

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO. N-01-498-11/2012

ANTARA

1. MUHAMAD JUZAILI BIN MOHD KHAMIS
2. SHUKUR BIN JANI
3. WAN FAIROL BIN WAN ISMAIL ... PERAYU-PERAYU

DAN

1. KERAJAAN NEGERI SEMBILAN
2. JABATAN HAL EHWAL AGAMA ISLAM NEGERI SEMBILAN
3. PENGARAH JABATAN HAL EHWAL AGAMA ISLAM NEGERI SEMBILAN
4. KETUA PEGAWAI PENGUATKUASA AGAMA NEGERI SEMBILAN
5. KETUA PENDAKWA SYARIE NEGERI SEMBILAN ... RESPONDEN-RESPONDEN

AMICUS BRIEF

Presented by **Human Rights Watch**

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TABLE OF CONTENTS

A. INTRODUCTION, INTEREST OF AMICUS ETC.	3
B. DOCUMENTS REFERRED TO	4
C. CHRONOLOGY OF RELEVANT FACTS	4
D. ISSUES TO BE DETERMINED	6
E. ISSUE NO. 1 – Court can apply International Human Rights Treaties and/or norms	6
F. ISSUE NO. 2 - Provisions of international human rights treaties and/or international norms have been breached	9
G. CONCLUSION.....	23

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO. W-01-382-09/2012

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AMICUS BRIEF

[Appeal]

If it pleases My Lordships,

A. INTRODUCTION, INTEREST OF AMICUS ETC.

Introduction

1. Human Rights Watch ("**Amicus**") respectfully submit this brief of amicus curiae in support of the Appellants' appeal against the High Court judge's decision to dismiss the Appellant's judicial review application.

Background and Interest of Amicus

2. The Amicus is a nonprofit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States.
3. By exposing and calling attention to human rights abuses committed by state and non-state actors, the Amicus seeks to bring international public opinion to bear upon offending

governments and others to end abusive practices. The Amicus has filed amicus briefs before various bodies, including U.S. courts and international tribunals.

4. The Amicus submits that this Court is entitled by law to allow the Amicus as a disinterested bystander to inform the Court on points of law.¹

Summary of Submissions

5. The Amicus submits that the Appellants' appeal should be allowed as:
- a. this Court is entitled to apply international human rights treaties and norms when deciding this matter; and
 - b. once taken into account, it is evident from the facts of this appeal that the provisions of international human rights treaties and/or norms have been breached thereby enabling this Court to allow the appeal.

B. DOCUMENTS REFERRED TO

6. For the purposes of this Appeal, the Amicus craves leave to refer to the following documents:

<u>No.</u>	<u>Particulars</u>	
a.	Record of Appeal (Vol. 1) Part A	<i>ROA Vol. 1</i>
b.	Record of Appeal [Vol. 2(1)] Part B	<i>ROA Vol. 2(1)</i>
c.	Record of Appeal [Vol. 2(2)] Part B	<i>ROA Vol. 2(2)</i>
d.	Record of Appeal [Vol. 2(3)] Part C	<i>ROA Vol. 2(3)</i>
e.	Record of Appeal [Vol. 2(4)] Part C	<i>ROA Vol. 2(4)</i>
f.	Record of Appeal [Vol. 2(5)] Part C	<i>ROA Vol. 2(5)</i>
g.	Record of Appeal [Vol. 2(6)] Part C	<i>ROA Vol. 2(6)</i>
h.	Record of Appeal [Vol. 2(7)] Part C	<i>ROA Vol. 2(7)</i>
i.	Record of Appeal [Vol. 2(8)] Part C	<i>ROA Vol. 2(8)</i>
j.	Supplementary Record of Appeal	<i>Supplementary ROA</i>

(collectively referred to as "***the Documents***")

C. CHRONOLOGY OF RELEVANT FACTS

7. The following constitutes a chronology of facts relevant to the 1st Appellant's appeal:

<u>No.</u>	<u>Date</u>	<u>Particulars</u>
a.	22.07.1987	The 1 st Appellant was born in Kota Bharu, Kelantan.

¹ *TSC Education Sdn. Bhd. v. Kolej Yayasan Pelajaran Mara & Anor* [2002] 5 MLJ 577 page 585 paragraph F: "... the amicus as a disinterested bystander would, at the court's request or permission, inform the court on points of law."

