



# **THE SITUATION OF LGBTI PEOPLE IN MALAYSIA : A HUMAN RIGHTS PERSPECTIVE**

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# Human rights instruments

- Universal Declaration of Human Rights (UDHR)
  - Art 2, 5, 7, 9, 12
- International Covenant on Civil and Political Rights (ICCPR)
  - Art 2, 6(1), 7, 9(1), 17, 26
- International Covenant on Economic, Social and Cultural Rights (ESCSR)
  - Art 2(2), 3
- Convention on the Elimination of Discrimination against Women (CEDAW)
- Yogyakarta Principles
- Sustainable Development Goals (SDGs)

# LGBTI scenario in Malaysia

- LGBTI community is often regarded as a taboo
- The traditional binary classification of gender is deeply rooted in domestic laws, policies, cultures and beliefs
  - resulted in discrimination against LGBT community and led to violations of their human rights
- The existence of the community has been sensationalized by the media
  - negative publicity perpetuates stereotypes, stigmatizes and exposed them to security risks
  - regarded as a 'threat' to society
  - face lack of acceptance in mainstream Malaysia – a 'marginalized group'

# LGBT & same-sex marriages

- Malaysia describes oral and anal sex as against the order of nature. Civil law stipulates jail for up to 20 years, caning and fines for offenders.
- Muslims are also governed by state-level Islamic laws, most of which carry provisions outlawing cross-dressing and same-sex acts.
- In Sept 2018, the Prime Minister made a statement that Malaysia cannot accept same-sex marriage or LGBT rights.
- SUHAKAM's stance:
  - SUHAKAM does not support same-sex marriage in Malaysia. While SUHAKAM believes and subscribes to the universality of human rights, SUHAKAM does not fail to take into account the Malaysian context specific values.
  - However, SUHAKAM is steadfast in its position that no one has the right to discriminate LGBTs or treat them with hate or violence. The government cannot allow a situation where personal religious beliefs coupled with government inaction and political homophobia become a license for violence against LGBTs.
  - SUHAKAM stands firm that their human rights and fundamental liberties must be upheld and respected at all times. There can be no justification in harming them, no matter how different they are or how unacceptable their LGBT-related actions are to the majority.

# Domestic legal frameworks

## The Federal Constitution of Malaysia

### Syariah laws

- Malaysia does not have any law criminalising homosexuality per se. Section 377 of the Penal Code, criminalises the act of sodomy, but has not been used to prosecute homosexual couples.
- The Syariah laws of each state is much clearer in criminalising homosexuality, and is applicable to all Muslims.
- Several states in Malaysia have instated Islamic Syariah laws, applying to male and female Muslims, criminalising male/male and female/female sexual acts with up to three years imprisonment and whipping.
- The Syariah Penal law in Pulau Pinang confers penalties for sodomy and lesbian relations with fines of RM5,000.00, three years imprisonment and 6 lashes of the whip. All these penalties can be combined. *(2017 ILGA Report)*

# Provisions related to criminal and civil laws

## Penal Code

- Section 377A – Carnal intercourse against the order of nature
  - “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 offence described in this section.”
- Section 377B – Punishment for committing carnal intercourse against the order of nature
  - “Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.”
- Section 377C - Committing carnal intercourse against the order of nature without consent, etc.
  - “Whoever voluntarily commits carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting other person in fear of death or hurt to the person or any other person, 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.”
- Section 377D – Outrages on decency
  - “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.”

