and amended existing sections by making the punishment more severe whilst expanding the power of the Syariah Court by empowering the courts to replace or add other 'alternative' punishment such as community service and/or rehabilitation. Arguably, the 'alternative' punishments under the 2019 Enactment go beyond the maximum punishment permitted under Act 355 - maximum fine of RM5000, 3 years imprisonment and 6 lashes of the cane. This is a clear usurpation of syariah court to the civil court's jurisdiction as enshrined in Article 121(1)(a)¹ of the Federal Constitution.

With the 2019 Enactment coming into force, the Kelantan Islamic Department and courts are empowered to implement the Enactment by taking actions on the wide-ranging areas that the enactment penalizes. The enactment reinforces a narrow brand of Islam on its citizen. While the enactment is only applied to Muslim persons, it has an extensive impact on all persons in the state of Kelantan.

The report analyzes the 2019 Enactment through the human rights and constitutional frameworks. The report finds

- Provisions under the 2019 Enactment **overlap with existing laws at the Federal Level and items on the Federal List**, infringing the Federal Constitution, the supreme law of the land. The Federal Constitution has divided the areas of law that could be legislated by the Federal Government and the State Government. There are provisions under the 2019 Enactment that clearly intrude on existing Federal laws, such as the Penal Code, Dangerous Drugs Act, and various Acts related to commercial and banking matters.
- The **fundamental liberties guaranteed by the Federal Constitution and international human rights law are challenged** by the 2019 Enactment. In particular, it will continue to infringe the right to freedom of religion and belief, the right to life, which includes the right to privacy, the right to live with dignity, the right to livelihood, the right to be free from torture; the right to freedom of speech, and association as a result of unnecessary state intervention into all aspects of a Muslim person's life, and by extension all persons regardless of religious background.
- The 2019 Enactment further **expands the notion of space, by extending it to online spaces** by introducing provisions that intrude on the privacy of a person to post photos of their choosing on their own social media accounts.²
- New sections under the 2019 Enactment **criminalises attempt of consensual sexual relations between persons of all genders**, as well as transgender and gender diverse persons based on their gender identity. This contravenes the very basis of equality and non-discrimination principles under international human rights law.

¹ The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

² Tuan Ahmad Irwan Bin Ismail. Majlis Perasmian Penerangan Enakmen Kanun Jenayah Syariah (I) 2019. retrieved from <https://www.youtube.com/watch?v=GNAXKuWkmJc&t=2094s> 1:00:52 - 1:02:32

- The 2019 Enactment also **maintains the corporal punishment of caning, and further increased areas for whipping as a permissible punishment.** This is in contravention of international human rights law as well as Article 5 of the Federal Constitution.

The 2019 Enactment is not without its political benefits and idiosyncratic beliefs. However, the short-term political gain is improvident given the disparity it will widen between groups in society. The analysis projects several negative impacts, and costs on people, businesses as well as the state.

With a wider and broader scope for the operation and enforcement of syariah laws, even more people face increased vulnerability to persecution, while existing vulnerable groups become even more vulnerable to state prosecution. Consequently, the Syariah legal system would also suffer as the projected influx of cases would increase, inadvertently exacerbating existing gaps in access to justice.

Marginalised groups, especially people who use drugs, sex workers, lesbian, gay, bisexual, transgender, queer (LGBTQ+) and gender diverse persons will be further left behind because of the enforcement of the Enactment, and its chilling effect on human rights.

The analysis foresees that the enactment will also have negative economic impacts as some businesses are unable to provide services without fear of prosecution under the 2019 Enactment.

Guided by the Federal Constitution and international human rights law, both the state and federal governments should review the 2019 Enactment while pausing on its enforcement until concerns surrounding its legality are meaningfully addressed and resolved. All relevant stakeholders must be meaningfully engaged and consulted without prejudice in this process to ensure protection of human rights for all.



Background

The Kelantan's Syariah Criminal Offences Enactment 2019 replaces the Kelantan Syariah Criminal Offences Enactment 1985, which came into force in 2011. The 1985 Enactment contained 35 sections, categorized into two main sections - introduction and offences. Of which, 27 were related to offences.

In 1993, Kelantan introduced the Syariah Criminal Code (II) Enactment, popularly known as the hudud enactment. Despite receiving royal assent in 2015, the enactment does not have legal effect, as the punishments in the enactment are beyond the maximum permitted under Act 355 — a maximum RM 5,000 in fines, 3 years of imprisonment, and 6 strokes of cane.³ Act 355 provides the mandate for the Syariah Courts to preside over persons professing Islam and matters in respect of offences against the precepts of Islam by people professing Islam.⁴ It must be noted that this provision⁵ limits the jurisdiction of the Syariah Courts within the confines of the Ninth Schedule of the Federal Constitution.

Sisters in Islam, in November 1993,⁶ submitted a memorandum that contained analysis of the Kelantan Syariah Criminal Code (II) to the then Prime Minister, Datuk Seri Dr. Mahathir Mohamad because of its glaring human rights violations.

The 2019 Enactment has 68 sections in total, divided into 9 sections:

- Part 1: Preliminary (Section 1 - 3)
- Part 2: Takzir offences relating to protection of religion (Section 4 - 13)
- Part 3: Takzir offences relating to protection of persons and dignity (Section 14 - 34)
- Part 4: Takzir offences relating to protection of mind and consumption (Section 35 - 36)
- Part 5: Takzir offences relating to protection of property (Section 37 - 42)
- Part 6: Takzir offences relating to protection of offspring (Section 43 - 51)⁷
- Part 7: Abetments and attempts (Section 52 - 56)
- Part 8: General exceptions (Section 57 - 62)
- Part 9: General (Section 63 - 68)

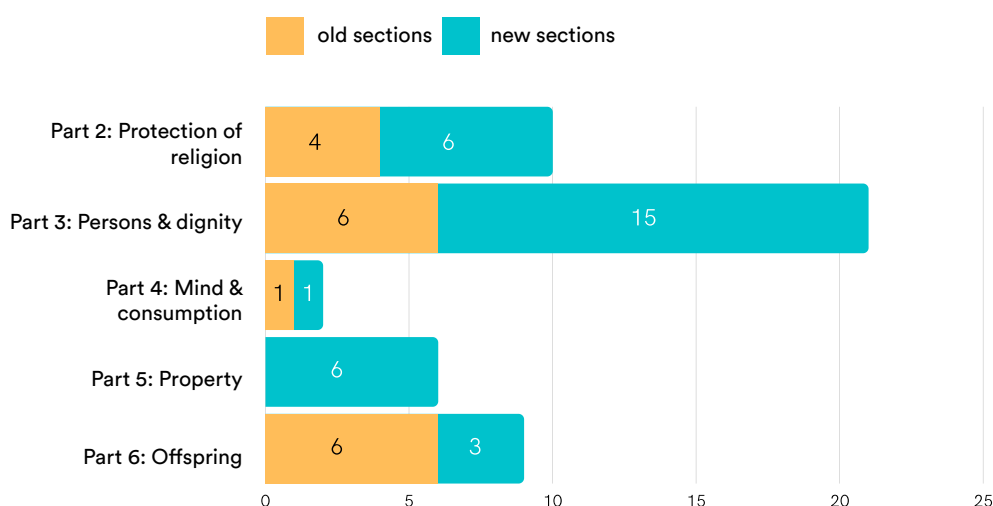


Figure 1: Number of Sections under each Part in the Kelantan Syariah Criminal Offences Enactment

³ *Syariah Courts (Criminal Jurisdiction) Act 1965 Act 355*. The Commissioner Of Law Revision, Malaysia In Collaboration With Percetakan Nasional Malaysia Bhd, 2006, www.ius.uzh.ch/dam/jcr:000000000-573e-dcae-0000-0000567519e5/Act355.pdf.

⁴ Section 2 of the *Syariah Courts (Criminal Jurisdiction) Act 1965 (Revised - 1988)*

⁵ *Supra*

⁶ Sisters in Islam. "Memorandum On the Syariah Criminal Code (II) 1993 State of Kelantan." Sisters in Islam, 5 Oct. 2019, sistersinislam.org/memorandum-on-the-syariah-criminal-code-ii-1993-state-of-kelantan.

⁷ Mistake on 47(2)

What are the issues with the Kelantan Syariah Criminal Offences Enactment 2019?

The Enactment allows for unreasonable state regulation and intervention in all aspects of a person's life—from their identity, body, belief, thoughts, behaviour, to the relationships that they nurture. Some of these sections not only criminalise the individual who commits the so-called offence, but also others, including healthcare and service providers.

- The Enactment introduces **31 new areas of criminality**, most of which fall outside of state jurisdiction, and infringe on the rights guaranteed under Federal Constitution. Among the 31 new sections are

- » Section 23. Exposing *aurat* in public places
- » Section 19. Change of gender (*jantina or sex characteristics and gender are used interchangeably, although they are two different yet interrelated aspects of human beings*)
- » Section 36. Anything intoxicating, which overlaps with Dangerous Drugs Act
- » Section 35. Intoxicating drinks
- » Section 33. Disobedience to parents
- » Section 40. Executing transactions contrary to *hukum syarak*
- » Section 41. Executing transactions via usury etc.

At least 15 new sections have been introduced under the Part 3: Takzir offences relating to protection of persons and dignity, making it the largest Part in the Enactment. Part 3 among others, penalizes

- **Self expression and speech**, through various sections that penalize exposure of *aurat*, speech or acts contrary to *hukum syarak*. *Hukum syarak* is defined as Islamic law in accordance with the Syafie, Maliki, Hanafi, and Hanbali sects.
- **Bodily autonomy**, including consensual and informed medical, non-medical, and other forms of interventions and changes on a person's own body to reflect their identities, self-expression. This ranges from types of attire worn in public places, transition-related procedures for trans and gender persons, cosmetic surgery, getting tattoos, among others.
- **'Indecent' act and speech**, which is defined as any act of kissing, hugging, sexually suggestive speech or gestures, wearing alluring attire, and other indecent acts inconsistent with *hukum syarak*.
- **Consensual sexual relationships between adults**, in particular consensual sex between unwed heterosexual persons and between women, consensual anal sex performed by a man with a person of any gender.
- **Severing ties with family members and being "disobedient to parents."** Section 28 specifically penalizes female persons who flee from their parents or guardian's custody without a reasonable cause under *hukum syarak*. The gendered nature of the section further underscores the patriarchal control over bodies, expressions, movement, among others, of persons assigned female at birth, and by extension all persons of all gender identities.

Part 5 on offences relating to protection of property introduces new sections in relation to abuse of property of orphans, transactions against *hukum syarak*, which have not been introduced in other state syariah criminal enactments. All six sections under Part 5 overreach into the Federal List and overlap with various existing Federal laws, including the Penal Code, Hire-Purchase Act 1967, Islamic Financial Services Act 2015 among others.

- The Enactment **widens the scope of criminalisation**. At least 8 sections in the Enactment criminalise attempt as well as commission of the acts. Of which, 3 sections criminalises consensual sex between adults of all genders. Criminalisation of consensual sexual acts is in violation of international human rights law.⁸

»	Section 14.	Sodomy
»	Section 15.	<i>Musahaqah</i>
»	Section 16.	Sexual intercourse with corpse
»	Section 17.	Sexual intercourse with non-human
»	Section 35.	Intoxicating drinks
»	Section 36.	Anything intoxicating
»	Section 46.	<i>Zina</i>
»	Section 47.	Act of incest

The three sections involving consumption of anything intoxicating, act of incest and sexual intercourse with non-human (partially) are already criminalised under the Federal Law and fall under the Federal List.

The following 4 sections, on the other hand, criminalise persons who cause an ‘offender’ to commit or attempt to commit the so-called offence extend to healthcare and service providers, human rights groups, businesses, among others.

- **Section 18. Changing gender:** Section 18 (b) and (d) criminalise any person who causes change in gender of the ‘offender’ and causes change in gender of another person.
- **Section 22. Applying tattoo or undergoing treatment or surgery for cosmetic purposes:** without syarii cause. Section 22 (d) explicitly criminalises any person who performs treatment or surgery for another person for cosmetic purposes without syarii cause’

Sections 18 and 22 can apply to healthcare and service providers as well as human rights groups, who provide trans-specific or gender-affirming healthcare related services and information. Transitioning related procedures is often misunderstood as ‘cosmetic’ or ‘elective’ surgery and often interpreted to act against *hukum syarak*, resulting in violation of right to identity, self-determination and access to life-saving healthcare services and information for trans and gender diverse people.⁹

- **Section 35. Intoxicating drinks:** Section 35 (2) criminalises persons who cause the ‘offender’ to attempt to consume intoxicating drinks, while Section 35 (3) penalizes anyone who, among others, sells, manufactures, or advertises intoxicating drinks.
- **Section 36. Anything intoxicating.** Section 36 (2) criminalizes any person who causes another person to use or attempt to use any intoxicating substance.

The punishment for the ‘offender’ and the person who causes the ‘offender’ to commit or attempt to commit the so-called offence are the same. For example, under Section 35, a person who consumes alcohol and a person who causes them to consume can both be fined RM 5,000, face imprisonment for not more than 3 years and not more than six strokes of cane. The court is also given discretionary powers to order any additional punishment it deems appropriate.

⁸ “Human Rights Explained: Case Studies: Complaints about Australia to the Human Rights Committee | Australian Human Rights Commission.” Australian Human Rights Commission, humanrights.gov.au/our-work/education/human-rights-explained-case-studies-complaints-about-australia-human-rights. See *Toonen v Australia*. The Human Rights Committee found the criminalization of consensual sex between men infringing Article 17 (privacy) and Article 2 (discrimination on the ground of sex) of the International Covenant on Civil Political Rights (ICCPR). Other subsequent court decisions, including *Navtej Johar v Union of India* declared criminalization of consensual sex between same sex adults violate right to privacy, dignity and personal autonomy, equality and non-discrimination.

⁹ WPATH. “Medical Necessity Statment - WPATH World Professional Association for Transgender Health.” The World Professional Association for Transgender Health (WPATH), 2016, www.wpath.org/newsroom/medical-necessity-statement.

- Some sections in the Enactment are **broad and vague in nature**, creating a blanket ban and restrictive effect on plurality ideas, and freedom of thought and belief, including their practices and expressions.
- » **Section 4. Sorcery:** Sorcery penalizes anyone who performs practice, act, action, or anything that can be defined as sorcery by any means. Sorcery is defined under the Enactment as abnormal acts that contradict with *hukum syarak* involving the use of spirits and demons through devotion, spell charm or other means. Consequently, creating a blanket ban and stigma against those whose religious and/or spiritual beliefs and practices does not fall within the restrictive interpretation of religion by the state.

The expert workshop on witchcraft and human rights report by the Independent Expert on the enjoyment of human rights by persons with albinism recommends that the definition or conceptualization of “witchcraft”, or ‘sorcery’ in context of the 2019 enactment, uses “an umbrella definition at the international level that covers the plurality of manifestations of witchcraft, with a focus on harmful practices and States’ obligations as defined by international human rights law.” The report flags ‘the practical consequences of language and the need to focus on harm, not on beliefs’.¹⁰

The strict liability of this section, does not provide for the element of *mens rea* (intention) to be proven. The difficulty of separating a cultural ritual and sorcery and the fact that the consequence of sorcery is intangible, obtaining proof would be difficult. Although Section 33 (1) Kelantan Syariah Court Evidence Enactment 2002 provides for the usage of expert opinion as proof, the question of credibility would then arise as there are no standards that provide a person as an expert for sorcery in Malaysia.

- » **Section 7. Distorting teachings and precepts of Islam:** This section does not explain what constitutes distortion of teachings and precepts of Islam.
- » **Section 9. Insulting or deriding laws:** Section 9 penalizes anyone who offends or insults any law relating to the religion of Islam enforced in Kelantan. This section effectively silences dissent and the people’s ability to hold the state accountable, adding barriers to enjoyment and meaningful realization of the principles of access to justice and rule of law.
- » **Section 12. Encouraging *mungkar*:** *Mungkar* is defined as bad, condemned, despised and forbidden acts under *hukum syarak*. While Section 29 protects a person from allegations of committing *mungkar* without proof, the broad definition of *mungkar* is still open to abuse.
- » **Section 13. Selling or giving away child to non-Muslim or morally reprehensible Muslim.** Under Section 13, anyone who sells, gives away or surrenders their child or children in their custody to any non-Muslim person or ‘morally reprehensible Muslim’ is an offence. This section raises many red flags.