- b. 2002 The 1st Appellant gender identity is that of a woman.
- c. 2003 The 1st Appellant begins hormone treatment.
- d. 2009/2010 The 1st Appellant undergoes breast augmentation surgery.
- e. 11.03.2010 The 1st Appellant was arrested at 1.30 am when being out and about at Taman AST by the 2nd Respondent's agents and/or employees. (**"the 1st Appellant's Arrest No. 1"**)
- f. - The 1st Appellant was then brought to the Syariah Court at 2.00 pm and charged under s. 66 of the *Syariah Criminal Enactment Negeri Sembilan 1992*. (**"the 1st Appellant's Charge No. 1"**)
- g. 31.05.2010 The 1st Appellant was arrested at 1.35 am when being out and about at Taman AST by the 2nd Respondent's agents and/or employees. (**"the 1st Appellant's Arrest No. 2"**)
- h. 07.08.2010 The 1st Appellant was arrested at 4.25 am when being out and about at Taman AST by the 2nd Respondent's agents and/or employees. (**"the 1st Appellant's Arrest No. 3"**)
- i. 23.08.2010 The 1st Appellant was then brought to the Syariah Court and charged for the 1st Appellant's Arrest No. 2 and the 1st Appellant's Arrest No. 3 under s. 66 of the *Syariah Criminal Enactment Negeri Sembilan 1992*. (**"the 1st Appellant's Charge No. 2 and 3"**)
- j. 24.11.2010 The 1st Appellant was arrested at 2.15 am when being out and about at Taman AST by the 2nd Respondent's agents and/or employees. (**"the 1st Appellant's Arrest No. 4"**)
- k. 20.12.2010 The 1st Appellant was then brought to the Syariah Court and charged under s. 66 of the *Syariah Criminal Enactment Negeri Sembilan 1992*. (**"the 1st Appellant's Charge No. 4"**)
- l. 11.01.2011 The 1st Appellant underwent a psychological evaluation and which confirms that the 1st Appellant's gender identity is that of a woman.
- m. 23.02.2011 The 1st Appellant underwent a psychiatric evaluation and which confirms that the 1st Appellant has a "*Gender Identity Disorder*".

(collectively referred to as "**the Facts**")

- 8. Similar fact patterns exist vis a vis the 2nd, 3rd and 4th Appellants i.e. with:
 - a. multiple arrests;
 - b. multiple charges being proffered against them under s. 66 of the *Syariah Criminal Enactment Negeri Sembilan 1992*; and
 - c. with even some of the Appellants being assaulted.

D. ISSUES TO BE DETERMINED

9. Based on the abovementioned Documents and Facts, the Amicus submits that the following issues have to be determined:

<u>No.</u>	<u>Issue</u>	
a.	Whether this Court is entitled to apply international human rights treaties and norms when deciding this matter.	ISSUE NO. 1
b.	Whether the provisions of international human rights treaties and/or norms have been breached.	ISSUE NO. 2

E. ISSUE NO. 1 – Court can apply International Human Rights Treaties and/or norms

International Human Rights Treaties Apply in Malaysia

10. The Amicus submits that this Court is entitled to apply international human right treaties and norms when hearing and deciding this appeal and/or to construe the constitutional rights expressly guaranteed by the Federal Constitution. : *Vishaka & Ors v State of Rajasthan & Ors* (1997) 6 SCC 241 at [14] & [15]² and *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507 at [55]³
11. This, no doubt, is at odds with a number of decisions made by the Courts in Malaysia. : see *Sis Forum (Malaysia)*⁴ and *Mohamad Ezam*⁵ Those 2 decisions suggest that Malaysia, like Britain, is a country with a dualist⁶ system of law and consequently any treaty must be transformed into municipal law before it is part of municipal law. (hereinafter “**doctrine of transformation**”)
12. The Amicus submits that:
- the legal position set out in paragraph 11 above is correct only in so far as it relates to treaties which the Executive enters into to the detriment of citizens of Malaysia : *In Re McKerr*
 - where the treaty in question creates fundamental rights for individuals, there is **no** necessity for the doctrine of transformation to be observed to endow fundamental rights, *as contained in those treaties*, to individuals in Malaysia : *In Re McKerr*
13. In the present appeal, the Amicus intends to refer to the following treaties i.e.:
- Universal Declaration of Human Rights (“**UDHR**”);
 - International Covenant on Civil and Political Rights;

² Refer to pg 12 of the IA(C).

³ Refer to pg 36 of the IA(C).

⁴ Refer to pg 60 of the IA(C).

⁵ Refer to pg 96 of the IA(C).

⁶ Dualist jurisdiction simply means that Malaysia is a country whereby international law and municipal law are two separate systems of law operating in its own area of competence.

- c. American Convention on Human Rights;
- d. European Convention on Human Rights; and
- e. African Charter on Human and People's Rights.

