

The Position and status of Lesbian, Gay, Bisexual and Transgender (LGBT): A Legal & Moral Human Rights Analysis

*Suria Fadhillah bt Md Pauzi
Farah Haneem Ahmad Jamal
Sharifah Shatrah Syed Hamid
Mohd Syahril Ibrahim*

ABSTRACT

Sexuality is treated as a sensitive topic and intensely private activity in our culture, hence the discussion on LGBT's issues seem inappropriate especially to our traditional society. However this group faces extreme forms of prejudice in many areas of life and struggle for the most basic civil rights such as fundamental right of access to employment or to have families. At international level, in 2008 94 member-states have rendered their support by signing LGBT Rights Declaration in the United Nation General Assembly whereas 54 member-states have signed a statement opposing the group rights. In 2011 the United Nation Human Rights Council has passed another resolution supporting LGBT rights after initiation made by South Africa. This paper will analyze the legal position and status of LGBT in our country with reference to relevant international conventions, Federal Constitution as our supreme law, Penal Code and selected Shariah State Enactments pertaining to this matter. This paper concludes that it is a legal obligation to safeguard the human rights of LGBT and thus they are entitled to enjoy the protection accorded by international and national law but paramount consideration should be placed on religious, moral and cultural values in supporting their rights by way of legislation.

Keywords: *LGBT, legal right, human rights, international law, Shariah*

Introduction

The issue and position of LGBT which stands for lesbian, gay, bisexual and transgender have recently become a major debate at the international level and started to emerge as a social phenomenon. In America alone, it is estimated that LGBT community makes up 3.8 percent of the country's population (Gates, 2012) whereas around 100,000 transsexuals is estimated in Malaysia (Chang, Azizan, Raihanah, Zuraidah & Kathleen, 2012). The year of 2009 is considered a victorious year for LGBT community where more countries have made a move to recognize same sex-marriage such as Uruguay, United States and Sweden. For South East Asia, at present two countries have legalized the same sex-marriage, namely Thailand and Vietnam. However, it is interesting to note that there are seventy-six countries which still criminalizing sexual acts between the same sex even though the respective parties consented to it (Bieksa, 2011). In seven of those countries, homosexual acts are punishable by death penalty (Austin, Johnson, & Wojcik, 2010). In Aceh, Indonesia for instance, legislation (Law No. 11/2006 of the Government of Aceh) is passed on September 2009 which imposes severe penalties for homosexual conduct, including prison terms and caning up to 100 lashes. Iraq conversely is reported to commit crime of executions, kidnapping and torture of gay men in the Sadr City area of Baghdad. (Human Right Watch, 2009). On the other hand, The Philippine Commission on Elections has refused Ang Ladlad, an organization representing LGBT community in the Philippines, to participate in the country's 2010 election on the basis that it is against the religion and morality that is well accepted in that country. However, it is interesting to note that on April 2010 the Supreme Court ruled that the party is allowed to participate in the upcoming general election which will be held in May. (Austin et al, 2010). Malaysia is no exception where it retains it stands to forbid the practice of such indecency and has recently objected to the inclusion of LGBT rights when signing ASEAN's first human right charter (The Malaysian Insider, April 22 2013). At international level, no discussion is made pertaining to this issue until in 2008 the issue is proposed to be discussed by French or Dutch representatives, backed by the European Union. In 2011 the United Nation has passed its first resolution recognizing LGBT rights (Human Rights Council Resolution, 17th session) whereas in 2012, a statement from Ambassador of South Africa calls for further discussion on the issue of LGBT especially concerning the recognition of LGBT's rights as part of the Universal Standard of Human Rights. This paper will analyses the legal position

and status of LGBT in our country with reference to relevant international conventions, Federal Constitution as our supreme law, Penal Code and selected Shariah State Enactments pertaining to this matter.

Objective Of The Study

The primary objective of this research is to determine the legal position and status of LGBT in our country with reference to relevant international covenants and conventions, Federal Constitution, Penal Code and also selected Shariah State Enactment namely the Syariah Criminal (Negeri Sembilan) Enactment 1992, Syariah Criminal Offenses Act (Federal Territories) 1997, Syariah Criminal Offenses Enactment (Sabah) and Syariah Criminal Offenses Ordinance (Sarawak) 2001. This research is intended to highlight that although a number of international conventions and laws do recognize and protect certain rights of the LGBT, the basic value related to religion and morality should not be set aside since Malaysia is a unique community with multi-cultural and multi-ethnic population that possess different moral values on personal intimate matters.