Firstly, this lumps together selling, giving away and surrendering a child in their custody without providing purposes or intentions of the acts.

Secondly, ‘morally reprehensible Muslim’ is not defined, raising concerns over exclusion and deprivation of the right as parents for highly stigmatized populations, including people who use drugs, sex workers, LGBTQ persons, among others.

Thirdly, in the context of adoption, this section, which penalises the act of selling, giving away or surrendering their children to any non-Muslim person has to be assessed against the best interest of the child, as stipulated under Article 3(1) of the Child Rights Convention (CRC).¹¹

¹⁰ “Report of the Independent Expert on the Enjoyment of Human Rights by Persons with Albinism on the Expert Workshop on Witchcraft and Human Rights.” A/HRC/37/57/Add.2, 2018, www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/37/57/Add.2.

¹¹ Committee on the Rights of the Children. “General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1).” OHCHR, 2013, www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf.

- » **Section 19 and Section 20: Male person posing as female and female person posing as male respectively.** This provision criminalises any person for wearing attire that is deemed to not belong to their gender identity, or ‘poses’ or ‘acts’ outside of the assigned identities at birth, in public places and any private places that are visible or accessible to the public. According to the Kelantan state agencies, places that are visible or accessible to the public include online or communication platforms, such as social media platforms.¹²

These two sections disproportionately affect trans and gender diverse persons. The expansive definition of space further increases state intrusion into the private lives of trans and gender diverse people, and in turn, shrinks spaces where trans and gender diverse people can exist with dignity and express themselves without fear of persecution.

- » **Section 21. Indecent act or speech:** As mentioned above, is widely defined as any act of kissing, hugging, sexually suggestive speech or gestures, wearing alluring attire, and other indecent acts inconsistent with *hukum syarak*.
- » **Section 24. Causing disruption to other people’s cohabitation:** This section reads as ‘menggangu rumah tangga orang lain’ in the BM version of the Enactment. The section penalizes anyone who causes any form of disruption to other people’s cohabitation or household resulting in neglect of existing cohabitating obligations. Cohabiting obligations are not defined or explained.
- » **Section 26. Instigating husband or wife to divorce or to neglect obligations:** This section penalizes anyone who persuades, forces or instigates a person in marriage to divorce their spouse or to neglect their duties and obligations as husband or wife. The lack of definition and explanation of ‘duties and obligations as husband or wife’ raises concerns, especially in a context where women are expected to play submissive gender roles in marriage.
- » **Section 48. *Muncikari*:** *Muncikari* is defined as anyone who acts as intermediary between woman and man and persons of the same gender for any purpose violates Part V of the Enactment on offences relating to protection of property. However, this section falls under Part VI on offences relating to offsprings, which criminalises sex work, khalwat among others instead of Part V of the Enactment that addresses offences relating to property.¹³ The fact that Section 48 appears under Part VI coupled with its gendered definition suggests that it could be applied in non-property related contexts, in particular in relation to consensual sex and sex work.¹⁴

- **Unconstitutional sections.** At least 25 sections under the Enactment overlap with existing Federal laws, and are in contravention with items listed in the Federal List. For example, Section 21 of the Enactment which penalises consumption of any intoxicating substance by any means, including eating, chewing, inhaling, smelling very clearly overlaps with the Dangerous Drugs Act. Meanwhile, Section 39. Reducing scale, measurement and weight overlaps with Sections 16 to 18 of the Weigh and Measurement Act 1972. (see Table 1).

¹² Tuan Ahmad Irwan Bin Ismail. Majlis Perasmian Penerangan Enakmen Kanun Jenayah Syariah (I) 2019. retrieved from <https://www.youtube.com/watch?v=GNAXKuWkmJc&t=2094s> 1:00:52 - 1:02:32

¹³ Section 2(1) - “....infringing Part V of this Enactment

¹⁴ Lacuna in law

¹⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, the four Geneva Conventions of 1949 (GC I, Art. 12; GC II, Art. 12; GC III, Arts 13, 17 and 87; GC IV, Arts 27 and 32; GC I-IV common article 3 and arts 50, 51, 130 and 147 respectively; Additional Protocol I of 1977 (Art. 75(2)(a)(ii)); and Additional Protocol II of 1977 (Art. 4(2)(a)), several UN and regional human rights bodies have held that corporal punishment, such as flogging, whipping or amputations, constitutes cruel, inhuman or degrading treatment or punishment, or even torture, see Human Rights Committee, general comment No. 20, para. 5; Communication No. 759/1997, *Osbourne v. Jamaica* Views

- **Continuation of judicial caning and other degrading, inhumane and punitive punishments.** At least 19 sections in the Enactment allow caning as a form of punishment that can be meted out, including against children and women. As stated in Section 60 of the Enactment, only children who have not reached puberty are exempted from the Enactment.

Children are vulnerable to caning under several sections, namely Section 48. for pregnancy out of wedlock and Section 33. Disobedient to parents. Any form of caning or whipping is prohibited under international laws,¹⁵ including the CRC.

- **Wide discretionary powers for syariah judges.** Other than fines, imprisonment and strokes of cane, at least 34 sections in the Enactment give the Syariah Court discretionary powers to mete out additional sentences to ‘offenders’. The additional sentence or forms of punishments introduced through this enactment is arguably ultra vires the Federal Constitution as it exceeds the Syariah Courts’ limited sentencing power provided under the Act 355 - RM 5,000 fine, maximum 3 years of prison sentence and 6 strokes of cane.

The Enactment allows the courts to issue the following additional sentences to ‘offenders’:

- Detention or counselling in rehabilitation at a rehabilitation center, Islamic Counseling Center, charitable home, mosque or institution or centers for rehabilitation to undergo rehabilitation for not more than 6 months. A monthly progress report will be submitted to the Court by presumably an officer in charge of the case. At least 4 sections under the enactment expressly allow this:
 - » Section 6. Attempt to renounce Islam
 - » Section 23. Exposing aurat in public places
 - » Section 19. Male person posing as a woman
 - » Section 20. Female person posing as a man
- Community services for not more than 240 hours can be found in at least 4 sections. The sections also allow judges the option to sentence ‘offenders’ to be detained or counselled in rehabilitation centers for not more than 6 months:
 - » Section 23. Exposing aurat in public places
 - » Section 19. Male person posing as a woman
 - » Section 20. Female person posing as a man
 - » Section 6. Attempt to renounce Islam

Section 65(2) defines “community service” as “any work, service or direction for the betterment of society in general and includes any work performed that involves payment to the prison or the local authorities.” This section raises many red flags; in particular the fact the state can impose ‘labour’ in exchange for fines, imprisonment, or caning.

All four sections also allow substitution of punishment of detention in an Islamic counselling centre for not more than 6 months to ensure repentance of the person in accordance with *hukum syarak*. These ‘restorative punishments’ are evidently retributive, punitive, and corrective in nature given its goal to correct persons who exist outside of the state’s religious cis-hetero patriarchal construct.

adopted by the Human Rights Committee on 15 March 2000, paras. 9.1, 9.2 and 11; Committee against Torture, concluding observations: Indonesia, CAT/C/IDN/CO/2, para. 15; and concluding observations: Yemen, CAT/C/YEM/CO/2/Rev.1, para. 18

- Order device, item or thing in commission of certain offences to be forfeited and destroyed. This is allowed under two laws in the Enactment:
 - » Section 4. Sorcery
 - » Section 37. Gambling. The court has discretionary power to order any device, item or thing used for the act of gambling to be forfeited and destroyed even if no one is convicted for the offence.
- Payment of reasonable compensation is allowed as an additional punishment under Section 11. Destroying or defiling a place of worship.
- Order married couples to cohabit as a married couple under Sections 25 and 26, which respectively penalize preventing a married couple from cohabiting as a husband and wife and instigating husband or wife to divorce or to neglect their obligations.
- Any order that the court deems appropriate appears in at least 26 sections under the Enactment. The parameters of what is deemed appropriate are not clarified or stated in the Enactment. For example, under Section 18, which penalizes ‘changing gender’, the court has discretionary power to mete out any additional punishment that the court deems appropriate in addition to fines and a prison sentence for a trans or gender diverse person who transitioned or against a healthcare provider that supports their transition.

Well-meaning sections under the Enactment

The Enactment introduces some well-meaning sections that nonetheless remain inconsistent with some provisions in the Federal Constitution:

- **Section 38. Dishonest disposal of orphan’s property**
Currently, to what extent is the state already monitoring the implementation of inheritance and what kinds of improvements are required to ensure the rights of orphans are upheld? While this section has good intentions, it still falls outside of the state list. An orphan is defined as a child whose biological father has passed away and has not reached the age of puberty. The definition could be reviewed to ensure access to social support for all orphans.
- **Section 31. Sexual harassment**
The section penalizes sexual harassment perpetrated against a person who does not have a familial (*mahram*) relationship with the perpetrator. The gaps in protection in the section are obvious, as it only protects people in non-familial relationships against sexual harassment. Further, protection against sexual harassment, although inadequate, can be found under Sections 81A and 81G of the Employment Act, and falls under the Federal List. However, a state-level anti-sexual harassment policy or guideline covering all spaces and relationships and in compliance with the Convention on the Elimination of Discrimination against Women (CEDAW) is recommended.
- **Introduction of safeguards against allegations of committing *mungkar* under Section 29 and *liwat*, *musahaqah* and *zina* under Section 51**
While the intention of these sections is to act as a safeguard against defamation, the criminalisation of consensual sexual acts violates a person’s right to dignity, privacy, equality and non-discrimination. Similarly, the broad and vague definition of *mungkar* which includes anything bad, condemned, despised and forbidden by *hukum syarak* as well as the criminalisation of persons who encourage *mungkar* under Section 12 undermines the safeguard under Section 29.

Constitutionality of Kelantan Syariah Criminal Offences Enactment

Article 4(1) of the Constitution affirms the primacy of the Federal Constitution as the supreme law of Malaysia. It also states that any law passed after Merdeka Day that is inconsistent with the Federal Constitution is void to the extent of its inconsistency.

The notion that Article 3(1)¹⁶ overrides the Federal Constitution and provides Islam with a special position in Malaysia is incorrect. Article 3(1) has to be read together with Article 3(4), which expressly states “nothing in this article derogates from any other provision of this Constitution.”¹⁷

The Federal Court decision¹⁸ on Section 28 of the Selangor Syariah Criminal Offences Enactment in 2021, clarifies the state governments’ power as stipulated in Article 74(2)¹⁹ of the Federal Constitution, and the extent to which the state governments can enact state syariah laws, specifically state syariah criminal offences related laws

[46] If we were to adopt the rather simplistic approach advanced by the respondents that it is sufficient to simply satisfy ourselves that Section 28 of the 1995 Enactment is squarely encapsulated within the definition of ‘precepts of Islam’ without regard to the preclusion clause, that would render the preclusion clause otiose.²⁰

The decision calls for a review of the types of Syariah criminal offences-related laws that can be enacted at the state level, which has yet to be fully addressed by the Federal agencies or state governments.

Thus it is clear and undisputed that all state laws, including islamic laws passed by the state legislature must be consistent with Article 74(3) which subjects state legislative power to limitations in enacting state laws, and Article 5-13 or Part II of the Federal Constitution.

Guided by Article 4(1) of the Federal Constitution, the constitutionality of the Kelantan Syariah Criminal Offences Enactment 2019 has to be tested on both the grounds of

- **Compliance with Federal State List** to determine the Kelantan state legislative’s competence to enact the state law as stipulated Articles 73, 74, and 75.
- **Compliance with Articles 5 to 13 of the Federal Constitution.**

¹⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, the four Geneva Conventions of 1949 (GC I, Art. 12; GC II, Art. 12; GC III, Arts 13, 17 and 87; GC IV, Arts 27 and 32; GC I-IV common article 3 and arts 50, 51, 130 and 147 respectively; Additional Protocol I of 1977 (Art. 75(2)(a)(ii)); and Additional Protocol II of 1977 (Art. 4(2)(a)), several UN and regional human rights bodies have held that corporal punishment, such as flogging, whipping or amputations, constitutes cruel, inhuman or degrading treatment or punishment, or even torture, see Human Rights Committee, general comment No. 20, para. 5; Communication No. 759/1997, *Osbourne v. Jamaica* Views adopted by the Human Rights Committee on 15 March 2000, paras. 9.1, 9.2 and 11; Committee against Torture, concluding observations: Indonesia, CAT/C/IDN/CO/2, para. 15; and concluding observations: Yemen, CAT/C/YEM/CO/2/Rev.1, para. 18

¹⁶ Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.

¹⁷ *State Govt. of NS v Muhammad Juzaili Mohd Khamis* [2015] 6 MLJ 736; s ZI Publication Sdn. Bhd. dan yang lain lwn Kerajaan Negeri Selangor; *Kerajaan Malaysia dan yang lain (mencelah)* [2015] 8 CLJ 621

¹⁸ “*Iki Putra Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 3 MLRA 384.” ELaw Journal Express, 2021, www.elaw.my/JE/01/JE_2021_18.html.

¹⁹ 9th Schedule; division between Federal list, state list and concurrent list.

²⁰ “*Iki Putra Mubarrak v Kerajaan Negeri Selangor & Anor* [2021] 3 MLRA 384.” ELaw Journal Express, 2021, www.elaw.my/JE/01/JE_2021_18.html.

Religion of the Federation

3. (1) Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.

(2) In every State other than States not having a Ruler the position of the Ruler as the Head of the religion of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and, subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired; but in any acts, observances of ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole each of the other Rulers shall in his capacity of Head of the religion of Islam authorize the Yang di-Pertuan Agong to represent him.

(3) The Constitution of the States of Malacca, Penang, Sabah and Sarawak shall each make provision for conferring on the Yang di-Pertuan Agong the position of Head of the religion of Islam in that State.

(4) Nothing in this Article derogates from any other provision of this Constitution.

(5) Notwithstanding anything in this Constitution the Yang di-Pertuan Agong shall be the head of the religion of Islam in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya; and for this purpose Parliament may be law make provisions for regulating Islamic religious affairs and for constituting a Council to advise the Yang di-Pertuan Agong in matters relating to the religion of Islam.

Supreme Law of the Federation

4. (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

(2) The validity of any law shall not be questioned on the ground that—

- (a) it imposes restrictions on the right mentioned in Article 9(2) but does not relate to the matters mentioned therein; or
- (b) it imposes such restrictions as are mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or—

- (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
- (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

Subject matter of federal and State laws

74. (2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

(3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

Rule of law & international human rights law

Streamlining areas of law-making is critical in ensuring equality before the law, preventing power abuse by the state and its actors, safeguarding human rights, protecting minorities against arbitrary majority rules,²¹ among key elements of rule of law. The European Commission for Democracy through Law or the Venice Commission noted “that the notion of the Rule of Law requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures”

The commission developed a checklist consisting of the following elements to ensure practical application of the principles of Rule of Law

1. Legality, including a transparent, accountable and democratic process for enacting law;
2. Legal certainty;
3. Prevention of abuse and misuse of powers. This includes restriction of discretionary powers;
4. Non-discrimination and equality before the law.²²
5. Access to justice before independent and impartial courts, including judicial review of administrative acts.

In the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, all UN member states reaffirmed “that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations.” The state reaffirmed their commitment to fulfil their obligation to promote universal respect, observance and protection of all human rights.²³ In addition, the states acknowledge the interrelated and mutually reinforcing relationship between rule of law and development, especially in building sustainable development, poverty eradication, and full realization of all human rights.²⁴

Ensuring rule of law and access to justice, as well as promoting and enforcing non-discriminatory laws and policies are further reflected in Sustainable Development Goal (SDG) 16, Peace, Justice and Strong Institutions.²⁵ SDG 16 is part of 17 goals with 169 targets that all countries aim to achieve by 2030. Goal 16 has several key targets²⁶ including

- Target 16.3 Promote rule of law and ensure equal access to justice
- Target 16.6 Develop effective, accountable and transparent institutions
- Target 16.7 Ensure responsive, inclusive and representative decision-making
- Target 16.B Promote and enforce non-discriminatory laws and policies

In Malaysia’s 2021 Voluntary National Review (VNR) report, Malaysia acknowledges that ‘good governance is a prerequisite to implementing and attaining the SDGs as a whole’. To that end, it has undertaken multiple institutional reforms, including legal reforms in relation to discriminatory laws on the basis of gender. It also reports the challenges it has faced in meeting the targets under Goal 16, including gender disparity, challenges in improving physical and financial access to justice as well as legal literacy, access to data, among others. Malaysia acknowledges in the report that ‘various vulnerable groups may also be at higher risk to discrimination and acts of violence due to their identities ...’ and that the government will ‘undertake [efforts] to enhance Malaysia’s human rights compliance in accordance to the Federal Constitution and international obligations’ over the next few years.²⁷

²¹ European Commission For Democracy Through Law. Rule of Law Checklist. European Commission For Democracy Through Law, 2016, page 7 [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e).