(collectively "**International Human Rights Treaties**")

and a cursory glance at those treaties confirms that the above treaties endow fundamental rights upon individuals. Consequently, vis a vis those treaties, the doctrine of transformation need not be observed and the provisions of those treaties are automatically part of municipal law and may be applied by this Honorable Court.

Alternatively, UDHR Applies in Malaysia

- 14. **If nothing else**, the Amicus submits that as a matter of law, this Court is entitled to apply the provisions contained in the UDHR.
- 15. Admittedly, there is a decision of the Federal Court which previously ruled that 'regard' did not mean that it was duty bound to apply the principles contained in the UDHR. : *Mohamad Ezam* and s. 4(4) *Human Rights Commission Malaysia Act 1999*
- 16. Nevertheless, the Amicus submits that:
 - a. the observation in *Ezam* was merely *obiter* as the question of whether UDHR applies or otherwise played no part in the decision making process of that case i.e. that the arrest and detention of the appellants under s. 73 of the *Internal Security Act* was *mala fide* as the arrests were NOT made to enable the police to conduct further investigation regarding the Appellants' acts and conduct; and
 - b. **alternatively**, the ratio of that case should be confined in its scope only in so far as there was a statutory interpretation exercise carried out on the phrase '*regard shall be had*' as contained in s. 4(4) of the *Human Rights Commission Malaysia Act 1999*.
- 17. Consequently, the question of whether UDHR is now part of municipal law because of compliance with the doctrine of transformation remains a live matter to be decided by this Court.
- 18. In that regard, the Amicus submits in that respect that by way of s. 4(4), Parliament observed the doctrine of transformation and transformed UDHR to be part of municipal law in Malaysia. The only limitation imposed by Parliament was that UDHR applies only in so far as it is consistent with the Federal Constitution. : *50th Turkish Constitutional Court and International Symposium* and *Indira Gandhi*

Authority:

- *SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri)* [2010] 2 MLJ 377 where Ariff Yusoff, J (as he then was) held as follows:

"... in relation to the applicability of international norms and the approach as exemplified in the Australian case of *Teoh*, the position adopted by the Malaysian courts has been not to directly accept norms of international law unless they are incorporated as part of our

municipal law: See *Merdeka University Berhad v Government of Malaysia* [1981] 2 MJ 356.”

[Refer to pg 60 of the Amicus’ Bundle of Authorities]

- *In re McKerr* [2004] 1 WLR 807 where Lord Steyn held as follows:

“50. The rationale of the dualist theory, which underpins the *International Tin Council case*, is that any inroad on it would risk abuses by the executive to the **detriment** of citizens. It is, however, difficult to see what relevance this has to **international human rights treaties which create fundamental rights for individuals** against the state and its agencies. ...”

[Refer to pg 50 of the Amicus’ Bundle of Authorities]
- *Human Rights Commission Malaysia Act 1999* which provides as follows:

“(4) For the purpose of this Act, regard **shall** be had to the *Universal Declaration of Human Rights 1948* to the extent that it is not inconsistent with the Federal Constitution.”

[Refer to pg 91 of the Amicus’ Bundle of Authorities]
- Cf. *Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & other appeals* [2002] 4 MJ 449 where Siti Norma, FCJ held as follows:

“Notwithstanding s 4(4) of the *Human Rights Commission of Malaysia Act 1999*, reference to international standards set by the *Universal Declaration of Human Rights 1948* (*‘the 1948 Declaration’*) and several other United Nations documents on the right of access cannot be accepted as such documents were not legally binding on the Malaysian courts. The use of the word *‘regard shall be had’* in s 4(4) of the *Human Rights Commission of Malaysia Act* can only mean an invitation to look at the 1948 Declaration if one was disposed to do so and to consider the principles stated therein and be persuaded by them if need be. Beyond that, one was not obliged or compelled to adhere to the 1948 Declaration. This was further emphasized by the qualifying provisions of s 4(4) of the *Human Rights Commission of Malaysia Act* which provided that regard to the 1948 Declaration was subject to the extent that it was not inconsistent with the Constitution (see pp 513H-I, 514D-F).”

[Refer to pg 96 of the Amicus’ Bundle of Authorities]
- Yang Amat Arif Tun Arifin bin Zakaria, the Chief Justice of Malaysia, in the *50th Turkish Constitutional Court and International Symposium* in April 2012 noted as follows:

“33. The *Human Rights Commission of Malaysia Act 1999* has tremendous impact in Malaysia in one important respect. It has imported the international law on human rights enshrined in the Universal Declaration of Human Rights 1948 into our domestic constitutional law.

34. This means that whatever rights and liberties not mentioned in the *Human Rights Commission of Malaysia Act 1999* but referred to in the *Universal Declaration of Human Rights 1948* must still be considered provided that there is no conflict with the Federal Constitution.