Research Methodology

This research is doctrinal-based research where data are collected through libraries and other databases. This study used primary data such as international conventions, statutes and decided cases and the secondary data which was obtained from relevant articles and websites. The data are thoroughly examined and analyzed in order to identify whether such rights are given to LGBT.

LGBT & International Human Rights

The legal obligations of States to safeguard the human rights of LGBT are well established in international human rights law on the basis of the Universal Declaration of Human Rights and subsequently agreed international human rights treaties. All people, irrespective of sex, sexual orientation or gender identity, are entitled to enjoy the protections provided for by the international human right law, including in respect of the rights to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association and peaceful assembly.

The opening words of the Universal Declaration of Human Rights are unequivocal: "All human beings are born free and equal in dignity and rights." 60 years ago, the governments that drafted and passed the Universal Declaration of Human Rights were not thinking about how it applied to the LGBT community. They also were not thinking about how it applied to indigenous people or children or people with disabilities or other marginalized groups. Yet in the past 60 years, we have come to recognize that members of these groups are entitled to the full measure of dignity and rights, because, like all people, they share a common humanity. The LGBT groups are always subject to hatred, discrimination and violence. States are under obligation to protect everyone's right to life, liberty and security of the person including LGBT, as guaranteed by Article 3 of the Declaration. Article 3 says:

"Everyone has the right to life, liberty and the security of person."

Another relevant provision can be seen in Article 5 when it states that

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

The group of LBGT is also entitled to all rights and freedom same like other human beings without making any distinction to race, colour, sex, language, religion and others, as enshrined in Article 2 of the Declaration. Article 7 also secures the position of LGBT in its wording. It says:

"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."

There are a few more articles in UDHR that promotes and protects the right of LGBT community since they are human and need to be treated as human.

The International Covenant on Civil And Political Rights (ICCPR) imposes legally-binding obligations of State Parties to respect a number of human rights, including the freedom of expression. Even though Malaysia is yet to ratify the Covenant, there are 167 State parties to it. It is globally accepted by the international community as one of the important international legal frameworks to guarantee the protections of the human rights. The relevant provisions related to the right of LGBT are;

Article 6: Every human being has the inherent right to life. This right shall be by law. No one shall be arbitrarily deprived of his life.

Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 2 (1): Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 9: Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

On the other hand, International Covenant on Economic, Social and Cultural Rights under Article 2 provides that The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Malaysia acceded to the Convention on the Rights of The Child on 17 February 1995. The relevant principle formulates with regard to discrimination to LGBT is in Article 2. It says:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

It is interesting to note that Article 1(1) of Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines the term "torture" to means *any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.* In addition, Article 2(1) provides that *each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.*

Though Malaysia is not a party to this instrument, it must observe the principle lay down as it sets out the minimum standard of human rights for all people and all nations.

Another international legal framework that should be noted upon is Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. The Principles are intended as a coherent and comprehensive identification of the obligation of States to respect, protect and fulfill the human rights of all persons regardless of their sexual orientation or gender identity. It also addresses the broad range of human rights standards and their application to issues of sexual orientation and gender identity. The Principles affirm the primary obligation of States to implement human rights.

Other than that, there are several regional principles that observe and promote the right of LGBT in the society, such as Latin American-based Campaign for a Convention on Sexual and Reproductive Sexuality and Human Rights and The Latin American and Caribbean Committee for the Defense of Women's Rights or better known as CLADEM.

In addition to the international legal framework, the European Court of Human Rights (ECHR) in particular, but also the European Court of Justice has issued more than two dozen judgments relating to non-discrimination and privacy for same sex sexual activity, sexual and gender orientation, sexuality information, and (hetero)sex assault.

All in all, international legal frameworks and some practices in the regional level have made it clear that LGBT group has carried with them, the rights and freedom, similar to another human being. They have the right to live, not to be discriminated, equality, be free from torture and so choose their own gender orientation.

Malaysia: Civil And Criminal Position

Our Federal Constitution under Article 5 to Article 13 stipulates and recognizes a number of fundamental liberties to citizens such as equality before the law, freedom of expression and personal liberty. In addition, our constitution also forbids discrimination in certain aspects such as religion, race, sex, descent or place of birth. The fundamental liberties as enshrines under our constitution are all interconnected and ought not to be separated in order to achieve the justice in the true sense.