²² Ibid.

²³ “67/1. Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels.” *United Nations*, 2012, www.un.org/ruleoflaw/files/37839_A-RES-67-1.pdf, para 6

²⁴ Ibid. para 30

²⁵ “Goal 16: Peace, Justice and Strong Institutions.” *The Global Goals*, www.globalgoals.org/16-peace-justice-and-strong-institutions.

²⁶ “Goal 16: Peace, Justice and Strong Institutions - SDG Tracker.” *Our World in Data*, sdg-tracker.org/peace-justice.

²⁷ Malaysia Voluntary National Review (VNR) 2021. Economic Planning Unit, Prime Minister’s Department, 2021, page 107 - 114 www.epu.gov.my/sites/default/files/2021-07/Malaysia_Voluntary_National_Review_%28VNR%29_2021.pdf.

Despite these commitments, laws such as the Enactment are legislated. Not only does the Enactment overlap and intrude on existing Federal laws, causing legal uncertainty and inconsistency; the chilling effects on the human rights of persons in Kelantan and other states are wide and far-reaching. In addition, the indirect impact on non-Muslim persons in Kelantan —including freedom of expression, privacy, the right to identity and self-determination, among others — is inevitable.

The subsequent section, will explore the extent to which the Enactment fails to comply with the Federal Constitution and is in violation of the following rights

- Freedom of thought, conscience and religion or belief
- Privacy
- Bodily autonomy and integrity
- Freedom of movement
- Freedom of opinion and expression
- Access to healthcare services and information
- Access to justice

Compliance with Federal-State lists

The Kelantan Syariah Criminal Offences Enactment 2019 was enacted pursuant to Article 73(b) of the Federal Constitution, which allows the state government to enact state laws, including state syariah laws.

Article 74(2) empowers the state to enact state laws with respect to matters listed in the State List and Concurrent List. However, the State List only allows the state to enact syariah laws on 25 areas of personal laws in Islamic matters and on matters that are considered residual — remaining matters that are not legislated by the federal government.

In addition, while the state can enact laws that are deemed as against the precepts of Islam, targeting persons professing the religion of Islam, its powers are limited by the preclusion clause which states “... except in regard to matters included in the Federal List.”

Meaning, the state government has no power to enact laws on areas that are already listed down in the Federal List under the Ninth Schedule.

Further, the assumption that Islamic law is solely assigned to the state government is incorrect as many matters that concern Islam like commercial trade, tourism, and criminal matters²⁸ are in the exclusive jurisdiction of the Federal government.²⁹

At least 31 sections in the Kelantan Syariah Criminal Offences Enactment undermine the preclusion clause and encroach into subject matters under the Federal List, in particular

²⁸ Murder, theft etc.

²⁹ List II - state list. Item 1 - “... but shall not have jurisdiction in respect of offences except in so far as conferred by federal law...”

- **Item 3** of the Federal List³⁰ on **internal security** which includes:
 - » (b) Prisons; reformatories; remand homes; place of detention; probation of offenders; juvenile offenders
 - » (c) Preventive detention; restriction of residence
- **Item 4** of the Federal List includes **civil and criminal law and procedure and the administration of justice under Federal jurisdiction**. This includes:
 - » (e)(i) Commercial Contracts;
 - » (f) Official secrets, corrupt practices;
 - » (h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;
 - » (l) Betting and lotteries;
 - » (k) Ascertainment of Islamic Law and other personal laws for purposes of federal law, which includes matters of Islamic banking, Islamic finance and takaful.
- **Item 7** on **finance**
- **Item 8 (f)** on **establishment of standards of weights and measures**³¹
- **Item 14 (d)** on **intoxicating drugs and liquors**³²

Compliance with Article 5 - 13 of the Federal Constitution

Many of the sections under various state Syariah criminal offences acts and enactments have been subject to wide scrutiny due to serious human rights violations brought about by the law. By increasing punishments of existing sections and introducing new areas of criminalisation, the state intensifies these violations and harms. It gives further power to the Islamic Departments and Syariah Court to act with impunity, interfere with the lives and restrict the rights of Muslim persons, and by extension all persons in Kelantan.

The increased state's capacity to intervene in the lives of Muslim persons, undeniably, increases violation of privacy, dignity, equality, right to be free from discrimination, freedom of movement, freedom of expression, association and assembly, guaranteed under Article 5, 8, 9 and 10 of the Federal Constitution. Any form of restriction of rights must be reasonable, legal and necessary as stated in the Federal Constitution and international human rights law.

Restrictions of freedom and rights can only happen when there is a clear violation of public safety, public order, health or morals, and the rights and freedoms of others.³³ When such restrictions take place, the state must justify the legality, necessity and proportionality of the restrictions.

Public morality and order have been misused by the majority to justify restrictions of rights and freedoms. In many case laws, including *Navtej Johar vs Union of India*, courts have affirmed that public morality and order cannot be used to enforce the morality of the majority. Instead, the state must take measures to uphold the principle of constitutional morality and protect all people, in particular minorities and marginalised populations, from majoritarianism.

³⁰Ninth Schedule of the *Federal Constitution of Malaysia*. PNMB, 2006, Pg 174 - 175, www.jac.gov.my/spk/images/stories/10_akta/perlembagaan_persekutuan/federal_constitution.pdf.

³¹Ibid. pg 177

³²Ibid. pg 179

³³*Federal Constitution of Malaysia*. PNMB, 2006, Pg, 16 www.jac.gov.my/spk/images/stories/10_akta/perlembagaan_persekutuan/federal_constitution.pdf.

*[116] ... the concept of constitutional morality ... strives and urges the organs of the State to maintain such a heterogeneous fibre in the society, not just in the limited sense, but also in multifarious ways. It is the responsibility of all the three organs of the State to curb any propensity or proclivity of popular sentiment or majoritarianism. Any attempt to push and shove a homogeneous, uniform, consistent and a standardised philosophy throughout the society would violate the principle of constitutional morality. Devotion and fidelity to constitutional morality must not be equated with the popular sentiment prevalent at a particular point of time.*³⁴

The Enactment gives the Kelantan Islamic Department wider powers to carry out arrests, raids, surveillance and other actions against actual or perceived Muslim persons. Even if the arrests and raids are carried out with the police and other enforcement agencies and in full compliance with Standard Operating Procedures (SOP), the state's intervention in the private lives of people is still unreasonable.

For example, despite the fact that many cases of khalwat raids have resulted in death, the punishment for khalwat has been increased to a fine of RM 5,000 and a maximum of 2 years of prison sentence. Moreover, the Syariah Court is given discretionary power to mete out any additional punishment that it deems appropriate.

Similarly, despite high levels of sexual harassment and violence complaints by transgender women, Section 18 penalizes anyone who 'changes gender', where gender is considered private body parts including genitalia, although factually, gender is not defined by our genitals. This section could result in increased breaches of dignity and privacy as well as sexual violence against trans women with impunity.

The UN Special Rapporteur on violence against women, its causes and consequences asserted that the values of dignity, equality, justice and protection of the marginalised, which are found in the corpus of syariah are consistent with universal human rights principles and values. She further added that "international human rights standards are intrinsic to Islamic teachings and must jointly lead to national guarantees of equality and non-discrimination ... Given the centrality of equality to achieve justice today, there can be no justice without gender equality to the philosophy of law in Islam, and no justice without gender equality in our contemporary times."³⁵

³⁴*Navtej Singh Johar v. Union of India*. 2018 Indlaw SC 786 para 116 www.humandignitytrust.org/wp-content/uploads/resources/2018.09.06-Johar-v-India-judgment-Indian-SC.pdf.

³⁵"Any Party in Afghanistan Declaring It Follows Islamic Sharia Must Uphold and Protect the Rights of Women and Girls." *OHCHR*, 2021, www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27402&LangID=E.

Freedom of thought, conscience and religion or belief

Under the Federal Constitution, the right to profess and practice a person's religion is guaranteed under Article 11, although with limitations in relation to propagation of religion. In addition, discrimination on the ground of religion is prohibited under Article 8(2).

In a 2017 report by the Special Rapporteur on Freedom of Religion and Belief asserted that freedom of religion or belief and the right to equality (and non-discrimination) are inextricably linked. Freedom of religion or belief should be seen as constituting a right to equality, which prohibits discrimination on the basis of religion or belief. He added that this right, however, does not give the power to marginalise, suppress or carry out violent acts against others and those in vulnerable situations, including women or LGBTI persons under the guise of manifesting their religion.³⁶

Article 18 of the Universal Declaration of Human Rights protects the right to freedom of thought, conscience and religion.³⁷ The right includes,

- the right to hold or change a person's religion or belief,
- the right to manifest their religion or belief in teaching, practice, worship and observance individually or in community with others.^{38, 39}

The restriction of freedom of religion under the Enactment manifests in multiple folds.

Firstly, the enactment as a **whole restricts a Muslim person's ability to profess and practice their religion** individually or as a community, **express views that are contrary to the state**, among others. The Enactment reinforces a state's construct of a Muslim person, who appears to be a submissive gender conforming cisgender heterosexual person who does not stray from the state's religious ideology. The harsh punishments ranging from rehabilitation to caning to anything deemed appropriate, is likely to increase self-censorship, reduce the autonomy and ability of persons to make informed decisions, and create opportunities for self-exploration and discovery without state or external interventions.

Secondly, restrictions of freedom of religion are glaring under several sections, including

- **Section 6. Attempt to renounce Islam:** violates a person's right to change their religion.
- **Section 7. Distorting teachings and precepts of Islam:** can have a negative impact on knowledge building, plurality of thoughts and beliefs. This section also poses significant barriers in the enjoyment of the rights of persons belonging to religious minorities, including the right to manifest their religion or belief in worship, observance, teaching and practice and other rights.
- **Section 8. *Takfir*:** penalises anyone who expresses, organises or facilitates activities that make a person who identifies and identified as Muslim a non believer or cease to believe in Islam.

³⁶“Report of the Special Rapporteur on Freedom of Religion and Belief A/HRC/34/50.” para 31, [OHCHR](#), 2017, [documents-dds-ny.un.org/doc/UNDOC/GEN/G17/008/79/PDF/G1700879.pdf?OpenElement](#).

³⁷United Nations. “Universal Declaration of Human Rights.” [United Nations](#), [www.un.org/en/about-us/universal-declaration-of-human-rights](#).

³⁸“Gender-Based Violence and Discrimination in the Name of Religion or Belief.” [A/HRC/43/48](#), 2020, page 14 [documents-dds-ny.un.org/doc/UNDOC/GEN/G20/217/76/PDF/G2021776.pdf?OpenElement](#).

³⁹“Article 18: The Importance of FoRB in International Law.” [University of Birmingham](#), [www.birmingham.ac.uk/schools/ptr/departments/theologyandreligion/research/ciforb/news/2017/forb-in-international-law.aspx](#).

- **Section 9. Insulting or deriding Islam:** penalises anyone who offends or insults any laws relating to Islam in Kelantan. This effectively silences dissent against state laws, and further perpetuates misinformation about syariah laws that the laws are divine and made by God, when the state enactment is clearly made through the state assembly while abiding by limitations imposed by the Federal Constitution.
- **Section 12. Encouraging *munjkar*:** broadly defined as any bad, condemned, despised and forbidden by *hukum syarak* casts a wide net.

Thirdly, the restriction of freedom of religion under this enactment infringes on other rights, including the right to privacy, freedom of expression, association and assembly, right to self-determination, right to healthcare services and information. In situations where there are conflicts between rights, international human rights law and principles of non-discrimination, pluralism, legality, proportionality, impartiality, among others, can be used to resolve these conflicts.

The Special Rapporteur on freedom of religion or belief in his report on gender-based violence and discrimination in the name of religion or belief stresses that states as duty bearers, must address the overlap between freedom of religion and right to non-discrimination by producing “practical concordance” of all rights at stake without trade-offs or hierarchy.

52. ... this overlap between freedom of religion or belief and the right to non-discrimination needs to be addressed not by trade-offs or a hierarchy, but by producing the “practical concordance” of all human rights involved, to a maximum degree possible, based on reasons accessible to all. ...

As duty bearers, States must become more clear-eyed about the root causes of gender inequality and intentional about the multilevel, transformational approaches that are necessary to “solve” such a complex problem.

Anchoring freedom of religion or belief in a principle that demands non- discrimination requires the legal protection of the equality of opportunity in the enjoyment by all of this right, as well as all the other rights on which freedom of religion or belief depends. This means that the rights of individuals should be protected even within groups, by creating an enabling environment where dissenters are protected against incitement to violence, and are able to assert their agency through the exercise of their fundamental human rights, including freedom of expression, right to information, freedom of religion or belief, the right to education, the right to work, freedom from coercion and equality before the law, among others.⁴⁰

⁴⁰“Report on Freedom of Religion or Belief and Gender Equality.” [OHCHR](https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/ReportGenderEquality.aspx), 2020, www.ohchr.org/EN/Issues/FreedomReligion/Pages/ReportGenderEquality.aspx.

Privacy

The right to privacy includes being free from physical or online surveillance, monitoring of communications or activities, state intrusion into private, family or home affairs from the State, private sector or other citizens.⁴¹ In *Justice KS Puttaswamy v Union of India*, the court expanded the definition of privacy to include privacy of body, mind and information.⁴² The right to privacy is critical in allowing humans to develop self-worth and dignity; establish and nurture human relationships and intimacy, and make autonomous and informed decisions without interference from external parties or communities.⁴³

In *Sivarasa v Badan Peguam Malaysia & Anor*, the Federal Court of Malaysia held that Article 5(1) of the Federal Constitution, which protects the right to life and personal liberties, includes the right to privacy.

The Enactment shows widespread and unreasonable state intrusion into all aspects of Muslim persons' lives, be it in private or public spaces. By extension, it increases state intrusion in the lives of all persons regardless of their religious backgrounds or beliefs. In reality, the relationships and interactions that people have, nurture and develop are not bound by religion. As such, the Enactment further adds barriers in the development of various forms of relationships and interactions outside of their gender, religious and other identities and constructs. This has a broader impact in creating and entrenching isolation and homogeneity along religious and racial lines.

In addition, all persons, especially those who are perceived as Muslims, face increased vulnerability to various forms of policing not only by the state, but also private actors for not adhering to the state's construct of a Muslim person or Islamic teachings. Consequently, the Enactment increases and legitimises moral policing and breaches of privacy of private actors in the lives of others.

Any form of restriction or interference of privacy must be justified through a proportionality test.⁴⁴ As such, the Enactment must be tested on the grounds of its legality, necessity and proportionality in terms of infringement of fundamental rights given its widespread violation of privacy.

Bodily autonomy and integrity

Violations of **bodily autonomy and integrity** in the Enactment manifest through

- Various **sections that prohibit various forms of self expression** through clothing, ideas, speech; medical and non-medical changes on a person's own body; for engaging in consensual sexual acts, among others.
- **Sections that violate self determination and right to identity**, including sections related to changing gender and posing as man or woman. These sections have direct impact on recognition of transgender and gender diverse persons.
- **Sections that violate access to health**, including sexual reproductive health and rights, in particular sections that prohibit changing gender, 'cosmetic surgeries', pregnancy out of wedlock, liwat, musahaqah, sex work, and consumption of drugs.
- **Multiple forms of punishments** that do not only impose physical harm, but also psychological harm.

⁴¹ "Two Sides of the Same Coin – the Right to Privacy and Freedom of Expression." Privacy International, 2018, privacyinternational.org/blog/1111/two-sides-same-coin-right-privacy-and-freedom-expression.

⁴² Singh, Gurpreet. "Deep Dive Into The History Of The Right To Privacy In India." Youth Ki Awaaz, 11 Oct. 2021, www.youthkiawaaz.com/2021/10/save-yourself-from-intrusion-know-your-right-to-privacy.