35. It may thus be argued that the provisions on human rights enshrined in the *Human Rights Commission of Malaysia Act 1999* are an extension to the fundamental liberties provided in the Federal Constitution. Therefore, there is no doubt that the *Human Rights Commission of Malaysia Act 1999* has constitutional status.”

[Refer to pg 172-173 of the Amicus’ Bundle of Authorities]

- *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2013] 5 MLJ 552 where at paragraph 86, the learned Judicial Commissioner held as follows:

“It would not be incorrect to say that we have given the principles of the UDHR a statutory status and a primal place in our legal landscape. The UDHR is part and parcel of our jurisprudence as the international norms in the UDHR are binding on all Member countries unless they are inconsistent with the Member countries’ constitution.”

[Refer to pg 210 of the Amicus’ Bundle of Authorities]

F. ISSUE NO. 2 - Provisions of international human rights treaties and/or international norms have been breached

Introduction

19. The international human rights treaties set out in paragraph 13 above and international norms as embodied in non-treaty documents guarantee the following rights to all individuals:
 - a. Right to non discrimination;
 - b. Freedom of expression;
 - c. Right to live with dignity;
 - d. Right to privacy;
 - e. Right to livelihood/work; and
 - f. Freedom of movement.
20. Nevertheless, special mention must be made of the Yogyakarta Principles⁷ as it has not been adopted by any State, including Malaysia, in a treaty and are thus not by itself a legally

⁷ Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity is a set of principles relating to sexual orientation and gender identity, intended to apply international human rights law standards to address abuse of human rights of lesbian, gay, bisexual and transgender (“**LBGT**”) people, and issues of intersexuality. As this case involves litigants

binding part of international human rights law. However, in keeping with this Honorable Court's role to promote the observance of human rights in this country, the Principles can serve and are intended to serve as an interpretive aid to the international human rights treaties. : *Noorfadilla*

21. It is also trite that this Honorable Court is constitutionally bound to arrest any wrong contrary to human rights values, and advance a remedy to ensure respect and recognition is given to individual liberties in recognition of Malaysia being signatory to the relevant International Convention on Human Rights. : *Chai Kheng Lung*

Authority:

- *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors* [2012] 1 MLJ 832 where the learned High Court judge held as follows:

“[28] To me, in interpreting art 8(2) of the Federal Constitution, it is the court's **duty** to take into account the government commitment and obligation at international level especially under an international convention, like CEDAW, to which Malaysia is a party. The court has no choice but to refer to CEDAW in clarifying the term 'equality' and gender discrimination under art 8(2) of the Federal Constitution.”

[Refer to pg 229 of the Amicus' Bundle of Authorities]

- *Chai Kheng Lung v Inspector Dzulkarnain Abdul Karim & Anor* [2008] 8 MLJ 12 where the learned High Court judge held as follows:

“[19] ... within the constitutional framework there is a balance; it is only a matter of the court to, where necessary, move to arrest the wrong and advance the remedy to be held to the oath of office of His Majesty's judges, which is a legitimate expectation of the public within the spirit and intent of the Federal Constitution. Cases in this area of law which does not take into account growing concern of human rights values, must be expeditiously struck down by the apex court to ensure more respect and recognition is given to individual liberties as enshrined in the Federal Constitution, and also in recognition of Malaysia being signatory to the relevant International Convention on Human Rights.”

[Refer to pg 248 of the Amicus' Bundle of Authorities]

- *Universal Declaration of Human Rights* which provides as follows:

Article 1

All human beings are born free and equal in **dignity** and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 7

who are subjected to **rights violations on the basis of their gender identity**, the Yogyakarta Principles would be of practical relevance and value to this Court.

All are equal before the law and are entitled without any **discrimination** to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 12

No one shall be subjected to arbitrary interference with his **privacy**, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

1. Everyone has the right to freedom of **movement** and residence within the borders of each State.
2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 19

Everyone has the right to **freedom of opinion and expression**; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 23

1. Everyone has the right to **work**, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

[Refer to pg 250-259 of the Amicus' Bundle of Authorities]

- *International Covenant on Civil and Political Rights* which provides as follows:

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[Refer to pg 256-259 of the Amicus' Bundle of Authorities]

- *American Convention on Human Rights* which provides as follows:

Article 11. Right to Privacy

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.

Article 13. Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 1. respect for the rights or reputations of others; or
 2. the protection of national security, public order, or public health or morals.

3.The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

4.Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.

5.Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

[Refer to pg 260-267 of the Amicus' Bundle of Authorities]

- *European Convention on Human Rights* which provides as follows:

Article 8

Everyone has the right to respect for his private and family life, his home and his correspondence.