Article 8(1) of the Federal Constitution stipulates that all persons are equal before the law and are entitled to equal protection of the law. Meanwhile, Article 8(2) of the Federal Constitution prohibits discrimination on citizens on the grounds only of religion, race, descent, place of birth or gender unless allowed by the Constitution itself. Can these provisions be used to protect the rights of the LGBT community in Malaysia as there is no other clear provision to that effect? The scope of this discussion is to look at the natural rights as always been fought for by this community, right to be recognized according to their choice for example rights to be identified as a woman when they choose to be one although they are born as a man, thus include all the rights that should come together with such recognition, no employment discrimination, sex orientation and same sex marriage. This discussion will not focus on specific rights but will generally discuss the current position of Malaysian law. Whether the words 'sex' and 'gender' under Article 8 are wide enough to include 'sexual orientation' or 'sexual preference or sexual' has never been addressed. Yet this Article 8 has never been interpreted to mean sexual preference but has always been understood to mean either male or female. In other words, LGBT is not about gender but more on sexual preference and thus invoking protection on the ground of gender discrimination is not equitable.

In the case of *Wong Chiou Yong v Pendaftar Besar/ Ketua Pengarah Jabatan Pendaftaran Negara [2005] 1 CLJ 622* High Court Ipoh upheld the refusal of the National Registration Department to amend the birth certificate and identity card of the plaintiff who was a transsexual man. In this case the court was of the view that the person who has undergone a sex change operation cannot be regarded as belonging to the sex for which reassignment surgery was undertaken for the purpose of correcting the registration of sex of the applicant on the Register of Births or the National Registration Identity Card which was already issued.

The decision seems to conflict with a decision in the case of *Re JG v. Pengarah Jabatan Pendaftaran Negara [2006] 1 MLJ 90*, where the Kuala Lumpur High Court in dealing with a very similar facts decided the plaintiff's identity card should be amended to acknowledge her acquired gender. In this case the court agreed the dissenting judgment in *Bellinger v Bellinger (2002) 1 All ER. 311*, where the Court of Appeal stated that the psychological factor has not given much prominence in the determination of this issue. He was of the view that psychological factor cannot be considered at birth because they do not yet manifest, they may become an overriding consideration subsequently as the individual develops. It is interesting to note that the court in this case has taken a more liberal approach that had been adopted by Australia as well as the European continent under the European Court of Justice.

In the most recent judgment *Kristie Chan v Ketua Pengarah Jabatan Pendaftaran Negara [2013] 4 CLJ 627* on this issue however the Court of Appeal unanimously dismissed without costs an application by

Miss Chan, a 35-year old transsexual to review a High Court decision rejecting her application to have her gender changed from male to female on her MyKad. The quorum chairman Justice Datuk Abdul Wahab Patail said Malaysian medical reports were needed to support the Malaysian application rather than reports from Hong Kong and Thailand. It is interesting to note on one of the grounds given by the Judicial Commissioner in this case is:

“Dikhuatiri golongan senasib dengan pemohon akan menuntut segala hak mereka di bawah Undang-Undang dan Perlembagaan dalam menjalani kehidupan seharian termasuklah pekerjaan, hak perkahwinan, kepusakaan dan lain-lain aspek kehidupan. Akan timbul suatu ketidaktentuan keadaan di dalam status jantina terkini, situasi yang mengundang suatu impak yang besar dalam masyarakat dan pentadbiran negara samada secara langsung mahupun tidak langsung. Sebab itulah saya katakan yang saya tidak bersedia untuk membenarkan permohonan ini kerana ianya bukan sahaja dalam ketiadaan undang-undang yang mentadbir situasi ini tetapi dilihatkan lebih mirip kepada perkara polisi yang harus dilihat oleh Kerajaan dan mungkin juga oleh Parlimen dan bukan melalui penyelesaian sementara secara mudah melalui Mahkamah.”

Therefore, it can be safely concluded from the above cases that even though there are some part which the judgments are seemed to be in conflict, but courts are more inclined to disapprove the application of changing sex status in the identity cards. This shows the reluctance of the judiciary in recognizing changed of identity.