⁴³ Navtej Singh Johar v. Union of India. 2018 Indlaw SC 786 www.humandignitytrust.org/wp-content/uploads/resources/2018.09.06-Johar-v-India-judgment-Indian-SC.pdf.

⁴⁴ Hon Mr Justice Andrew Cheung PJ. "Conflict of Fundamental Rights and the Double Proportionality Test." Hong Kong Court of Final Appeal, 2016, [www.hkcfca.hk/filemanager/speech/en/upload/2236/Common%20Law%20Lecture%20\(Final%20Version\).pdf](https://www.hkcfca.hk/filemanager/speech/en/upload/2236/Common%20Law%20Lecture%20(Final%20Version).pdf).

At least 19 sections in the Enactment allow caning as a form of punishment that can be meted out, including to children who have reached puberty, under Section 48, for pregnancy out of wedlock and Section 33, for disobedience to parents. (see Table 3)

Caning or whipping is inconsistent with international human rights law. Article 5 of the Universal Declaration of Human Rights prohibits torture or cruel, inhuman or degrading treatment or punishment against any person. Article 5 (1) of the Federal Constitution safeguards against deprivation of life or personal liberties, which includes freedom from torture and inhuman or degrading treatment.

In Malaysia's 2007 Child Rights Convention review, the Child Rights Committee expressed deep concerns over the use of caning under the law and as a disciplinary measure. The Committee recommended the government to

“(49).... immediately abolish all forms of cruel, inhuman or degrading punishments, including caning and other forms of corporal punishment imposed on persons having committed a crime when under the age of 18 and as a disciplinary measure in penal institutions...”⁴⁵

In addition, under Section 289 of the Criminal Procedure Code, women are exempted from being caned or whipped. However, the state syariah laws, women can be caned for various reasons. In 2019, the Terengganu Syariah High Court sentenced two queer people to public caning for attempt read together with *musahaqah*. In 2018, the CEDAW Committee recommended Malaysia to ‘Harmonise syariah laws with Section 289 of the Criminal Procedure Code to prohibit the whipping of women as a form of punishment.’⁴⁶

Meanwhile, **at least 34 sections allow the court the discretionary power to mete out additional punishments**. Of which, 26 sections allow the court to mete any punishment that it deems appropriate. Among these, 14 sections already impose the maximum punishment of RM 5,000 in fine, 3 years of imprisonment and 6 strokes of cane. This includes, for being disobedient to parents, consuming intoxicating drinks and substances, and sex work.

Under the following sections, the court can mandate a maximum of 6 months of detention or counseling at an Islamic counseling center

- Section 6. Attempt to renounce Islam
- Section 19. Male person posing as a woman
- Section 20. Female person posing as a man
- Section 23. Exposing aurat in public places

A monthly progress report is required to be submitted to the court by an officer in charge.

⁴⁵“United Nations High Commissioner for Refugees. “Refworld | UN Committee on the Rights of the Child: Concluding Observations, Malaysia.” Refworld, 2007, www.refworld.org/publisher,CRC,CONCOBSERVATIONS,MYS,468912822,0.html.

⁴⁶Recalling its general recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19, the Committee recommends that the State party: (e) Harmonize Syariah law with section 289 of the Criminal Procedure Code to prohibit the whipping of women as a form of punishment;

The state's efforts to correct and change a person's gender and religious identities and expressions through 'restorative punishment,' such as counseling, detention, community service, among others, can amount to torture given the severe psychological harm on people for merely expressing their gender identity, gender expression, beliefs and who they are as human beings. Further, these 'restorative punishments' could also subject so-called offenders to further punishments, surveillance and other forms of state intrusion into the private lives of people for an extended period of time.

These punishments, in turn, will increase self-censorship, self-regulation and denial of the right to self-determination.

In line with international human rights law and the Federal Constitution, Suhakam has called for the government ensure prohibition of torture, among others, by developing a comprehensive Plan of Action for Torture Prevention, reducing the rate of incarceration of detainees and addressing overcrowded conditions in detention centres, and reviewing compatibility of existing laws or legislating new laws to give effect the Convention against Torture.⁴⁷

Freedom of movement

Restriction of freedom of movement manifests in multiple ways through the Enactment. Firstly, the Enactment has an adverse impact on the movement of people within Kelantan, especially in public places. Section 23 which penalises exposure of aurat in public places, and Sections 19 and 20, which penalise persons on the basis of their gender identity and gender expression "in any public place or in any private place publicly visible or accessible" have very negative and disproportionate impacts on the freedom of movement cisgender and trans women as well as gender diverse people.

In the Court of Appeal decision on the constitutionality of the previous version of Section 66 of the Negeri Sembilan Syariah Criminal Offences Enactment, which criminalises trans women based on their gender expression and identity in public places, the court stated the restriction of freedom of movement must satisfy the test of reasonableness, which Section 66 failed

... even if we were to regard section 66 as a restriction and not as a denial of the right to move freely within the country, still, such restriction, according to judicial authorities (see Sivarasa Rasiah; Dr. Mohd Nasir Hashim and Muhammad Hilman), must be subject to the test of reasonableness. However, we hold that section 66 is an unreasonable restriction of the appellants' right to freedom of movement – and hence unconstitutional as being inconsistent with Art. 9(2) of the Federal Constitution.⁴⁸

Secondly, the Enactment also acts as a barrier for persons in Malaysia, especially Muslim persons, to travel to Kelantan without fear of persecution.

⁴⁷Suhakam. "Make Elimination of Torture a Reality." Malaysiakini, 26 June 2020, www.malaysiakini.com/letters/531937.

⁴⁸Muhammad Juzaili Bin Mohd Khamis, et al. v. State Government of Negeri Sembilan, et Al. Legal Information Institute, 2015, page 22 www.law.cornell.edu/women-and-justice/resource/muhammad_juzaili_bin_mohd_khamis_et_al._v._state_government_of_negeri_sembilan_et_al.

Freedom of opinion and expression

Freedom of opinion and expression includes the freedom to hold opinions without interference; to seek, receive and impart information and ideas through any media and regardless of frontiers;⁴⁹ to express identity or personhood through various means,⁵⁰ among others. Freedom of expression is protected under Article 10 (1) of the Federal Constitution, along with freedom of association and assembly.

Similar to other rights, restriction of freedom of expression must be provided by the law and its necessity must be justified. Article 10 (2) states that Parliament may restrict freedom of expression, however, the restrictions must be necessary and reasonable.⁵¹ This is further affirmed in several case laws in Malaysia, namely *Sivarasa Rasiah vs Badan Peguam Malaysia* and *Muhammad Hilman bin Idham v Kerajaan Malaysia*.⁵² In the Court of Appeal decision on the constitutionality of Section 66 of the Negeri Sembilan's Syariah Criminal Offences Enactment, the Court found that Section 66 violates freedom of expression and fails the reasonableness test required to restrict freedom of expression. The decision also asserts and reiterates that only Parliament, not the state legislative assembly may restrict freedom of expression with reasonable, legal and necessary grounds.⁵³

The violation of freedom of expression can be seen:

- ▶ **Through the overall effect of the Enactment.** The Enactment as a whole will increase negative impacts on freedom of expression, including self-censorship, impede self-exploration and discovery, and increase barriers in making informed decisions and choices.
- ▶ Expressly under various sections of the Enactment.

At least **6 sections directly infringe on the freedom to hold opinions without interference.** This includes:

- » **Section 6. Attempt to renounce Islam**
- » **Section 8. Takfir** penalizes anyone who expresses, organises or facilitates activities that makes a person who identifies and identified as Muslim a non believer or cease to believe in Islam.
- » **Section 9.** Insulting or deriding laws penalises anyone who offends or insults any law relating to Islam in Kelantan, which may result in suppression of criticism of the state syariah laws.
- » **Section 12. Encouraging *mungkar*:** *Mungkar* is defined as acts that are bad, condemned, despised and forbidden by hukum syarak. The broad definition of *mungkar* can be open to abuse although Section 29 safeguards against allegations of committing *mungkar*.
- » **Section 21. Indecent act or speech** includes hugging, kissing, sexually suggestive speech or gesture, wearing alluring attire, and other indecent acts inconsistent with hukum syarak. This section imposes a blanket prohibition of expressions and speech.
- » **Section 30. Words capable of breaking peace.** This section penalises willful utterance or dissemination of words contrary to hukum syarak and likely to cause breach of peace.

⁴⁹“Universal Declaration of Human Rights.” OHCHR, www.ohchr.org/en/udhr/pages/Language.aspx?LangID=eng.

⁵⁰“Principle 19 – Yogyakarta Principles.” Yogyakarta Principles, yogyakartaprinciples.org/principle-19.

⁵¹ Page 16

⁵² Sreenevasan, Ambiga, and Jo-Ann Ding. “The Courts and the Enforcement of Human Rights.” Singapore Academy of Law, 2020, pp. 472–78, journalonline.academyPublishing.org.sg/Journals/Singapore-Academy-of-Law-Journal-Special-Issue/e-Archive/ctl/eFirstSALPDFJournalView/mid/513/ArticleId/1524/Citation/JournalsOnlinePDF.

⁵³ Muhammad Juzaili Bin Mohd Khamis, et al. v. State Government of Negeri Sembilan et al, [2015] 3 MLJ 513 et Al. Legal Information Institute, 2015, page 24 https://www.law.cornell.edu/women-and-justice/resource/muhammad_juzaili_bin_mohd_khamis_et_al._v._state_government_of_negeri_sembilan_et_al.

At least **14 sections in the enactment directly impact a person's ability to seek, receive and impart information.** The following sections, among others, have a negative impact on creation, preservation and access to knowledge, ideas and practices.

- » **Section 4. Sorcery:** The blanket ban on sorcery has an impact on the preservation and development of knowledge, practices and ideas, including non-harmful alternative healing practices.
- » **Section 7. Distorting teaching and precepts of Islam:** In the past, the state Islamic Departments have banned books, carried out raids to seize books⁵⁴ that are deemed against the precepts of Islam, resulting in censorship of information and knowledge.^{55, 56}
- » **Sections that criminalise pregnancy out of wedlock, drug use, sex work, consensual sexual relationship between adults, gender identity, and some healthcare treatments and procedures** at the state level will increase barriers in relation to access to healthcare information and services. The (increased) criminalization of these consensual acts and groups of people increases their vulnerability to state surveillance and harmful interventions.

At least **10 sections prohibit self-expression and personhood.** Many of these sections will disproportionately affect women, LGBTIQ persons, young people, among others.

The criminalization of exposure of aurat in public spaces not only regulates a person's attire, but it also reinforces state constructed binary gender identities and harmful gender norms and roles that perpetuate unequal power dynamics on the basis of gender.

It is important to note that the criminalisation of consensual sexual acts extends beyond the sexual act that is criminalised. In the context of LGBTIQ persons, criminalization of sodomy and *musahaqah*⁵⁷ shapes and reinforces negative perceptions of LGBTIQ persons and contributes to the ability of LGBTIQ persons to express themselves without fear and wider discrimination, violence and marginalization that they face.

- » Section 4. Sorcery
- » Section 6. Attempt to renounce Islam
- » Section 14. Sodomy
- » Section 15. *Musahaqah*
- » Section 18. Changing gender
- » Section 19. Male person posing as female
- » Section 20. Female person posing as male
- » Section 21. Indecent act or speech
- » Section 22. Act of applying tattoo or undergoing treatment or surgery for cosmetic purposes without *syarii* cause
- » Section 23. Exposing *aurat* in public places

Article 13 of the CRC safeguards freedom of expression for children. The child rights committee in 2007 recommended Malaysia to “(47) ... to take all necessary measures to ensure the full practical implementation of the rights to freedom of expression and freedom of association and peaceful assembly” of children.⁵⁸

⁵⁴“Malaysia: Reverse Book Ban.” Human Rights Watch, 28 Oct. 2020, www.hrw.org/news/2012/05/31/malaysia-reverse-book-ban.

⁵⁵*Berjaya Books v Jawi* [2014] 1 MLJ 138; *ZI Publications v Selangor* [2016] 1 MLJ 153

⁵⁶Rowland, Kathy. “Faisal Tehrani: From Poster Boy to Pariah.” *ArtsEquator*, 8 Dec. 2017, artsequator.com/faisal-tehrani-poster-boy-pariah.

⁵⁷Defined as sexual acts between women

⁵⁸United Nations High Commissioner for Refugees. “Refworld | UN Committee on the Rights of the Child: Concluding Observations, Malaysia.” Refworld, 2007, www.refworld.org/publisher/CRC/CONCOBSERVATIONS/MYS/468912822,0.html.

Access to healthcare services and information

Research shows clear correlations between low health seeking behaviour and criminalisation.⁵⁹ The criminalisation of pregnancy out of wedlock, drug use, liwat and musahaqah and sex work will increase barriers for affected communities to seek healthcare services due to heightened vulnerability of being reported to state agencies should they seek healthcare services.

In the context of HIV, the Ministry of Health Malaysia in its Global AIDS Monitoring 2020 report acknowledges that access to HIV prevention services for cisgender women sex workers and gay, bisexual, queer and other men who have sex with men (MSM) ‘have been poor probably because they are the most hard-to-reach and difficult to identify due to stigma and discrimination’.⁶⁰

A research by the Centre of Excellence for Research in ADIS (CERiA) with 26 muslim queer men shows a causal link between low health seeking behaviour, lower self-esteem and poor mental health and fear of prosecution under federal and state syariah laws; familial and societal pressure to marry and ‘return to the right path, among others.’⁶¹

Meanwhile, as noted by UNAIDS, **sex workers are particularly marginalized** as ‘intersecting forms of structural and societal stigma and discrimination, including punitive laws, policies and practices, create significant inequalities and prevent sex workers from being able to protect their health, safety and well-being.’⁶²

- » According to UNAIDS, in 2019 globally cisgender women sex workers were 30 times more likely of acquiring HIV than the general population. UNAIDS further asserts that ending direct and indirect criminalisation of sex work, sex workers and their clients as well as stigma and discrimination is critical in ending AIDS.
- » A 2014 study shows ‘decriminalisation of sex work would have the greatest effect on the course of HIV epidemics across all settings, averting 33–46% of HIV infections in the next decade.’⁶³

As such, UNAIDS has called on all countries to remove discriminatory laws and stigma towards key populations—gay men and other men who have sex with men, sex workers, transgender people, people who inject drugs and prisoners and other incarcerated people, a key action towards achieving the Sustainable Development Goals. These two mutually reinforcing factors “fuel violence, exploitation and a climate of fear, hindering efforts to make HIV services available to the people who need them.”⁶⁴

Trans and gender diverse peoples’ access to healthcare will be even more limited and restricted because of the Enactment. Trans and gender diverse people face overwhelming health disparities and inequities⁶⁵ compounded by stigma, criminalisation and other state sanctions against trans people through fatwas and other state measures. Following a 1982 fatwa by the National Fatwa Council prohibiting sex reassignment surgery for trans people, or now known as gender affirming procedures, trans people face increasing challenges in accessing healthcare services as well as legal gender recognition following a 1982 fatwa by the National Fatwa Council prohibiting sex reassignment surgery, or now known as gender affirming procedures. Although the fatwa was not gazetted, and as such, has no legal effect, the trans-specific healthcare services that were provided at the University Hospital at that time were hastily terminated.⁶⁶

⁵⁹Vogler, Jacob. “Access to Health Care and Criminal Behavior: Short-Run Evidence from the ACA Medicaid Expansions.” SSRN Electronic Journal, 2017. Crossref, doi:10.2139/ssrn.3042267.

⁶⁰Ministry of Health Malaysia. Global AIDS Monitoring 2020: Malaysia HIV/AIDS Progress Report. Ministry of Health Malaysia, 2020, www.moh.gov.my/moh/resources/Penerbitan/Laporan/Umum/Laporan_Global_AIDS_Monitoring_2020_new.pdf.

⁶¹Lim, Sin How, et al. “‘You Have to Keep Yourself Hidden’: Perspectives From Malaysian Malay-Muslim Men Who Have Sex With Men on Policy, Network, Community, and Individual Influences on HIV Risk.” *Journal of Homosexuality*, vol. 67, no. 1, 2018, pp. 104–26. Crossref, doi:10.1080/00918369.2018.1525946.

⁶²“HIV and Sex Work Human Rights Fact Sheet Series 2021.” UNAIDS, 2021, www.unaids.org/sites/default/files/media_asset/05-hiv-human-rights-factsheet-sex-work_en.pdf.