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10

1. Everyone has the right to freedom of expression. this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[Refer to Tab 12 of the Amicus' Bundle of Authorities]

- *African Charter on Human and People's Rights* which provides as follows:

Article 4

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Article 9

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

[Refer to pg 274-275 of the Amicus' Bundle of Authorities]

- *Yogyakarta Principles* which provides as follows:

Principles 1

THE RIGHT TO THE UNIVERSAL ENJOYMENT OF HUMAN RIGHTS

All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

States shall:

- A. Embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislation and ensure the practical realisation of the universal enjoyment of all human rights;
- B. Amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights;
- C. Undertake programmes of education and awareness to promote and enhance the full enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity;
- D. Integrate within State policy and decision-making a pluralistic approach that recognises and affirms the interrelatedness and indivisibility of all aspects of human identity including sexual orientation and gender identity.

Principles 6

THE RIGHT TO PRIVACY

Everyone, regardless of sexual orientation or gender identity, is entitled to the enjoyment of privacy without arbitrary or unlawful interference, including with regard to their family, home or correspondence as well as to protection from unlawful attacks on their honour and reputation. The right to privacy ordinarily includes the choice to disclose or not to disclose information relating to one's

sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others.

States shall:

- A. Take all necessary legislative, administrative and other measures to ensure the right of each person, regardless of sexual orientation or gender identity, to enjoy the private sphere, intimate decisions, and human relations, including consensual sexual activity among persons who are over the age of consent, without arbitrary interference;
- B. Repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;
- C. Ensure that criminal and other legal provisions of general application are not applied to de facto criminalise consensual sexual activity among persons of the same sex who are over the age of consent;
- D. Repeal any law that prohibits or criminalises the expression of gender identity, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity;
- E. Release all those held on remand or on the basis of a criminal conviction, if their detention is related to consensual sexual activity among persons who are over the age of consent, or is related to gender identity;
- F. Ensure the right of all persons ordinarily to choose when, to whom and how to disclose information pertaining to their sexual orientation or gender identity, and protect all persons from arbitrary or unwanted disclosure, or threat of disclosure of such information by others.

Principle 12

THE RIGHT TO WORK

Everyone has the right to decent and productive work, to just and favourable conditions of work and to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity.

States shall:

- A. Take all necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation and gender identity in public and private

employment, including in relation to vocational training, recruitment, promotion, dismissal, conditions of employment and remuneration;

- B. Eliminate any discrimination on the basis of sexual orientation or gender identity to ensure equal employment and advancement opportunities in all areas of public service, including all levels of government service and employment in public functions, including serving in the police and military, and provide appropriate training and awareness-raising programmes to counter discriminatory attitudes.

Principles 19

THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

States shall:

- A. Take all necessary legislative, administrative and other measures to ensure full enjoyment of freedom of opinion and expression, while respecting the rights and freedoms of others, without discrimination on the basis of sexual orientation or gender identity, including the receipt and imparting of information and ideas concerning sexual orientation and gender identity, as well as related advocacy for legal rights, publication of materials, broadcasting, organisation of or participation in conferences, and dissemination of and access to safer-sex information;
- B. Ensure that the outputs and the organisation of media that is state-regulated is pluralistic and non-discriminatory in respect of issues of sexual orientation and gender identity and that the personnel recruitment and promotion policies of such organisations are non-discriminatory on the basis of sexual orientation or gender identity;
- C. Take all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood, including through speech, deportment, dress, bodily characteristics, choice of name or any other means;
- D. Ensure that notions of public order, public morality, public health and public security are not employed to restrict, in a discriminatory manner, any exercise of freedom of opinion and

expression that affirms diverse sexual orientations or gender identities;

- E. Ensure that the exercise of freedom of opinion and expression does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities;
- F. Ensure that all persons, regardless of sexual orientation or gender identity, enjoy equal access to information and ideas, as well as to participation in public debate.

[Refer to Tab 14 of the Amicus' Bundle of Authorities]

- *Asean Human Rights Declaration* which provides as follows:⁸

"24. Every person has the right to freedom of peaceful assembly."

[Refer to pg 276-280 of the Amicus' Bundle of Authorities]

Non-Recognition and/or Criminalization of the Appellants' Identity Breaches the Right to **Privacy**

- 22. The Amicus submits that non-recognition and/or criminalization of the Appellants' ability to manifest their identities amounts to a violation of right to privacy as encapsulated in the respective provisions of the International Human Rights Treaties.
- 23. The gender identity of the Appellants is that of a woman but the laws in question here denies the Appellants the ability to manifest that identity and negates their autonomy *vis a vis* a very private as well as personal matter. The Appellants, in fact, are also unable to live in security given that manifesting their identity results in a multiplicity of arrests, charges and/or assaults. This cannot, by any stretch of imagination, be said to be a minor inconvenience suffered by the Appellants.
- 24. Consequently, it is submitted that the provision in question i.e. s. 66, directly affects the Appellants' Right to Privacy as guaranteed by International Human Rights Treaties.