Article 10 of Federal Constitution on the other hand guarantees Malaysian citizens the right to freedom of speech and expression. Cross-dressing which has been practiced by the LGBT community as personal expression and preference may be defended as part of fundamental liberties as a citizen. However, in spite of its preferred position in our constitution, this right is subject to certain restriction. In this respect, Article 10 (2) (a) further states that such right is subject to regulation on grounds of morality. Thus, we can see the reluctance of the court in recognizing the right of LGBT community to express their personal preferences in public in the recent case decided by the High Court. On 11 October 2012, the High Court in Seremban heard and rejected the application of Juzaili Khamis 24, Shukor Jani, 25, Wan Fairol Wan Ismail, 27, and Adam Shazrul Yusoff, 25, four trans women challenging the Section 66 of the Syariah Criminal Enactment, which forbids them from behaving and dressing like women, in contradiction of the Federal Constitution, which states that: “no person shall be deprived of his life or personal liberty”, bars discrimination on the grounds “of religion, race, descent, place of birth or gender” and protects freedom of expression. The judge in her ruling said the four Muslim Transgenders are subjected to sharia law and hence the Federal Constitution should be exempted under this case. The decision which was received with disappointment by this community directly illustrates the negative response in identifying the abnormal practice.

Another landmark decision that should not be excluded is the unanimous decision of the Court of Appeal recently. A three-member panel led by Justice Datuk Clement Allan Skinner ruled that the police’s decision to ban the festival was not amenable to judicial review. On December 9, 2011, the appellants filed an application seeking leave to initiate judicial review to challenge the decision of the then deputy inspector general of police Tan Sri Khalid Abu Bakar (now inspector-general of police) to ban the event known as Seksualiti Merdeka. In their application, they claimed that Khalid’s decision declaring a ban on all functions and events of Seksualiti Merdeka was illegal as it contravened Article 8 and 10 of the Federal Constitution. Seksualiti Merdeka is an annually sexuality rights festival celebrating human rights of people of diverse sexual orientation and gender identity, and it promotes the rights of lesbian, bisexual, gay and transgender community.

In addition to the above fundamental rights, Article 5 (1) of the Federal Constitution provides that “no person shall be deprived of life and liberty save in accordance with law”. It should be noted here that whether or not the “law” which prohibits LGBT from practicing their personal preferences is justified or not is not a matter for the court to decide but for the Parliament to justify the reasonableness on such law. (*PP v. Lau Kee Hoo* [1983] 1 MLJ 157.) Therefore the matter should not be brought before the court because the reasonableness of such law is not challengeable in the court of law. Similarly whether or not LGBT practice is part of personal liberty will depends upon the concept of ‘personal liberty’ as adopted by our law. In this respect, Malaysian court is more inclined to interpret personal liberty narrowly. Thus, we can see in the case of *Ooi Kean Thong & Anor v. Public Prosecutor* [2006] 3 MLJ 389, the court of the opinion that kissing or hugging in public is not part of personal liberty as citizen whereas in the case of *the Government of Malaysia & Ors v. Loh Wai Kong* [1979] 2 MLJ 33, the court held that the words “personal liberty” does not include

the right to travel overseas or the right to a passport. However it is interesting to note that in delivering the judgment of the court, Suffian LP further added that, *"If it is established that the Government has acted mala fide or has in other ways abused this discretionary power, the court may, ... review Government's action and make the appropriate order ..."*. Similarly in *Attorney-General, Malaysia v. Chioh Thiam Guan [1983] 1 CLJ 27; [1983] CLJ (Rep) 462*, the court of the view that, *"if Parliament deems it necessary that the death penalty should be mandatory for a person convicted under s. 57 (1) of the Internal Security Act neither Article 5 (1) nor Article 8 of the Federal Constitution would bar the sentence from being imposed."* In addition, the court in *PP v. Yee Kim Seng [1983] 1 CLJ 38; [1983] CLJ (Rep) 824* held that the Internal Security Act was a perfectly valid law passed by Parliament. Therefore *"Article 5(1) ... is not infringed because the accused is not going to be deprived of his life or personal liberty except in accordance with law"*. (per Ajaib Singh J. at p.826). Therefore it is submitted that the prohibition imposed by the law in respect of LGBT practice does not infringe the personal liberty of that community.

Article 12 of the Universal Declaration of Human Right (UDHR) stipulates that *"no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks"*. It is worth noting that even though Malaysia becomes signatory of this convention, it seems that the right to privacy is not fully recognized by our law. This can clearly be seen in a number of our statutes such as Companies Act, Anti-Corruption Act and Penal Code. For instance, the Anti-Corruption Act empowers the Attorney General to authorize the interception of any messages sent or received through any means of communication and wiretapping of telephones in corruption investigations whereas an amendment is made to the Penal Code which gives the government broader authority to secretly install surveillance devices on private property. The case of *Ultra Dimension Sdn. Bhd. v. Kook Wei Kuan [2004] 5 CLJ 285* and *Lew Cher Phow @ Lew Cha Paw & 11 Ors v. Pua Yong Yong & Anor [2009] 1 LNS 1256* *Johor Bahru High Court Civil Suit No. MT 4-22-510-2007* is among the cases which showed that an invasion or violation of privacy is not a recognized tort or a cause of action in Malaysia.