⁶³Shannon, Kate, et al. “Global Epidemiology of HIV among Female Sex Workers: Influence of Structural Determinants.” *The Lancet*, vol. 385, no. 9962, 2015, pp. 55–71. Crossref, doi:10.1016/s0140-6736(14)60931-4.

⁶⁴“UNAIDS Calls on Countries to Remove Discriminatory Laws and Enact Laws That Protect People from Discrimination.” UNAIDS, 2019, www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2019/may/20190516_IDAHOT.

⁶⁵Galen Center and SEED Malaysia. “Practical Guidelines For Trans-Specific Primary Health Care.” Galen Center, 2020, p. 7.

⁶⁶“I’m Scared to Be a Woman.” Human Rights Watch, Feb. 2018, pp. 57–58. <https://www.hrw.org/report/2014/09/24/im-scared-be-woman/human-rights-abuses-against-transgender-people-malaysia>

In addition, several sections under the Enactment directly criminalises healthcare and other service providers for providing treatments and procedures affecting availability and accessibility to healthcare services.

- » Section 18 for providing gender affirming and trans specific healthcare services.
- » Section 22 penalises any person who performs treatment or surgery for another person's cosmetic purposes without syar'i cause. Transitioning related procedures and trans specific healthcare is often mischaracterized as cosmetic procedures or treatment, and in turn, increases vulnerability of trans and gender diverse people as well as service providers to prosecution for seeking healthcare services. Consequently, it increases barriers in relation to availability and accessibility of trans specific healthcare services as well as misinformation regarding trans specific healthcare services.

Access to justice

Access to justice is a core principle of rule of law. The Declaration of the High-level Meeting on the Rule of Law reiterates and clarifies UN member states' commitments to rule of law and access to justice.

In the 2012 declaration, UN member states 'reaffirmed the principle of good governance and commitment to an effective, just, non-discriminatory and equitable delivery of public services pertaining to the rule of law, including criminal, civil and administrative justice, commercial dispute settlement and legal aid.' States emphasised equal access to justice for all, including persons belonging to vulnerable groups together with the significance of legal awareness raising. To that end, member States had also committed to take all necessary steps to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including legal aid.⁶⁷

These commitments to access to justice are further reflected in Goal 16 of the SDG, including target 16.3, 'promote the rule of law at the national and international levels and ensure equal access to justice for all.' In Malaysia's 2021 Voluntary National Review Report, Malaysia reports that provision of legal aid to remote areas is a challenge, legal literacy remains low, and high cost of court proceedings acts as a barrier for litigants from lower economic background.⁶⁸

Indeed, in many cases of prosecution under the Syariah Criminal Offences Enactments, those accused are from lower economic backgrounds, who cannot afford to pay the fines, let alone afford legal representation.⁶⁹ Many reported cases of those who have been prosecuted and severely punished under the state Syariah Criminal Offences Enactment were not represented by a lawyer. While the National Legal Aid Foundation (NLAf) and Legal Aid Centre (LAC) by the Malaysian Bar Council provide legal aid for syariah related matters, it remains inaccessible to those facing prosecution.

In addition, Section 9. Insulting or deriding laws, which explicitly penalizes dissent or criticism is inconsistent with the spirit of upholding access to justice.

⁶⁷"Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels." United Nations, 2012, www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/a_res_67_1.pdf.

⁶⁸Malaysia Voluntary National Review (VNR) 2021. Economic Planning Unit, Prime Minister's Department, 2021, page 109, www.epu.gov.my/sites/default/files/2021-07/Malaysia_Voluntary_National_Review_%28VNR%29_2021.pdf.

⁶⁹"Single Mother Sentenced to 6 Months in Prison and 6 Strokes of the Rotan for Doing Sex Work | Global Network of Sex Work Projects." Global Network of Sex Work Projects (NSWP), 2018, www.nswp.org/news/single-mother-sentenced-6-months-prison-and-6-strokes-the-rotan-doing-sex-work.

Groups affected

The Enactment further marginalises groups who are already marginalised and left behind because of intersecting forms of structural and systemic discrimination and stigma by increasing their vulnerability to state prosecution, and in some cases multiple prosecutions. This could have an overall adverse effect on Malaysia's national and international commitments and goals, especially in relation to the Sustainable Development Goals (SDG).

Some of the affected groups include:

- Women
- Children and youth
- Lesbian, gay, bisexual, queer, trans and gender diverse people
- Human rights defenders
- People who use drugs
- Businesses and service providers
- Healthcare providers

Women

Women, in particular Muslim women who are unwed, entrepreneurs, especially beauty and cosmetics entrepreneurs, human rights defenders, sex workers, lesbian, bisexual, queer and transgender and others who are marginalised face increased vulnerability due to the Enactment. At least 5 sections specifically target women (including trans women) and persons assigned female at birth.

- *Section 15. Musahaqah*
- *Section 18. Changing gender*
- *Section 19. Male person posing as female*
- *Section 20. Female person posing as male*
- *Section 28. Female person fleeing from custody:* This section penalises a female person who flees their parents or lawful guardian's custody without a reasonable cause under *hukum syarak*. This section encapsulates the patriarchy that Muslim women and persons assigned female at birth are subjected to in Malaysia. This section together with others shows that their bodies and their ability to make decisions about their own bodies do not belong to them; instead, it's heavily regulated by the state and other state proxies, including the family, members of the public and others.

Meanwhile, the following gender neutral and gendered sections disproportionately affect women

- **Section 21. Indecent act or speech** includes wearing alluring clothes as an indecent act
- **Section 22. Act of applying tattoo or undergoing treatment or surgery for cosmetic purposes without syarii cause:** This section affects women disproportionately as they not only undergo treatments and surgeries for perceived cosmetic reasons, but also because they provide beauty and wellness services professionally.
- **Section 23. Exposing aurat in public places**
- **Section 32. Wrongful cutting off ties with immediate family**
- **Section 33. Disobedient to parents**
- **Section 43 to 45 are related to sex work.** Vice is defined as matters containing sexual elements, including consensual sexual services. While all three sex work related sections are gender neutral, they affect cisgender and transgender women disproportionately.
 - » Section 43. Offering or providing vice services.
 - » Section 44. Preparatory act of offering or providing vice services
 - » Section 45. Preparatory act of vice
- **Section 49. Pregnancy out of wedlock**

As a state party to CEDAW, Malaysia is obligated to eliminate all forms of discrimination against women and report its progress through a periodic review to the CEDAW Committee. General Recommendation 28 requires the state to adopt an intersectional framework in its efforts to eliminate discrimination against women.

18. Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women **based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity.** Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. They also need to adopt and pursue policies and programmes designed to eliminate such occurrences, including, where appropriate, temporary special measures in accordance with article 4, paragraph 1, of the Convention and general recommendation No. 25.^{70, 71}

⁷⁰“General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women.” OHCHR, 2010, www2.ohchr.org/english/bodies/cedaw/docs/cedaw-c-2010-47-gc2.pdf.

⁷¹ <https://outrightinternational.org/content/cedaw-adopts-general-recommendations-including-sexual-orientation-and-gender-identity>

In Malaysia's 2018 CEDAW review, the CEDAW committee expressed concern “.. about the existence of a parallel legal system of civil law and multiple versions of syariah law, which have not been harmonized in accordance with the Convention, as previously recommended by the Committee⁷²..., which leads to a gap in the protection of women against discrimination, including on the basis of their religion.”⁷³

The Committee recommended the state to “take effective measures to **ensure that civil law and syariah laws are in full compliance with the provisions of the Convention** at the local, state and federal levels so as to ensure that the rights of all women are legally guaranteed on an equal footing throughout the State party. **The Committee reminds the State party that provisions of its internal law cannot be used as justification for its failure to abide by its obligations under the Convention**”.⁷⁴

It is also important to note that Malaysia falls short in its report on SDG 5 on gender equality, as it has yet to report on key targets such as

- Target 5.1 End discrimination against women and girls, which includes availability of legal frameworks, mechanisms to promote, enforce and monitor equality and non-discrimination against women and girls
- Target 5.2 End all violence against and exploitation of women and girls, including intimate partner violence and others
- Target 5.3 Eliminate forced marriages and genital mutilation
- Target 5.6 Universal access to reproductive rights and health
- Target 5.C Adopt and strengthen policies and enforceable legislation for gender equality

⁷² Concluding Comments of the Committee on the Elimination of Discrimination against Women: Malaysia CEDAW/C/MYS/CO/2. Convention on the Elimination of All Forms of Discrimination against Women, 2006, para 14 documents-dds-ny.un.org/doc/UNDOC/GEN/N06/384/40/PDF/N0638440.pdf?OpenElement.

⁷³ “Concluding Observations on the Combined Third to Fifth Periodic Reports of Malaysia.” OHCHR, 2018, Para 11 documents-dds-ny.un.org/doc/UNDOC/GEN/N18/070/50/PDF/N1807050.pdf?OpenElement.

⁷⁴ Ibid, Para 12 (c)

Children and youth

While Section 60 exempts **children** who have not reached the age of puberty from the Kelantan Syariah Criminal Offences Enactment, the age of puberty is not specified. In contrast, the criminal liability of a child is stated clearly in the Penal Code.⁷⁵ Consequently, young people are made more vulnerable by the Enactment.

At least six sections in the Enactment disproportionately affect children and young people

- Section 13. Selling or giving away child to non-Muslim or morally reprehensible Muslim
- Section 23. Exposing aurat in public places
- Section 28. Female person fleeing from custody
- Section 32. Wrongful cutting off ties with immediate family
- Section 34. Disobedient to parents
- Section 49. Pregnancy out of wedlock

The criminalisation of pregnancy out of wedlock under Section 49 penalises women or girls if they are found to be pregnant, given birth to a child out of wedlock, or given birth to a child in less than 175 days and 2 *lahzah*. Meanwhile, a man or boy who causes a woman to be pregnant out of wedlock is also penalised under the section. Both can be sentenced to RM 5,000 in fines, 3 years of imprisonment and 6 strokes of cane.

According to research, about 14 in every 1,000 adolescent girls become pregnant each year in Malaysia, bringing it to an average of 18,000 pregnancies among adolescent girls per year. Statistics also show up to 1,000 babies are abandoned each year.

Federation of Reproductive Health Associations, Malaysia (FRHAM) attributes fear of prosecution under the Penal Code and state syariah criminal enactments as one of the main driving factors that causes parents to abandon their babies.⁷⁶ Sexual reproductive health and rights advocates note that many reported cases are from lower socio economic background, urban poor households, among others. In many cases, girls are sent to half-way houses to complete their pregnancy, give birth and give up their babies for adoption, as the teenager's parents believe the child could bring shame to the family.⁷⁷

Evidently, this section will not only increase fear of prosecution among unwed parents and people experiencing unintended pregnancies, but also shame and stigma related to pregnancy out of wedlock.

Sexual reproductive health and rights groups and advocates have long called for introduction of comprehensive sexual education and promotion of contraceptives. In spite of this, Malaysia's response to the issue is not informed by an evidence and rights based framework.

Malaysia acceded to the Child Rights Convention (CRC) in 1995 with reservations to Article 2, 7 (right to identity and nationality), 14, 28(1)(a) (access to primary education) and 37.⁷⁸ As a party to the Convention, Malaysia has a legal obligation to domesticate the CRC and implement it in national legislations, as well as ensure that all national laws and policies comply and are aligned with the CRC.

⁷⁵ Section 82 & Section 83, "Penal Code Malaysia Act 574." www.ilo.org/dyn/natlex/docs/ELECTRONIC/61339/117909/F1085941047/MYS61339%202015.pdf

⁷⁶ Kanyakumari, D. "Pregnant and Alone: In Malaysia, Social Stigma Forces Unwed Mothers to Give up Babies." CNA, 31 Dec. 2020, www.channelnewsasia.com/asia/malaysia-abandoned-babies-dumping-unwed-mothers-adoption-1328261.

⁷⁷ "25pc of 18,000 Teen Pregnancies in Malaysia out of Wedlock: Study | Daily Express Online - Sabah's Leading News Portal." 2021, 2019, www.dailyexpress.com.my/news/130099/25pc-of-18-000-teen-pregnancies-in-malaysia-out-of-wedlock-study-.

⁷⁸ CRC reservations Article 2 (regarding non-discrimination), Article 7 (regarding birth registration, the right to a name and nationality), Article 14 (regarding freedom of thought, conscience and religion); Article 28(1)(a) (regarding compulsory and free primary education for all); and Article 37 (regarding torture or other cruel, inhuman or degrading treatment or punishment and unlawful or arbitrary deprivation of liberty). Child Rights Coalition Malaysia. "Child Rights Coalition Malaysia's Report for the Universal Periodic Review." UPR-Info, www.upr-info.org/sites/default/files/document/malaysia/session_17_-_october_2013/js6_upr17_mys_e.pdf.

The Kelantan Syariah Criminal Offences Enactment violates the following article under the Child Rights Convention

- Article 2 on **non discrimination of children**. The article requires state parties to take all appropriate measures to protect children against all forms of discrimination or punishment
- Article 6 protects the **right to life** of every child. The state has a legal obligation to ensure the maximum extent possible the survival and development of the child
- Articles 12 and 13 say that the state has a duty to assure **freedom of expression and opinion** of every children
- Article 14 on the right of the child to **freedom of thought, conscience and religion**
- Article 16 protects a child from violation of **privacy and the right to protection against violation of privacy**
- Article 24 on right of the child to the enjoyment of the **highest attainable standard of health**
- Article 37 on being **free from torture and other cruel, inhuman or degrading treatment or punishment**

In Malaysia's 2007 CRC review, it's only CRC periodic review since its ratification in 1995, the CRC Committee recommended Malaysia to remove Malaysia's reservations⁷⁹ to the convention in accordance with the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights of 1993.

Similar to the CEDAW committee, the CRC Committee also raised concerns over the inequalities faced by children due to the dual legal system in Malaysia and the slow pace of the domestication of the CRC.

The Committee recommended Malaysia to 'conduct an international comparative study on the implications of the dual legal system of civil law and syariah law and, based on the results of this assessment, take necessary measures to reform the dual legal system with a view to removing inconsistencies between these systems in order to create a more harmonious legal framework which is able to provide consistent solutions.'⁸⁰

In addition, the Committee also recommended Malaysia to 'undertake a comprehensive review of the national legal framework with a view to ensuring its full compatibility with the principles and provisions of the Convention' and 'take all necessary measures to expedite the process of necessary law reforms'.⁸¹

Lesbian, gay, bisexual, queer, trans and gender diverse people

Lesbian, gay, bisexual, queer, trans and gender diverse people face increased criminalisation and vulnerability under the Enactment.

The Enactment introduces two new sections that prohibit 'change of gender' and criminalise trans men and masculine persons as well as gender diverse persons through Section 20. These sections further reinforce misinformation about trans and gender diverse people as well as gender identity, while causing severe impact on the availability of trans-specific healthcare, protection against discrimination and violence, among others for trans and gender diverse people.

⁷⁹ "Concluding Observations, CRC/C/MYS/CO/1, 25 June 2007: Malaysia." OHCHR, 2007, www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_MYS_CO_1.pdf, para 12

⁸⁰ Ibid, para 16

⁸¹ Ibid, para 16

⁸⁰ Kanyakumari, D. "Pregnant and Alone: In Malaysia, Social Stigma Forces Unwed Mothers to Give up Babies." CNA, 31 Dec. 2020, www.channelnewsasia.com/asia/malaysia-abandoned-babies-dumping-unwed-mothers-adoption-1328261.

In total, five sections directly criminalise persons on the basis of their sexual orientation, gender identity and gender expression as well as consensual sex between persons of the same gender and/or sex.

- **Section 14. Sodomy:** Sodomy is defined as anal sex between man and person of any gender.
- **Section 15. *Musahaqah*:** *Musahaqah* is defined as any physical activity between women that would amount to sexual activity similar to sexual activity between a man and a woman.

Section 14 and 15 in the current enactment criminalises attempt of sodomy and *musahaqah*: The punishment for attempt and commission of the act is the same. It is imperative to note that Section 14 has no legal effect. The Federal Court's decision on the Selangor state's overreach in enacting Section 28 of the Selangor Syariah Criminal Offences Enactment that prohibits sex against the order of nature applies to all liwat and sex against the order nature laws under the Syariah Criminal Offences Enactments and Act.