Authority:

- *Christine Goodwin v the United Kingdom (Application no. 28957/95)* where the European Court of Human Rights decided that non-recognition of a transsexual by the UK Government amounted to a violation of art. 8 of the *European Convention on Human Rights* (ECHR), which guaranteed the right to respect for private life (privacy) noted that:
 - a. in Goodwin, the applicant was a male-to-female transsexual who dressed as a woman from early childhood: at [12-13]
 - b. The applicant began treatment and attended appointments with a psychiatrist and a psychologist and she lived fully as a woman: at [13]

⁸ Malaysia has adopted the ASEAN Human Rights Declaration since 18th. November, 2012.

- c. The applicant eventually had treatment and sex reassignment surgery financed by the UK Government under the UK's National Health Service: at [13]
- d. However, UK laws relating to employment and registration still failed to recognise the applicant's change of gender: at [23-27]

And the Court, juxtaposing art. 8 of the ECHR with the facts, held as follows:

"(at [77], [90])...serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity...The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.

... Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings...In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved." [Emphasis added]

[Refer to pg 313, 316-317 of the Amicus' Bundle of Authorities]

Non-Recognition and/or Criminalization of the Appellants' Ability to Dress as a Woman Infringes the Right to Privacy and Proportionality

- 25. The following points are made in support of the Appellants' submissions on the Right to Privacy and the application of the test of Proportionality.
- 26. Comparable in facts and issues as the present case is the unreported English High Court decision of *E, R (on the Application of v Ashworth Hospital Authority [2001]* EWHC Admin 1089.
 - a. In *Ashworth*, the claimant filed a judicial review application to challenge the decision of the *Ashworth Hospital Authority*, which prevented him from dressing as a woman. *Ashworth* is a special mental hospital where patients are detained for treatment in conditions of high security: at [1]
 - b. The claimant has for long wished to dress as, and assume the appearance of, a woman. He wishes to be allowed to dress as a woman within the hospital, but the hospital has restricted him from doing so i.e. permitting him to wear women's undergarments only within his own room and not outside of it: at [2-3]

- c. The claimant argues that the Hospital's restrictions is in breach of his rights under Article 8 of the European Convention on Human Rights i.e. the Right to Respect for Private Life (Right to Privacy): at [4]
 - d. The claimant's application is supported by the evidence of Professor Green, the Head of the Gender Identity Clinic at Charing Cross Hospital and Dr Lomax, a consultant forensic psychiatrist who both say that the claimant is a transsexual i.e. has a clinically recognised need to live as a woman: at [16] and [18]
 - e. The Hospital's medical director, Dr. James, gave substantial evidence to justify the Hospital's restriction (at [14]). She said:
 - i. Ashworth is not a prison but a secure mental hospital where it treats patients who have been perpetrators or victims of sexual abuse who have difficulties in their relationships with men and women.
 - ii. If a patient was allowed to cross dress this could increase the risk of assaults on that patient. Further, there is an increased risk that the patient would be ostracised and ridiculed. This would be detrimental to that patient's treatment.
 - iii. If one patient has access to female clothing, this increases the risk that these garments may get into the hands of patients who are not authorised to have access to such clothing. If that happens it could be harmful to the treatment of the patient who received the item and to the patient whose item it was.
 - iv. The restriction is also made to prevent patients from 'masquerading' out of the hospital.
 - v. Some patients in a mental hospital may wish to dress bizarrely as a result of abnormal ideas. If limitations were not placed on the patients' ability to dress how they like there is a real risk that this would lead to a deterioration in their treatment.
27. The learned Judge correctly stated the Proportionality test as follows:
“(at [37])...There is an admitted interference with the claimant's rights under Article 8(1), which the hospital must therefore justify under Article 8(2)”
28. The learned Judge then reproduces art. 8(1) and 8(2) of the European Convention on Human Rights (at [39]) before finding that the hospital's restriction did indeed violate the claimant's rights:
“(at [40])...the restrictions placed by Ashworth on the claimant's freedom to dress as a woman and to assume the appearance of a woman constitute an interference with his private life within Article 8(1)”
29. However, after meticulously going through the hospital's evidence and justification and applying the Proportionality test, the learned Judge reached his decision as follows:
“(at [46])...In my judgment the hospital has put forward valid therapeutic and security concerns in support of its approach. I am satisfied that the restrictions are imposed in pursuit of legitimate aims and that there is a rational connection between the aims pursued and the concerns advanced.