However, it is worth noting that Federal Court Judge Gopal Sri Ram in the case of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 at 519* that the right to personal liberty includes right to privacy. In the same year, the court in the case of *Lee Ewe Poh v Dr. Lim Teik Man & Anor [2010] 1 LNS 1162* recognizes the invasion of privacy as an actionable tort. In this case, the court ruled that the taking of a picture of the Plaintiff's anus during a medical procedure without informing the Plaintiff even it is for medical purpose and it is done in the course of the medical procedure is not an acceptable practice because it is done without obtaining consent from the plaintiff. The judge further held that, *"The privacy right of a female in relation to her modesty, decency and dignity in the context of the high moral value existing in our society are her fundamental right in sustaining that high morality that is demanded of her and it ought to be entrenched. Hence, it is just right that our law should be sensitive to such rights"*. Therefore from the above cases, it can be said that even though the Malaysian law does not fully recognize the right to privacy, but the Sivarasa's case may be a stepping stone for the LGBT community to expand the debate of right to privacy in their circumstances. But it should be noted that even if the court recognizes the right to privacy for the LGBT community, but if they practice it openly and thus indirectly affects the public order, morality and national security, the government may prohibit such undesirable practice.

Besides civil offenses, Malaysian law also provides for criminal punishment to those who practice unordinary sexual act. Such penalty enumerates in a number of provisions. Section 377A of the Penal Code (Act 574) provides that, *"Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature. ... Penetration is sufficient to constitute the sexual connection necessary to the offense described in this section."* On the other hand, section 377B of the same Act stipulates punishment for committing carnal intercourse against the order of nature, where if found guilty the offender shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping. In addition, Section 377C provides that Committing carnal intercourse against the order of nature without consent, where upon conviction shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping. Besides that, section 377D of the same Act provides for an act of gross indecency. It states, *"Any person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years."* Of all these provisions Section 377B was used twice against Dato' Seri Anwar Ibrahim. The first trial was held in 1998, and resulted in the former Deputy Prime Minister Anwar Ibrahim being convicted (*PP v Dato' Seri Anwar*

Ibrahim [1999] 1 CLJ 537), and given a nine-year prison sentence. This verdict was overturned in 2004 ([2004] 3 CLJ 737), resulting in Anwar's release from prison. Anwar was charged under the same offense in 2008 but was acquitted in 2012 ([2011] 7 CLJ 253).

Another provision worth to note is section 21 of the Minor Offences Act 1955 which among other provides for an offence for those who commit any riotous, disorderly or indecent behavior, or of persistently soliciting or importuning for immoral purposes in any public road or in any public place or place of public amusement or resort, where on conviction shall be liable to a fine not exceeding twenty-five ringgit or to imprisonment for a term not exceeding fourteen days, and on a second or subsequent conviction to a fine not exceeding one hundred ringgit or to imprisonment for a term not exceeding three months or to both. The meaning of indecent behavior in respect of this provision is not defined, however an LGBT person may also be charged under this section.

As a conclusion the law of course does not deny the rights of a person regardless of his religion, race, descent, place of birth or gender but that does not include recognizing their rights which are against the norm.

Malaysia: Syariah Position

In Malaysia, LGBT Muslim men and women can also be prosecuted under sharia law as this country practices dual legal system. Among the offenses concerning LGBT community which is prohibited by sharia law in this country are sodomy, musahaqah (lesbianism) and cross-dressing. Out of 14 states in Malaysia, 13 states have laws that prohibit 'male person posing as woman', while 3 states have laws that criminalize 'female person posing as man'. In 1983, the National Fatwa Council introduced religious edict to prohibit sex reassignment surgery for transpeople, but permit khunsa (hermaphrodites) to undergo such surgery so that they can become either male or female (Teh,2001).