- **Section 18. Changing gender:** Gender is defined as any private part for that gender. In the context of the Enactment, gender and sex are used interchangeably and viewed from a binary and biological essentialism lens, where only two types of bodies and identities are recognized — male and female bodies and identities.

The non-recognition of diverse gender identities and bodies through this section and Sections 19, 20, 22 and 23 increase multiple forms violation of trans and gender diverse people's bodily autonomy, especially bodily intrusion by the state. These sections completely overlook the high level cases of sexual harassment and violence towards trans and gender diverse people. In turn, it legitimises sexual harassment and violence against trans and gender diverse people with impunity, overlooking high level cases of sexual harassment and violence towards trans and gender diverse people. Such violations of privacy and dignity are unreasonable and deprive trans and gender diverse people of their right to self-determination and identity. Section 18, 19, 20 and 22 very expressly illustrate the patriarchal state construct of gender identities.

- **Section 19. Male person posing as female.**
- **Section 20. Female person posing as male:** Both Section 19 and 20 can be applied against anyone who wears attires or expresses themselves in a way that is deemed not belonging to their gender group in public spaces and places that can be viewed or accessed by the public. Based on the official explanation by the Kelantan state agencies, this extends to online means.⁸⁵ Both sections effectively shrink spaces for trans and gender diverse persons to exist and severely increase their vulnerability of arrest and detention.

Sex and gender under international law

Sex or sex characteristics and gender have different meanings. Gender serves as an umbrella term for gender identity and gender expression, among many other things. Human rights frameworks, medical bodies, academics, and legislative bodies in essence define gender identity as personal experiences of their own gender which can be different from the assigned sex at birth.

⁸² Tuan Ahmad Irwan Bin Ismail. Majlis Perasmian Penerangan Enakmen Kanun Jenayah Syariah (I) 2019. retrieved from <https://www.youtube.com/watch?v=GNAXKuWkmJc&t=2094s> 1:00:52 - 1:02:32

Meanwhile, sex characteristics is defined as physical characteristics relating to sex, including genitalia and other reproductive anatomy, chromosomes and hormones, and secondary physical characteristics emerging from puberty.⁸²

The Malta Gender Identity, Gender Expression And Sex Characteristics Act adopts the definition of Yogyakarta Principle definition of “gender identity” in its act - each person’s internal and individual experience of gender, which may or may not correspond with the sex assigned at birth. This includes the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance and, or functions by medical, surgical or other means) and other expressions of gender, including name, dress, speech and mannerisms.⁸³

Similarly, the Pakistan Transgender Persons (Protection of Rights) Act, 2018 defines gender identity as a “person’s innermost and individual sense of self as male, female or a blend of both or neither that can correspond or not to the sex assigned at birth”.⁸⁴

Meanwhile, at least 11 sections disproportionately affect LGBTIQ persons, including

- **Section 22. Act of applying tattoo or undergoing treatment or surgery for cosmetic purposes without *syarii* cause:** This section is linked to Section 18 in the context of trans and gender diverse people. Transition-related procedures are often misperceived as cosmetic surgery, and against *hukum syarak*, resulting in violations of the right to identity, self-determination and access to healthcare services and information. It is important to state that transition-related procedures can be life-saving⁸⁶ for trans and gender diverse people as it allows them to live with dignity and as who they truly are.
- **Section 23. Exposing *aurat* in public places:** This section together with other gender related sections imposes the state’s binary construct of gender and creates barriers for trans and gender diverse people.
- **Section 48. *Muncikari*:** *Muncikari* is defined as anyone who acts as intermediary between woman and man and persons of the same gender for any purpose offences relating to protection of property. However, this section falls under Part VI on offences relating to offsprings.
- **Section 12. Encouraging *mungkar*:** Events organised and participated by trans people have been vulnerable to raids by the state Islamic Departments. In many cases, the organisers of the event, be it a transgender, cisgender or persons of any gender identity, are investigated for ‘encouraging vice’ under the respective state act and enactments.⁸⁷ Given the broad definition of this section, which prohibits anything ‘bad, condemned, despised and forbidden by *hukum syarak*,’ this section is open to abuse and can be used widely to restrict freedom of expression, assembly and association.

⁸³ United Nations. Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law. 2nd ed., United Nations, 2019, www.ohchr.org/Documents/Publications/Born_Free_and_Equal_WEB.pdf.

⁸⁴ “Gender Identity, Gender Expression and Sex Characteristics Act.” Legislation Malta, 2015, legislation.mt/eli/cap/540/eng/pdf.

⁸⁵ International Commission of Jurists (ICJ). Pakistan: Transgender Persons (Protection of Rights) Act, 2018 - A Briefing Paper. International Commission of Jurists (ICJ), 2020, www.icj.org/wp-content/uploads/2020/03/Pakistan-Transgender-Advocacy-Analysis-brief-2020-ENG.pdf.

⁸⁶ WPATH. “Medical Necessity Statement - WPATH World Professional Association for Transgender Health.” The World Professional Association for Transgender Health (WPATH), 2016, www.wpath.org/newsroom/medical-necessity-statement.

⁸⁷ Jun, Soo Wern. “Rights Groups Concerned over Probe into Kedah Event Organiser for ‘Encouraging Vice’ after Raid against Trans Women.” Malay Mail, 30 Oct. 2020, www.malaymail.com/news/malaysia/2020/10/30/rights-groups-concerned-over-probe-into-kedah-event-organiser-for-encouraging-vice/1917958.

- **Section 43. Offering or providing vice services.**
- **Section 44. Preparatory act of offering or providing vice services.**
- **Section 45. Preparatory act of vice.**
- **Section 28. Female person fleeing from custody.**
- **Section 36. Anything intoxicating.**
- **Section 32. Wrongful cutting off ties with immediate family.**
- **Section 33. Disobedient to parents.**

The spillover effect of the Syariah Criminal Offences Enactment on non-Muslim persons is clear in the context of LGBTQ and gender diverse people. The criminalisation and non-recognition of LGBTQ and gender diverse persons under syariah laws extends to all persons regardless of religious backgrounds as evidenced by the lack of availability and accessibility to trans specific healthcare and LGBT affirming healthcare services in the national and private healthcare systems, legal gender recognition, protection against violence and discrimination against LGBTQ persons on the basis of sexual orientation, gender identity and gender expression.

At least five concluding observations in Malaysia's 2018 CEDAW review are related to LGBTI women. The committee recommended Malaysia to undertake awareness-raising measures to eliminate discrimination and negative stereotypes against lesbian, bisexual, transgender and intersex women, by among others,

- Amending all laws which discriminate against LGBTI women, including the provisions of the Penal Code and Syariah laws that criminalize same-sex relations between women and cross-dressing;
- Applying a policy of zero-tolerance with regard to discrimination and violence against LGBTI women, including by prosecuting and adequately punishing perpetrators;
- Expediting measures to discontinue all policies and activities, which aim to "correct" or "rehabilitate" LGBTI women.⁸⁸

⁸⁸ Concluding Comments of the Committee on the Elimination of Discrimination against Women: Malaysia CEDAW/C/MYS/CO/2. Convention on the Elimination of All Forms of Discrimination against Women, 2006, para 47, 48 documents-dds-ny.un.org/doc/UNDOC/GEN/N06/384/40/PDF/N0638440.pdf?OpenElement.

Human rights defenders and groups

Human rights defenders (HRD) and groups may face additional barriers in carrying out their human rights work, including in providing life-saving support information and services to those in need, holding the state accountable, among others. The following sections increase the vulnerability of HRDs:

- **Section 7. Distorting teachings and precepts of Islam:** This section is extremely vague and broad as it criminalises anyone who distorts teachings and precepts of Islam without any explanation as to what amounts to distortion.
- **Section 9. Insulting or deriding laws:** Trends show that HRDs are already vulnerable to various forms of reprisals by state and non-state actors, among others, judicial harassment and online gender based violence for criticising Federal and state level policies, practices and laws.^{89, 90} This section increases their vulnerability.
- **Section 26. Instigating husband or wife to divorce or to neglect obligations:** This section broadly penalizes anyone who instigates, forces or persuades a married person to seek divorce or neglect their duties and obligations as a husband or wife, making domestic violence support groups vulnerable to harassment and prosecution.
- **Section 27. Enticing away any Muslim from custody:** This section penalizes anyone who entices or induces any Muslim person from leaving the custody of parents or guardian.
- **Section 28. Female persons fleeing from custody without reasonable cause under *hukum syarak*** is an offence.

Sections 27 and 28 are connected and have similar impacts. In 2018, the police broke into a human rights defender's home who was providing support for a woman, who had left her family to escape violence. The police reported that they carried out the 'rescue' operation following police reports by her family members. The human rights defender was briefly detained under Section 186 of the Penal Code for obstructing a public servant.⁹¹ These laws can inadvertently protect perpetrators, instead of those in need of support and those providing support. Further, this could also hinder persons at risk of seeking support due to fear of prosecution on them and others.

- **Section 30. Words capable of breaking peace.**
- **Section 36. Anything intoxicating.** Criminalisation of drug use will impact outreach and service provision to people who use drugs.

In Malaysia's CEDAW review, the CEDAW committee recommended Malaysia to 'ensure that women human rights defenders can freely undertake their important work without fear or threat of arbitrary arrest, harassment or intimidation, including the issuance of fatwas by religious institutions, by fully guaranteeing their rights to freedom of expression, assembly and association.' The Committee also recommended the state to provide capacity-building on women's rights and gender equality to law enforcement officials, members of the judiciary and members of religious institutions.⁹²

⁸⁹ Lim, Serene. "We Are Sisters in Islam." GenderIT.Org, 2019, genderit.org/feminist-talk/we-are-sisters-islam.

⁹⁰ The Star. "Stop Harassment of Activist Who Criticised Jakim, Says Group." The Star, 6 Aug. 2020, www.thestar.com.my/news/nation/2020/08/06/stop-harassment-of-activist-who-criticised-jakim-says-group.

⁹¹ Tee, Kenneth. "Cops Say Broke into Siti Kasim's Home to 'Rescue' Client, Prevent Violence." Malay Mail, 24 June 2018, www.malaymail.com/news/malaysia/2018/06/24/cops-says-broke-into-siti-kasims-home-to-rescue-client-prevent-violence/1644972.

⁹² "Concluding Observations on the Combined Third to Fifth Periodic Reports of Malaysia." OHCHR, 2018, p. 15 documents-dds-ny.un.org/doc/UNDOC/GEN/N18/070/50/PDF/N1807050.pdf?OpenElement.

The Declaration on Human Rights Defenders adopted by consensus by the General Assembly in 1998 outlines the state duties and roles in upholding, respecting, supporting and protecting human rights defenders in the context of their work. This includes, among others:⁹³

- Adopting such legislative, administrative and other steps as may be necessary to ensure effective implementation of rights and freedoms.
- Taking all necessary measures to ensure the protection of everyone against any violence, threats, retaliation, adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the Declaration.
- Promoting public understanding of civil, political, economic, social and cultural rights.

People who use drugs

People who use drugs face widespread discrimination, surveillance, coercion, non-consensual treatment, punishment for possession and use of drugs, lack of access to social and healthcare services because of criminalisation and punitive measures in relation to possession and use of substance. According to the Department of Statistics of Malaysia at least 23,957 were reportedly arrested for drug use nationwide in 2019. Of which, Kelantan arrested at least 2,988 persons, making it the second highest state with recorded cases of arrest related to drug use. In 2018, Kelantan recorded the highest cases of arrest with 4,153 persons arrested for drug use.⁹⁴ According to Malaysia's Voluntary National Report 2021, unsentenced prisoners remain a critical area for Malaysia to improve, and in 2019, Kelantan recorded the third highest rate of unsentenced detainees as prisoners.⁹⁵

Globally, women are approximately one third of people who use drugs. Women who use drugs are more vulnerable to intimate partner violence than the broader population⁹⁶ and face an increased lack of access to healthcare services. Everything on my own, a Policy Brief on Women who Use Drugs in Malaysia by the Malaysian AIDS Council finds that the treatment services for drug addiction and harm reduction do not include the unique needs of women who use drugs, including sexual reproductive health needs and domestic violence response. In addition, women who use drugs face increased stigma and vulnerability of having their children removed from them by state social services or family members. The report also found one-fifth of the women interviewed faced intimate partner violence.⁹⁷

The Special Rapporteur on Right to Health asserts that all people who use drugs, including those who are dependent on it, have the right to health regardless of the fact of their drug use. The Special Rapporteur clarifies the difference between drug use and drug dependence, and emphasises that “drug dependence is considered a chronic, relapsing disorder involving altered brain function that may require medical treatment, ideally utilizing a “biopsychosocial” approach. By contrast, drug use is not a medical condition and does not necessarily imply dependence. Indeed, the majority of people who use drugs do not become dependent and do not require any treatment.”⁹⁸

⁹³“Declaration on Human Rights Defenders.” OHCHR, www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx.

⁹⁴“Department of Statistics Malaysia Official Portal.” Crime Statistics, Malaysia, 2020, Nov. 2020, www.dosm.gov.my/v1/index.php?r=column/cthemeByCat&cat=455&bul_id=UFZxVnpONEJqUU5pckJlbzIXeEJ1UT09&menu_id=U3VPMldoYUxzVzFaYmNkWXZteGduZz09.

⁹⁵Malaysia Voluntary National Review (VNR) 2021. Economic Planning Unit, Prime Minister's Department, 2021, page 110, www.epu.gov.my/sites/default/files/2021-07/Malaysia_Voluntary_National_Review_%28VNR%29_2021.pdf.

⁹⁶“Statement by the UN Expert on the Right to Health* on the Protection of People Who Use Drugs during the COVID-19 Pandemic.” OHCHR, 2020, www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25797&LangID=E.

⁹⁷Rahman, Fifi, and Sarah Iqbal. “Everything on My Own: A Policy Brief on Women Who Use Drugs in Malaysia.” Malaysian AIDS Council, 2015, www.mac.org.my/v3/everything-on-my-own.

⁹⁸“Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health A/65/255.” OHCHR, 2010, documents-dds-ny.un.org/doc/UNDOC/GEN/N10/477/91/PDF/N1047791.pdf?OpenElement.

The war on drugs approach, reinforces the notion that drugs are evil and must be eliminated. This approach has been widely unsuccessful and failed given its lack of rights and evidence-based approach. Criminalisation of use of drugs as a deterrence has not only failed, but it also perpetuates risky forms of drug use and punishment of people who use drugs.⁹⁹ As such, the Special Rapporteur recommends a “Compassionate, inclusive, health-centered and human rights based approach to the drug policy” instead of punitive measures in addressing drug related issues.¹⁰⁰

In the Thirtieth Special Session General Assembly, all countries recognized as part of a comprehensive, integrated and balanced approach to addressing and countering the world drug problem, that appropriate emphasis should be placed on individuals, families, communities and society as a whole, with a view to promoting and protecting the health, safety and well-being of all humanity.¹⁰¹ In addition, countries also recognized that drug dependence is a complex, multifactorial health disorder that requires effective scientific evidence based drug treatment, care and rehabilitation programmes.¹⁰²

Businesses and service providers

Businesses and service providers, ranging from bookstores, health service providers, beauty and wellness as well as cosmetic entrepreneurs, and clothing stores are negatively impacted by the enactment. The following sections negatively affect businesses

- **Section 7. Distorting teachings and precepts of Islam**
- **Section 22. Act of applying tattoo or undergoing treatment or surgery for cosmetic purposes without *syarii* cause.**
- **Section 23. Exposing aurat in public places:** This section has an impact on the fashion industry and censorship. In 2021, the Film Censorship Board (LPF) had instructed two local stations not to show undergarments being worn by a model or a mannequin during its home shopping segments, as ‘any indecent visual displays, including advertising ‘undergarments’ will still offend the community.’¹⁰³

It should also be noted that in order for business owners to receive business permits from the local authority, the business owners must cover their aurat and ensure that their employees comply with the law on covering one’s *aurat*.¹⁰⁴ This is apparent through Section 34 of the Licensing Of Trades, Business And Industries (Gua Musang District Council) By-Laws 2019,¹⁰⁵ which states that an employer shall be responsible to ensure that their employees¹⁰⁶ cover their *aurat*¹⁰⁷ or modestly dressed.¹⁰⁸

⁹⁹Ibid.