...

(at [47]) ...What one patient is permitted to do in a high security hospital is plainly capable of affecting others within the hospital environment and there can be no rational basis for leaving the impact on others out of account. It is true that the wider concerns are of a generalised nature, but...[t]hey are based on a knowledge and understanding of the patient group and of the complex problems of managing such patients within the hospital environment.

...

(at [49]) Taking everything together, I am satisfied that the restrictions placed on the claimant reflect a pressing social need and are proportionate to the legitimate aims pursued. In my judgment there is a valid justification under Article 8(2) for the hospital's interference with his right to respect for private life."

30. In the instant case, it submitted an infringement on the four Appellants' Right to Privacy is established as a result of the effect of s. 66. Nonetheless, the Respondents have offered no justification to the law and this Honorable Court should infer that s. 66 has no justification to limiting the Appellants' Rights to Privacy, thus in violation of the Right to Privacy and by extension, the same - *in the absence of cogent reasons justifying the same* - is disproportionate pursuant to International Human Rights Treaties.

Authority:

- *R v Ashworth Hospital Authority ex parte E* [2001] EWHC Admin 1089.
[Refer to pg 331, 345, 346 and 349 of the Amicus' Bundle of Authorities]

Non-Recognition and/or Criminalization of the Appellants' Identity Infringes the Right to Livelihood/Work

31. S. 66 is explicit in criminalizing any male person who in any public place wears a woman's attire or poses as a woman. S. 66 therefore has a prohibitory effect on the Appellants in all public places.
32. The Appellants work as bridal makeup artists and have to move around Seremban during the day and the night. The Appellants' feelings of vulnerability, anxiety and fear are ever present as result of s. 66 and its enforcement.
33. The effect of s. 66 is such that it prohibits the Appellants from moving in public places to reach their respective places of work. The Appellants, being male-to-female transsexuals, must either respect the law and refrain from being cross-dressed (in public places), to which they are disposed by reason of their gender identity, or they commit such acts the moment they leave their homes and thereby become liable to criminal prosecution: *Dudgeon* at [41]
34. As such, it is submitted that s. 66 has the inevitable effect of rendering the Appellants' Right to Livelihood/Work illusory, for they will never be able to leave their homes to go to their respective places of work without being exposed to the penal sanctions of s. 66 and its enforcement. S. 66 is therefore inconsistent with International Human Rights Treaties.

Authority:

- *Dudgeon v The United Kingdom* Application No. 7525/76 where the European Court of Human Rights held as follows:

“41. The Court sees no reason to differ from the views of the Commission: the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant’s right to respect for his private life (which includes his sexual life) within the meaning of Article 8 par. 1 (art. 8-1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life (see, mutatis mutandis, the Marckx judgment of 13 June 1979, Series A no. 31, p. 13, par. 27): either he respects the law and refrains from engaging - even in private with consenting male partners - in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.

It cannot be said that the law in question is a dead letter in this sphere. It was, and still is, applied so as to prosecute persons with regard to private consensual homosexual acts involving males under 21 years of age (see paragraph 30 above). Although no proceedings seem to have been brought in recent years with regard to such acts involving only males over 21 years of age, apart from mental patients, there is no stated policy on the part of the authorities not to enforce the law in this respect (ibid). Furthermore, apart from prosecution by the Director of Public Prosecution, there always remains the possibility of a private prosecution (see paragraph 29 above).

Moreover, the police investigation in January 1976 was, in relation to the legislation in question, a specific measure of implementation - albeit short of actual prosecution - which directly affected the applicant in the enjoyment of his right to respect for his private life (see paragraph 33 above). As such, it showed that the threat hanging over him was real.”

[Refer to pg 366 of the Amicus’ Bundle of Authorities]

Human Rights Watch issues

35. The Appellants also exhibited in their affidavit a January 2012 report titled “*They Hunt Us Down for Fun*” Discrimination and Police Violence Against Transgender Women in Kuwait by international NGO Human Rights Watch. The report was on article 198 of the Kuwait Penal Code which criminalized any person “imitating the opposite sex in any way” (“**the Provision**”).
36. The Amicus found that the Provision had adverse effects on the transsexual community in Kuwait as:
 - a. Transsexuals suffered **sexual violence, physical abuse and torture at the hands of law enforcers** in the enforcement of the Provision;