In Negeri Sembilan, four male-to-female transsexuals were found guilty for cross-dressing under Section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992. The section states that wearing women's attire" or "posing as a woman" is a criminal offense if done by a man and provides for a fine not exceeding RM1000 or imprisonment not exceeding 6 months or both, upon conviction. An application for judicial review was made to the High Court of Seremban to declare section 66 of the Syariah Criminal (Negeri Sembilan) Enactment as unconstitutional. It was argued that the law breaches a number of their fundamental rights including the rights of non-discrimination, freedom of expression, human dignity, and personal liberty. Justice Siti Mariah Ahmad in her ruling held that as the four applicants were Muslims, section 66 applied to them, adding that the court had also referred the matter to the muftis before arriving at its decision. Even though this decision has caused uproar among the human right community, the court is steadfast about it (The Sun Daily, August 30, 2012).

On the other hand, the Syariah Criminal Offenses Act (Federal Territories) 1997 (Act 559) also states that those found guilty of sodomy (liwat) or lesbian relations (musahaqah) are liable to a fine of up to RM5,000, imprisonment for up to three years, whipping not exceeding six strokes, or any combination thereof. In this respect, on May 2012, JAWI have confiscated copies of the latest book by Muslim author Irshad Manji titled "Allah Liberty & Love-Courage to Reconcile Faith & Freedom" because the content is deemed contrary to Islamic teaching (New Straits Times, May 25 2012).

Likewise, Syariah Criminal Offenses Enactment (Sabah) 1995 under section 77 provides any woman who willfully commits musahaqah with another woman shall be guilty of an offense and shall on conviction, be liable to a fine not exceeding RM1000 or imprisonment for a term not exceeding six months or both. On the other hand, section 92 of the same enactment provides that any male person who in any public place wears a woman's attire and poses as a woman and vice versa shall be guilty of an offense and shall on conviction be liable to a fine not exceeding RM1000 or to imprisonment for a term not exceeding six months or both. In Sarawak, the musahaqah act is criminalized under section 23 of Syariah Criminal Offences Ordinance (Sarawak) 2001 where on conviction shall be liable to a fine not exceeding RM5000 or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or any combination thereof whereas section 25 of the same enactment provides for an offence of a man posing as a woman and on conviction shall be liable to a fine not exceeding RM1000 or to imprisonment not exceeding one year or both.

In November 2011, Chief Minister of Malacca has announced a move to amend its state Islamic enactment to prosecute homosexual, lesbian, bisexual and transsexual as there was no specific law at present to prosecute such groups (the Star, November 9, 2011). Likewise, Pahang through the State Mufti said that the state will follow Malacca's move to amend the Syariah enactment issues as the present provisions are insufficient to tackle the LGBT's issues. (the Star, November 10, 2011).

To conclude, even though the Islamic position is being attacked by many especially from those with liberal thought, Malaysia remains resolute in implementing the syariah principles by forbidding these indecent acts from becoming rampant in our society.

Conclusion

Emerging international norms of human rights and social forces outside the legal ambit continuously interact with the law and thus indirectly shape its impact on community's behavior and perception. This occurrence will eventually shape the countries' legislation. Malaysian society for instance, a unique community with multi-cultural and multi-ethnic, possess different moral values on personal intimate matters. The growing pressure made by LGBT movements throughout the world and significant steps towards LGBT equality which is made in various aspects at international arena posed a new challenge to Muslim country like Malaysia to defend itself at international level. Undoubtedly, repealing the law with regards to this issue is reflective of advances Malaysia can make in the name of human rights but indirectly by doing so, Malaysia has to sacrifice the sacred value of religion. For the present time, although the Supreme Court of Malaysia has been willing to rely on certain rights provisions to foster the protection of minority such as indigenous people but as Malaysia had no policy which supports the LGBT community, the issues of sexual orientation remain in the closet and regarded as a taboo to be discussed. This article concludes that advocating the recognition of fundamental rights as human beings of the LGBT community is a must but recognizing the LGBT's rights to practice what they believe which are totally opposed to religious principle and moral belief are not tolerable. Notwithstanding the development of this issue at international arena and the progress our country has made towards building a more tolerant society, recognizing equality and non-discrimination for all human beings is a sacred commitment that needs to be live up by our society, but the sanctity of religion and the well accepted morale value as Asian must be upheld. Therefore, it is the duty of the state under the name of religion and public morale to protect and maintain morality, public order and national security.

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SURIA FADHILLAH MD PAUZI, FARAH HANEEM AHMAD JAMAL, SHARIFAH SHATRAH SYED
HAMID, MOHD SYAHRIL IBRAHIM.

Universiti Teknologi MARA (Pahang).

suriapauzi@pahang.uitm.edu.my, farahhaneem@pahang.uitm.edu.my, shatrah@pahang.uitm.edu.my,
syah86@pahang.uitm.edu.my.