¹⁰⁰ “Statement by United Nations Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health at the United Nations Commission on Narcotic Drugs’ Intersession Meeting, 19 October, 2020.” OHCHR, Oct. 2020, www.unodc.org/documents/hlr/follow-up-process/2020-thematic-discussions/19th_Oct/Panel/UNOHCHR_Draft_CND_Statement-SR_Health_final.pdf.

¹⁰¹ Outcome Document Of The 2016 United Nations General Assembly Special Session On The World Drug Problem. UNGASS, 2016, page 3 <https://www.unodc.org/documents/postungass2016/outcome/V1603301-E.pdf>

¹⁰² Ibid, page 6

¹⁰³ Ariff, Imran. “Freedom of Speech Proponents Hit out at TV Underwear Ban.” Free Malaysia Today, 2021.

¹⁰⁴ “Tidak Boleh Berniaga Jika Tidak Bertudung.” MStar, 31 Oct. 2014, www.mstar.com.my/lokal/semasa/2014/10/31/tidak-boleh-berniaga-jika-tidak-bertudung.

¹⁰⁵ The licensee shall ensure that he and his employees are decently dressed, clean and tidy throughout undertake trade, business or industry. Licensing Of Trades, Business And Industries (Gua Musang District Council) By-Laws 2019, 2019, mdgm.kelantan.gov.my/images/2020/Borang_Muat_Turun/Undang_undang/UUK_Perlesenan_Tred_Perniagaan_dan_Perindustrian_MDGM_2019-final.pdf.

¹⁰⁶ “Operasi Aurat di Premis Perniagaan di Gua Musang.” Facebook, 25 July 2019, <https://www.facebook.com/106144776084086/posts/2552246201473919/>

¹⁰⁷ Section 34(2)(a) For muslims; ensure himself and his Muslim employees to wear an attire covering aurat and if the employees are non-Muslim to wear decent clothes

¹⁰⁸ Section 34(2)(b) For non-muslims; ensure himself and his non-Muslim employees to wear decent clothes and if the employees are Muslim shall wear an attire covering aurat.

- **Section 35. Intoxicating drinks:** Section 35(3) explicitly criminalises any person who among others sells, makes and manufactures intoxicating drinks.
- **Section 37. Gambling:** This section penalises anyone who gambles, is found at a gambling place, or allows gambling activities on their premises. In November 2021, a constitutional challenge was reportedly initiated against the Kedah state for banning gaming outlets, as betting and lotteries fall under the Federal government's purview.¹⁰⁹
- **Sections related to consensual sexual relations¹¹⁰** increase vulnerability of hotels to surveillance and raids.

It is important to note that all of these sections do not fall under the purview of the state government.

Healthcare providers

Healthcare providers are vulnerable to prosecution under the following sections:

- **Section 18 (1) (c) and (d)** penalises any person who changes the gender of another person and causes a change of gender of another person. These two broad categories make those who provide gender-affirming and trans-specific healthcare services vulnerable to prosecution while restricting availability and access to trans and gender-affirming healthcare services, including mental health services.
- **Section 22 (b)** penalizes any person who causes any person to apply a tattoo. Meanwhile, **Section 22 (d)** penalises any person who performs treatment or surgery on others for cosmetic purposes without syar'i cause. No explanation is provided as to what constitutes cosmetic purposes without syarii cause.

¹⁰⁹ Singh, Sarban. "Legal Challenge Mounted against Kedah 4D Ban." The Star, 19 Nov. 2021, www.thestar.com.my/news/nation/2021/11/19/legal-challenge-mounted-against-kedah-4d-ban.

¹¹⁰ Section 14. Sodomy, Section 15. Musahaqah. Section 43 - 45 on offering and providing vice services as well as preparatory acts, Section 46. Adultery, Section 50. Khalwat

Impact

The Enactment will result in many short term and long term impacts and costs. The Enactment exposes the short-sightedness of the PAS administration in Kelantan. It has short term political gain, but widens long term adverse socio-economic inequalities.

Malaysia has been plagued by negative attention for its cases of corruption and many human rights violations, namely towards refugees, migrant workers, LGBTQ people, and religious minorities, despite its attempts to restore its image by securing a seat on the Human Rights Council. Malaysia's moderate Muslim brand globally is also quickly diminishing, given the increased prosecution under Syariah laws. This Enactment further deepens concerns over state-sponsored human rights violations and misuse of religion by the state.

Without a doubt, the Enactment is counterproductive to the government's own goals, commitments and efforts to reduce inequalities, including the Sustainable Development Goals (SDG), Zero HIV by 2030, among others.

The economic impact of this Enactment is both at the state and federal levels. Kelantan is a state that has been left behind. According to the national statistics department, Kelantan's poverty rate is the second highest in Malaysia¹¹¹ with the Covid-19 pandemic only exacerbating the impact of poverty in the state.¹¹² In 2018 and 2019, Kelantan reportedly received financial aid from the Federal Government to pay for various costs, including salaries of government staff. It was also reported that Kelantan is the biggest debtor among all states with a total of RM 388 million of pending debt to the Federal government.¹¹³

In the short and long run, the Enactment increases the state's burden to manage the implementation and enforcement of the Enactment. Further, Syariah Courts are ill-equipped to implement such problematic legislation, and risk further entrenching human rights abuses. In the long run, the state will have to manage the social and human impacts and costs as a result of the Enactment, which as discussed above, will result in many human rights violations and individual as well as collective trauma. The Enactment is projected to increase public health impacts.

As Malaysia restarts its economy, and is eager to open to our borders for tourism, such laws do not boost confidence in local and foreign tourists as well as investors alike.

¹¹¹ Geraldine, Avila. "Sabah Ranks as Malaysia's Poorest State, Again." NST Online, 20 Sept. 2020, www.nst.com.my/news/nation/2020/09/625711/sabah-ranks-malaysias-poorest-state-again.

¹¹² Abdullah, Sharifah Mahsinah. "Poverty Monitoring Officer to Be Appointed in Sabah, Kelantan, Sarawak." NST Online, 9 Oct. 2021, www.nst.com.my/news/nation/2021/10/735015/poverty-monitoring-officer-be-appointed-sabah-kelantan-sarawak.

¹¹³ Nur Hasliza, Mohd Salleh. "Putrajaya Approves Another RM100 Mil for Kelantan." Free Malaysia Today, 2019, www.freemalaysiatoday.com/category/nation/2019/11/10/putrajaya-approves-another-rm100-mil-for-kelantan.

Recommendations

Federal Court of Malaysia and Attorney General Chambers of Malaysia (AGC)

- Review the Enactment's compliance with the Federal Constitution

Ministry of Women, Children and Community Development

- Assess impact of the Enactment on women, children and marginalised groups
- Review compatibility of the Enactment with CEDAW and CRC

Ministry of Health

- Assess and review health implication of the Enactment on persons living in Kelantan and Malaysia
- Review compatibility of the Enactment with Malaysia's healthcare policies and goals

Prime Minister's Office

- Ensure adequate legal representation and due process for those facing prosecution under the Enactment through the National Legal Aid Foundation (NLAF)

Ministry of Home Affairs and Foreign Affairs

- Ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

Suhakam

- Review the Enactment's compliance with international human rights law and rights guaranteed under the Federal Constitution
- Monitor implementation of the Enactment
- Ensure human rights observers in syariah courts in Kelantan to monitor the access to redress, due process and other human rights violations
- Ensure Suhakam's complaint mechanism is more accessible to people living in Kelantan

Kelantan State Assembly

- Review the Enactment's compliance with Federal Constitution
- Request statistics in relation to implementation of the Enactment, including arrests, raids, sentences, to be tabled at the state assembly

Kelantan state Islamic Department

- Halt enforcement of the Enactment until all Constitutional and human rights concerns in relation to the Enactment are adequately addressed and resolved
- Ensure gender disaggregated data and statistics on the implementation of the Enactment, including arrests, raids and punishments, are accessible and transparent to all persons

Bar Council and the Malaysian Syariah Lawyers Association or Persatuan Peguam Syarie Malaysia (PGSM)

- Ensure adequate legal representation and due process for those facing prosecution under the Enactment

Civil society

- Monitor cases of human rights violations under the enactment
- Facilitate submission of complaints of human rights violations under the Enactment to Suhakam

Annex

Table 1: Overlaps between Sections in the Kelantan Syariah Criminal Code (I) Enactment 2019 with Federal Laws

No	Sections in the enactment	Existing Federal laws
1	5. False claim <i>Dakwaan palsu</i>	<ul style="list-style-type: none"> Section 124I of the Penal Code penalizes dissemination of false reports
2	11. Destroying or defiling place of worship <i>Memusnahkan atau mencemarkan tempat beribadat</i>	<ul style="list-style-type: none"> Section 295 of Penal Code penalizes injuring or defiling a place of worship with intent to insult the religion of any class
3	13. Selling or giving away child to non-Muslim or morally reprehensible Muslim <i>Menjual atau memberikan anak kepada orang bukan Islam atau orang Islam yang keji akhlaknya</i>	<ul style="list-style-type: none"> Section 48. Child Act unlawful of control of child¹¹⁴ Section 14. Offence of trafficking in children¹¹⁵ under Anti-Trafficking In Persons and Anti-Smuggling Of Migrants Act 2007 criminalizes selling a child or children
4.	14. Sodomy <i>Liwat</i>	<ul style="list-style-type: none"> Section 377A. Carnal intercourse against the order of nature Section 377B. Punishment for committing carnal intercourse against the order of nature of the Penal Code <p><i>The Federal Court decision on the Selangor state's lack of competency to enact Section 28 of the Syariah Criminal Offence Enactment renders all liwat and sex against the order of nature provisions void</i></p>
5	16. Sexual intercourse with corpse <i>Persetubuhan dengan mayat</i>	<ul style="list-style-type: none"> Section 377D of the Penal Code penalizes Outrages on decency
6	17. Sexual intercourse with non-human <i>Persetubuhan dengan bukan manusia</i>	<ul style="list-style-type: none"> Section 377 of the Penal Code on buggery penalizes sexual intercourse with animals
7	24. Causing disruption to other people's cohabitation <i>Mengganggu rumah tangga orang lain</i>	<ul style="list-style-type: none"> Section 498 of the Penal Code criminalizes enticing or taking away or detaining with a criminal intent a married woman <p><i>Section 498 is gendered</i></p>

¹¹⁴ **48.(1) Unlawful transfer of possession, custody or control of child.** Any person who takes part in any transaction the object or one of the objects of which is to transfer or confer, wholly or partly, temporarily or permanently, the possession, custody or control of a child for any valuable consideration commits an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.

¹¹⁵ **14. Offence of trafficking in children.** Any person, who traffics in persons being a child, for the purpose of exploitation, commits an offence and shall, on conviction, be punished with imprisonment for a term not less than three years but not exceeding twenty years, and shall also be liable to fine.

No	Sections in the enactment	Existing Federal laws
8	25. Preventing married couple from cohabiting as husband and wife <i>Menghalang pasangan yang sudah bernikah daripada hidup sebagai suami isteri</i>	<ul style="list-style-type: none"> Section 498 of the Penal Code criminalizes enticing or taking away or detaining with a criminal intent a married woman <p><i>Section 498 is gendered</i></p>
9	26. Instigating husband or wife to divorce or to neglect obligations <i>Menghasut suami atau isteri supaya bercerai atau mengabaikan kewajipan</i>	<ul style="list-style-type: none"> Section 498 of the Penal Code criminalizes enticing or taking away or detaining with a criminal intent a married woman <p><i>Section 498 is gendered</i></p>
10	27. Enticing away any Muslim from custody <i>Memujuk lari mana-mana orang Islam dari jagaan</i>	<ul style="list-style-type: none"> Section 359 - 369 of the penal Code deals with kidnapping <p>Section 361. Kidnapping from lawful guardianship</p>
11	28. Female person fleeing from custody <i>Perempuan lari daripada jagaan</i>	<p>Section 359 - 369 of the penal Code deals with kidnapping</p> <ul style="list-style-type: none"> Section 361. Kidnapping from lawful guardianship Section 366. Kidnapping or abducting a woman to compel her marriage, etc.
12	30. Words capable of breaking peace <i>Kata-kata yang boleh memecah keamanan</i>	<ul style="list-style-type: none"> Section 298A. of the Penal Code penalizes any person who causes, etc., disharmony, disunity, or feelings of enmity, hatred or ill will, or prejudicing, etc., the maintenance of harmony or unity, on grounds of religion
13	31. Sexual harassment <i>Gangguan seksual</i>	<ul style="list-style-type: none"> Section 81A and 81G of the Employment Act Section 509 of the Penal Code
14	34. Possessing false document, giving false evidence, information or statement <i>Memiliki dokumen palsu, memberikan keterangan, maklumat atau pernyataan palsu</i>	<ul style="list-style-type: none"> Section 191 - 200 of the Penal Code provides for false evidences and offences against public justice
15	36. Anything intoxicating <i>Apa-apa yang mengkhayalkan</i>	<ul style="list-style-type: none"> Dangerous Drugs Act
16	38. Dishonest disposal of orphan's property <i>Memakan harta anak yatim</i>	<ul style="list-style-type: none"> Section 161 - 163 of the Penal Code are on offences relating to gratification by public servants Section 16 - 24 of the Malaysian Anti-Corruption Commission Act 2009 (MACC Act) on offences and punishment related to gratification

No	Sections in the enactment	Existing Federal laws
17	39. Reducing scale, measurement and weight <i>Mengurangkan ukuran, sukatan, dan timbangan</i>	<ul style="list-style-type: none"> Section 16-18 of the Weigh and Measurement Act 1972 on fraudulent weight measurement and scale
18	40. Executing transactions contrary to hukum syarak <i>Melakukan transaksi muamalat yang berlawanan dengan hukum syarak</i>	<ul style="list-style-type: none"> Islamic Financial Services Act 2015, Money Lenders Act 1951 (partly) Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001
19	41. Executing transactions via usury etc. <i>Melakukan transaksi muamalat secara riba dll.</i>	<p>Usury (high interest rate)</p> <ul style="list-style-type: none"> Section 17A of the Money Lenders Act <p>Ghisy (concealment of defective goods)</p> <ul style="list-style-type: none"> Consumer Protection Act Section 10, 32, 33, Penal Code <p>Gharar</p> <ul style="list-style-type: none"> Contracts Act, Sales of Goods Act, Consumer Protection Act, Capital Markets And Services Act 2007, <p>Ghasb</p> <ul style="list-style-type: none"> Hire-Purchase Act 1967,
20	42. Abuse of halal label and connotation <i>Penyalahgunaan penandaan dan perbahasan halal</i>	<ul style="list-style-type: none"> Section 14 - 17 of the Food act 1983 on labelling, false labelling, and advertisement.
21	43. Offering or providing vice services <i>Menawar atau memberi perkhidmatan maksiat</i>	<ul style="list-style-type: none"> Section 372 of the Penal Code criminalises various aspects of sex work Section 372. Exploiting any person for purposes of prostitution Section 372A. Persons living on or trading in prostitution Section 372B. Soliciting for purpose of prostitution
22	44. Preparatory act of offering or providing vice services <i>Perbuatan sebagai persediaan untuk menawarkan atau memberi perkhidmatan maksiat</i>	
23	45. Preparatory act of vice <i>Perbuatan sebagai persediaan untuk melakukan maksiat</i>	
24	47. Act of incest <i>Perbuatan sumbang mahram</i>	<ul style="list-style-type: none"> Section 376 A and B of the Penal Code criminalises incest
25	48. Muncikari <i>Muncikari</i>	<ul style="list-style-type: none"> Section 372: Exploiting any person for purposes of prostitution Section 372A. Persons living on or trading in prostitution

Summary of punishments: Kelantan Syariah Offences Enactment 2019

19

sections

RM 5,000 fine ,
3 years prison,
6 strokes

- 4. Sorcery
- 5 False claim
- 6. Attempt to renounce Islam
- 8. *Takfir*
- 13. Selling or giving away child to non-Muslim or morally reprehensible Muslim
- 14. Sodomy
- 15. Musahaqah
- 33. Disobedient to parents
- 35. Intoxicating drinks
- 36. Anything intoxicating
- 38. Dishonest disposal of orphan's property
- 43. Offering or providing vice services
- 44. Preparatory act of offering or providing vice services
- 45. Preparatory act of vice
- 46. Adultery
- 47. Act of incest
- 48. *Muncikari*
- 49. Pregnancy out of wedlock
- 51. *Accusing attempted adultery, sodomy or musahaqah*

5

sections

RM 5,000 fine ,
3 years prison

- 7. Distorting teachings and precepts of Islam
- 12. Encouraging mungkar
- 24. Causing disruption to other people's cohabitation
- 26. Instigating husband or wife to divorce or to neglect obligations
- 41. Executing transactions via usury etc.