- b. Transsexuals suffered **sexual assault by civilians** who take advantage of the Provision to blackmail and rape them, and discrimination accessing health care and employment; and
 - c. Fear prevented transsexuals from reporting incidents of violence to the police.
37. A perusal of the Appellants' supporting affidavits show that similar instances of sexual violence and physical abuse already being suffered by them at the hands of officers of the 2nd Respondent and 4th Respondent.
38. Further, much like the findings of the Amicus, PT Foundation, with its extensive experience in dealing with the transsexual community, opines that laws like s. 66 stigmatizes transsexuals as deviants and incites prejudice within society against them.
- a. This makes them vulnerable to violence and harassment.
 - b. This denies them recognition, and therefore protection and redress in the event they suffer violence and harassment.
 - c. This makes them fearful in reporting incidents of violence and harassment to the relevant authorities.
39. With the above statistical and opinion evidence from Professor Teh Yik Koon and PT Foundation as well as Human Rights Watch's report, it is submitted that there is little, if any, social value in making cross-dressing an offence. On the contrary, the harm caused outweigh any good:
- a. There is deprivation of constitutional rights like dignity, privacy and the right to work among the transsexual community;
 - b. Stigma and prejudice in society against the transsexual community, is created and perpetuated, resulting in vulnerability to violence and harassment, denial of protection and incitement of fear; and
 - c. There is a deprivation from society of a community (transsexuals) who could very well contribute to its well-being and make it better.
40. It is submitted that s. 66, bearing no social value, is repugnant to Public Interest for the above reasons.

Discrimination and International Human Rights Standards

- 41. PT Foundation ("**PT**") gives evidence to show that those from the transsexual community have been facing discrimination in accessing employment, healthcare and education.
- 42. PT also provides a list of reports, studies, articles and statements on the discrimination suffered by transsexuals in Malaysia which include abuse and harassment from State as well as non-State entities. Part of the discrimination suffered includes prosecution under anti-cross dressing laws.
- 43. PT opines that anti-cross dressing laws like s. 66 criminalizes the identity of transsexuals; violating their dignity and prohibiting them from being the person that they are; something which they have no control over.
- 44. Malaysia is a Member State of the United Nations. United Nations High Commissioner for Human Rights ("**the High Commissioner**") released a report in the end of 2011 on

discriminatory laws and practices against individuals based on their gender identity. In her report, the High Commissioner states, amongst other things:

- a. Member States have an obligation to protect everyone from discrimination on ground of gender identity.
 - b. The fact that someone is transgender does not limit their entitlement to enjoy the full range of human rights.
 - c. Dress codes that restrict men dressing in a manner perceived as feminine, and punish those who do amount to discriminatory practices.
 - d. Member States must ensure that laws are not used to harass or detain people based on their gender identity and expression.
45. Also relevant is the Amicus' criticism of a similar anti cross-dressing law in Kuwait. In their report, they state:
- "First, it is arbitrary in its application, because it fails to define concrete, specific criteria for what constitutes the offense of "imitating" the opposite sex, effectively allowing police absolute discretion in determining the criteria for arrest. Second, it fails to protect even those who have undergone full SRS, because there is no provision for allowing those who have undergone SRS to change their legal identity. Third, it effectively criminalizes transgender people even though the Kuwaiti Ministry of Health recognizes Gender Identity Disorder as a legitimate medical condition. Fourth, it constitutes clear discrimination against transgenders as the law directly targets individuals whose gender identity and presentation does not correspond with the gender assigned to them at birth."
46. Also noteworthy are the key recommendations of Amicus to the Kuwait Ministry of Interior, Ministry of Health and National Assembly, all of which bear much similarity to the reliefs being sought by the Appellants in this case.
47. The findings and opinions from PT, the High Commissioner and Amicus confirm that laws like s. 66 are discriminatory and do not conform to the norms set out in International Human Rights Treaties.
48. It is submitted that s. 66 creates and perpetuates discrimination against transsexuals for an attribute of their nature that they did not choose and cannot change. Laws like s. 66 proceed to affect other areas of life for transsexuals such as access to employment, health and education by inciting stigma and prejudice within society against them and making them a permanent underclass in society.
49. It is submitted that s. 66, being a law that perpetuates discrimination is incompliant with International Human Rights Treaties, and is consequently repugnant to Public Interest.

G. CONCLUSION

50. Based on the submissions as aforesaid, the Amicus prays that the appeal be allowed

Dated this 16th. May, 2014.



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Nizam Bashir

Solicitors for the Amicus Curiae

This **AMICUS BRIEF** has been filed by Messrs Nizam, Amer & Sharizad, Advocates, Solicitors, Syarie Lawyers for the Amicus Curiae having an address of service at C4-3A-13A, Solaris Dutamas, No. 1, Jalan Dutamas 1, 50480 Kuala Lumpur, Malaysia.

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