1

section

RM 5,000 fine ,
2 years prison

- 50. Khalwat

1

section

RM 3,000 fine ,
1 year prison

- 39. Reducing scale, measurement and weight

14

sections

RM 3,000 fine ,
2 years prison

- 9. Insulting or deriding laws
- 11. Destroying or defiling place of worship
- 16. Sexual intercourse with corpse
- 17. Sexual intercourse with non-human
- 18. Changing gender
- 19. Male person posing as female
- 20. Female person posing as male
- 25. Causing disruption to other people's cohabitation
- 27. Enticing away any Muslim from custody
- 28. Female person fleeing from custody
- 29. Allegation of committing mungkar
- 30. Words capable of breaking peace
- 34. Possessing false document, giving false evidence, information or statement
- 37. Gambling

4

sections

RM 2,000 fine ,
2 years prison

- 10. Disrespecting the month of Ramadan
- 21. Indecent act or speech
- 22. Act of applying tattoo or undergoing treatment or surgery for cosmetic purposes without syarii cause
- 40. Executing transactions contrary to hukum syarak

1

section

RM 1,000 fine

- 32. Wrongful cutting off ties with immediate family

2

sections

RM 1,000 fine ,
6 months prison

- 23. Exposing aurat in public places
- 31. Sexual harassment

Table 2: Summary of Sections under the Enactment Kelantan Syariah Criminal Code (I) Enactment 2019

	New
	Old

Federal Constitution guide

Article 5. Liberty of the person

5. (1) **No person shall be deprived of his life or personal liberty save** in accordance with law.

Right to life includes right to live with dignity, privacy, right to livelihood, to free from torture, degrading and inhumane treatment

Article 8. Equality

8 (1). **All persons are equal before the law and entitled to the equal protection** of the law

8 (2) Except as expressly authorized by this Constitution, there shall **be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender** in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

Article 9. Prohibition of banishment and freedom of movement

9. (2) Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, **every citizen has the right to move freely throughout the Federation and to reside in any part thereof.**

Article 10. Freedom of speech, assembly and association

10. (1) Subject to Clauses (2), (3) and (4)—

(a) every citizen has the right to **freedom of speech and expression**; (b) all citizens have the **right to assemble peaceably and without arms**; (c) all citizens have the **right to form associations.**

Article 11. Freedom of religion

11. (1) Every person has the right to **profess and practise his religion** and, subject to Clause (4), to propagate it.

Part 2: Takzir Offences relating to protection of religion

Total number of sections: 10 (6 new, 4 old)

Section	Violation of Federal List	Overlap with existing	Rights violated
4. Sorcery	4. Civil and criminal law and procedure and the administration of justice	-	The blanket ban of sorcery may violate Article 8 (1) Article 10 (1)(a)
5. False claim	4. Civil and criminal law and procedure and the administration of justice - (h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;	Section 124I of the Penal Code on Dissemination of false reports ¹¹⁶	-
6. Attempt to renounce Islam	-	-	Article 5 (1), Article 8 (1) & (2) Article 11 (1)
7. Distorting teachings and precepts of Islam	-	-	Article 5 (1), Article 8 (1) & (2) Article 10 (1) Article 11 (1)
8. Takfir			Article 10 (1) Article 11 (1)
9. Insulting or deriding laws			Article 8 (1) & (2) Article 10 (1)
10. Disrespecting the month of Ramadan			Article 8 (1) & (2) Article 11 (1)
11. Destroying or defiling place of worship	4. Civil and criminal law and procedure and the administration of justice - (h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;	Section 295 of Penal Code - Injuring or defiling a place of worship with intent to insult the religion of any class	-
12. Encouraging mungkar	-	-	Article 5 (1), Article 10 (1) (a), (b), (c) The broad definition of mungkar may have an impact on freedom of assembly and association

¹¹⁶ Any person who, by word of mouth or in writing or in any newspaper, periodical, book, circular, or other printed publication or by any other means including electronic means spreads false reports or makes false statements likely to cause public alarm, shall be punished with imprisonment for a term which may extend to five years.

Section	Violation of Federal List	Overlap with existing	Rights violated
13. <i>Selling or giving away child to non-Muslim or morally reprehensible Muslim</i>	4. Civil and criminal law and procedure and the administration of justice - (h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;	<ul style="list-style-type: none"> Section 48. Child Act unlawful of control of child¹¹⁷ Section 14. Offence of trafficking in children¹¹⁸ under Anti-Trafficking In Persons and Anti-Smuggling Of Migrants Act 2007 criminalizes selling a child or children 	-

Part 3: Takzir Offences relating to protection of person and dignity

Total number of sections: 21 (15 new, 6 old)

Section	Violation of Federal List	Overlap with existing	Rights violated
14. Sodomy	<i>Federal Court decision on Section 28 of the Selangor Syariah Criminal Offences Enactment applies to all liwat and sex against the order sections under all state syariah enactment and act</i>	Section 377 A and B of the Penal Code	Article 5 (1), Article 8 (1) & (2) Article 10 (1)
15. Musahaqah	-	-	Article 5 (1), Article 8 (1) & (2) Article 10 (1)
16. <i>Sexual intercourse with corpse</i>	4. Civil and criminal law and procedure and the administration of justice - (h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;	Section 377D Outrages on decency of the Penal Code	-
17. <i>Sexual intercourse with non-human</i>	4. Civil and criminal law and procedure and the administration of justice - (h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;	Section 377 of the Penal Code on buggery penalizes sexual intercourse with animals	-

¹¹⁷ **48.(1) Unlawful transfer of possession, custody or control of child.** Any person who takes part in any transaction the object or one of the objects of which is to transfer or confer, wholly or partly, temporarily or permanently, the possession, custody or control of a child for any valuable consideration commits an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.

¹¹⁸ **14. Offence of trafficking in children.** Any person, who traffics in persons being a child, for the purpose of exploitation, commits an offence and shall, on conviction, be punished with imprisonment for a term not less than three years but not exceeding twenty years, and shall also be liable to fine.

Section	Violation of Federal List	Overlap with existing	Rights violated
<i>18. Changing gender</i>	<p>14. Medicine and health including sanitation in the federal capital, and including—</p> <p>(a) Hospitals, clinics and dispensaries; medical profession; maternity and child welfare; lepers and leper institutions;</p> <p>5. Federal citizenship and naturalization;</p>	-	Article 5 (1), Article 8 (1) & (2) Article 10
<i>19. Male person posing as female</i>	-	-	Article 5 (1) [on right to live with dignity and livelihood], Article 8 (1) & (2) Article 9 (2) Article 10 (1)
<i>20. Female person posing as male</i>	-	-	Article 5 (1) [on right to live with dignity and livelihood], Article 8 (1) & (2) Article 9 (2) Article 10 (1)
<i>21. Indecent act or speech</i>	-	-	Article 5 (1), Article 8 (1) Article 10 (1)
<i>22. Act of applying tattoo or undergoing treatment or surgery for cosmetic purposes without syarii cause</i>	<p>14. Medicine and health including sanitation in the federal capital, and including—</p> <p>(a) Hospitals, clinics and dispensaries; medical profession; maternity and child welfare; lepers and leper institutions;</p>	-	Article 5 (1), Article 8 (1) Article 10 (1)
<i>23. Exposing aurat in public places</i>	-	-	Article 5 (1) [on right to live with dignity and livelihood], Article 8 (1) & (2) Article 9 (2) Article 10

Section	Violation of Federal List	Overlap with existing	Rights violated
24. Causing disruption to other people's cohabitation	4. Civil and criminal law and procedure and the administration of justice - (h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law	Section 498 of the Penal Code criminalizes enticing or taking away or detaining with a criminal intent a married woman <i>Section 498 is gendered</i>	-
25. Preventing married couple from cohabiting as husband and wife			-
26. Instigating husband or wife to divorce or to neglect obligations			-
27. Enticing away any Muslim from custody		Section 359 - 369 of the penal Code deals with kidnapping <ul style="list-style-type: none"> Section 361. Kidnapping from lawful guardianship 	Element of non consent, coercion, exploitation is not included in the section Article 5 (1) [on right to live with dignity and livelihood], Article 8 (1) & (2) Article 9 (2) Article 10
28. Female person fleeing from custody		Section 359 - 369 of the penal Code deals with kidnapping <ul style="list-style-type: none"> Section 361. Kidnapping from lawful guardianship Section 366. Kidnapping or abducting a woman to compel her marriage, etc. 	Element of non consent, coercion, exploitation is not included in the section Article 5 (1) [on right to live with dignity and livelihood], Article 8 (1) & (2) Article 9 (2) Article 10
29. Allegation of committing mungkar	-	-	Article 5 (1) Article 8 (1) & (2) Article 9 (2) Article 10 (1)

Section	Violation of Federal List	Overlap with existing	Rights violated
30. Words capable of breaking peace	4. Civil and criminal law and procedure and the administration of justice - (h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;	298A of the Penal Code penalizes anyone who causes, etc., disharmony, disunity, or feelings of enmity, hatred or ill will, or prejudicing, etc., the maintenance of harmony or unity, on grounds of religion	Article 10(1)
31. Sexual harassment		<ul style="list-style-type: none"> Section 81A and 81G of the Employment Act Section 509 of the Penal Code 	-
32. Wrongful cutting off ties with immediate family	-	-	Article 5 [privacy] Article 8(1)
33. Disobedient to parents	-	-	Article 5 [privacy] Article 8(1)
34. Possessing false document, giving false evidence, information or statement	4. Civil and criminal law and procedure and the administration of justice - (h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;	Section 191 - 200 of the Penal Code provides for false evidences and offences against public justice	-

Part 4: Takzir Offences relating to protection of mind and consumption
Total number of sections: 2 (1 new, 1 old)

Section	Violation of Federal List	Overlap with existing	Rights violated
35. Intoxicating drinks	14. Medicine and health including sanitation in the federal capital, and including (d) Intoxicating drugs and liquors; manufacture and sale of drugs.	-	-
36. Anything intoxicating	14. Medicine and health including sanitation in the federal capital, and including (c) Poisons and dangerous drugs;	Dangerous Drugs Act	<p>Criminalization of people who use drugs</p> <p>Article 5 (1) [on right to live with dignity, free from torture, cruel and degrading treatment, and livelihood], Article 8 (1) Article 9 (2) Article 10 (1) [freedom of association & assembly]</p>

Section	Violation of Federal List	Overlap with existing	Rights violated
37. <i>Gambling</i>	4. Civil and criminal law and procedure and the administration of justice - (l) Betting and lotteries.	-	-
38. <i>Dishonest disposal of orphan's property</i>	4. Civil and criminal law and procedure and the administration of justice - (f) Official secrets; corrupt practices	Section 161 - 163 of the Penal Code are on offences relating to gratification by public servants Section 16 - 24 of the Malaysian Anti-Corruption Commission Act 2009 (MACC Act) on offences and punishment related to gratification	-
39. <i>Reducing scale, measurement and weight</i>	4(k) 'Ascertainment of Islamic Law and other personal laws for purposes of federal law', 8. <i>Trade, commerce and industry, including— (f)</i> Establishment of standards of weights and measures;	Weights and Measurement Act 1972	-
40. <i>Executing transactions contrary to hukum syarak</i>	4(k) 'Ascertainment of Islamic Law and other personal laws for purposes of federal law',	<ul style="list-style-type: none"> Islamic Financial Services Act 2015, Money Lenders Act 1951 (partly) Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 	-
41. <i>Executing transactions via usury etc.</i>	<p>7: Finance (d) <i>Loans to or borrowing by the States, public authorities and private enterprise;</i> (j) <i>Banking; money-lending; pawnbrokers; control of credit</i></p> <p>8. <i>Trade, commerce and industry, including— (c)</i> <i>Incorporation, regulation and winding up of corporations</i></p>	<p>Usury (high interest rate)</p> <ul style="list-style-type: none"> Section 17A of the Money Lenders Act - <p>Ghisy (concealment of defective goods)</p> <ul style="list-style-type: none"> Consumer Protection Act Section 10, 32, 33, Penal Code <p>Gharar</p> <ul style="list-style-type: none"> Contracts Act, Sales of Goods Act, Consumer Protection Act, Capital Markets And Services Act 2007 <p>Ghasb</p> <ul style="list-style-type: none"> Hire-Purchase Act 1967 	-

Section	Violation of Federal List	Overlap with existing	Rights violated
42. Abuse of halal label and connotation	4. Civil and criminal law and procedure and the administration of justice - (h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;	Section 14 - 17 of the Food Act 1983 on labelling, false labelling, and advertisement.	-

Part 6: Takzir Offences relating to protection of offspring
Total number of sections: 9 (3 new, 6 old)

Section	Violation of Federal List	Overlap with existing	Rights violated
43. Offering or providing vice services	4. Civil and criminal law and procedure and the administration of justice - (h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;	Section 372 of the Penal Code criminalises various aspects of sex work Section 372. Exploiting any person for purposes of prostitution Section 372A. Persons living on or trading in prostitution Section 372B. Soliciting for purpose of prostitution	Criminalization of sex work, sex workers and their clients violate Article 5 (1) [on right to live with dignity, free from torture, cruel and degrading treatment, and livelihood], Article 8 (1) Article 9 (2) Article 10 (1) [freedom of association & assembly]
44. Preparatory act of offering or providing vice services	-	-	Criminalization of sex work, sex workers and their clients violate Article 5 (1) [on right to live with dignity, free from torture, cruel and degrading treatment, and livelihood], Article 8 (1) Article 9 (2)

Section	Violation of Federal List	Overlap with existing	Rights violated
45. Preparatory act of vice	-	-	Criminalization of sex work, sex workers and their clients violate Article 5 (1) [on right to live with dignity, free from torture, cruel and degrading treatment, and livelihood], Article 8 (1) Article 9 (2)
46. Adultery	-	-	Article 5 (1), Article 8 (1)
47. Act of incest	4. Civil and criminal law and procedure and the administration of justice - (h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;	Section 376(a) and (b) of the Penal Code criminalises incest	-
48. Muncikari	4. Civil and criminal law and procedure and the administration of justice - (h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;	<i>In the context of violation acting as a middle persons for sex related violations</i> Section 372. Exploiting any person for purposes of prostitution Section 372A: Whoever knowingly lives wholly or in part on the earnings of the prostitution of another person	-
49. Pregnancy out of wedlock	14. Medicine and health including sanitation in the federal capital, and including— (a) Hospitals, clinics and dispensaries; medical profession; maternity and child welfare; lepers and leper institutions;	-	Article 5 (1) [on right to live with dignity and livelihood], Article 8 (1) & (2)
50. Khalwat	-	-	Article 5 (1) [on right to live with dignity and livelihood], Article 8 (1)
51. Accusing attempted adultery, sodomy or musahaqah	-	-	-

Part 8: General Exceptions

Total number of sections: 9 (3 new, 6 old)

Section	Violation of Federal List	Overlap with existing	Rights violated
60. <i>Act of Child who has not reached puberty</i>	-	<p>Section 82 & 83 of the Penal Code</p> <ul style="list-style-type: none"> Section 82 exempts child under 10 years from the offences in the Penal Code Section 83 exempts children above ten years of age and under twelve, who have not attained sufficient maturity of understanding to judge the nature and consequence of his conduct on that occasion from the offences in the Penal Code 	Article 5 (1)

Part 9: General

Section	Violation of Federal List	Overlap with existing	Rights violated
63. <i>Establishment of rehabilitation Centre</i>	3. Prisons; reformatories; remand homes; places of detention; probation of offenders; juvenile offenders;	-	Article 5 (1) Article 8 (1) & (2) Article 10 (1) Article 11
64. <i>Power of court to make orders against convicted person to be placed in rehabilitation centre....</i>	-	<ul style="list-style-type: none"> Criminal Procedure Code (CPC), Offenders Compulsory Attendance Act 1954 Article 121(1) of the Federal Constitution Court of Judicature Act 1964 	-
65. <i>Power of court to order additional punishment or alternative punishment to carry service</i>	-	<ul style="list-style-type: none"> Criminal Procedure Code (CPC), Offenders Compulsory Attendance Act 1954 Article 121(1) of the Federal Constitution Court of Judicature Act 1964 	-