## Minor Offence Act 1955

- Section 21 – Drunkenness and disorderly behavior in public places

## Current situation/ Cases

- 2019 - intimidation and harassment towards the transgender women community in Semporna, Sabah by the Islamic State Department and conservative groups.
- 2018 - the Terengganu Syariah Court sentenced two women to six strokes of caning each and RM3,300 fine for attempted same-sex sexual activity.
  - SUHAKAM criticised the decision as 'humiliating and demeaning' and calls for a repeal of such punishments in all laws.
- 2018 - resignation of the interim press secretary of the Youth and Sports Minister following some public backlash over his sexual orientation and/or LGBT non-discrimination activism.
  - SUHAKAM urged to government to stand up for all Malaysians, including LGBT persons, while firmly upholding principles of equality and non-discrimination in accordance with the Federal Constitution.
- 2018 - removal of two portraits of LGBT activists with Malaysian and rainbow pride flags from an arts festival in Penang.
- Rise in cases of crimes and violence against trans people
  - According to transgender rights group, 12 cases of physical attacks, humiliation and torture against trans people were documented between 2017 and 2018; and in 2017, at least 3 cases of murder of trans women were reported.
- 2011 - Seksualiti Merdeka movement festival banned - the annual festival to promote sexuality rights that began in 2008 was banned by police after Muslim groups alleged that it promoted homosexuality and sexual promiscuity.

# Related cases to gender identity

- Mohammed Juzaili bin Mohd. Khamis & 2 Others v. Kerajaan Negeri Sembilan & 4 Others (2015)
  - The Court of Appeal ruled in favour of the transgender women and declared the state law discriminatory against those who were suffering from gender identity disorder (GID).
  - However, the State appealed to Federal Court and the case was overturned by on a technical issue that a legal challenge on constitutionality of law should be made directly to the Federal Court as the matter involved Federal Constitution.
- Tan Poi Yee v National Registration Department (2016)
  - The case was heard in Kuala Lumpur High Court – the court ordered the plaintiff to be declared as a man.
  - The decision was overturned in January 2017 following an appeal by the NRD.
- Aleesha Farhana v NRD (2011)
  - The case was heard at the Terengganu High Court – application to change her name & gender was dismissed.
  - She died because of depression before she could make an appeal on the decision.



# Offence of cross-dressing in Syariah law

- States differ in defining such an offence.
  - Some states deem cross-dressing *per se* an offence
  - The majority States do not deem cross-dressing *per se* an offence. It is an offence only if:-
    - it is for an immoral purpose
    - it is done without any reasonable cause, thus implying that if it is with a reasonable cause (for example, a person cross-dresses because he/she is a transgender) then it is not an offence.
  - Some States deem cross-dressing an offence only if the cross-dresser is a male Muslim while some States prohibit both males and females from cross-dressing
    - This is because under Islamic law, the prohibition against cross-dressing does not apply to Muslim males only but applies to both male and female Muslims.

## SUHAKAM's work on LGBT

- SUHAKAM initial works regarding the LGBT community was taken up since 2010.
- Due to the sensitivities of the issue, SUHAKAM adopted a step-by-step approach to engage with stakeholders in a series of closed-door discussions, which includes:
  - Meetings with various Islamic groups, non-muslim groups as well as LGBT groups
  - Hold a roundtable discussion on gender equality
  - Meetings with NGOs that advocate for transgender women
  - Hold a workshop on human rights and justice – gender was one of the issues discussed

# Complaints received on LGBTI

- SUHAKAM received several complaints from the LGBT community of violations of human rights including:
  - harassment and ill-treatment, bullying, sexual assault and violence, intimidation, denial of employment and education opportunities as well as medical treatment purely because of their sexual orientation and gender identity.
  - Between 2015 – 2019, SUHAKAM received 4 cases & a memorandum related to LGBT.

# SUHAKAM's study on transgender

- In 2016, SUHAKAM decided to embark on a study to identify the types of discrimination faced specifically by transgender persons based in Kuala Lumpur and Selangor and understand how their basic rights have been violated.
  - focus on transgender persons due to the visibility of their gender expression, exposing them to a greater number of discriminatory practices.
- Main objective: to assist SUHAKAM in identifying strategic actions to ensure respect of human rights of the transgender community.
  - To obtain first-hand information on discrimination faced by transgender persons particularly relating to their rights to education, employment, healthcare, housing and dignity.
- Findings: The study revealed that all transgender respondents agreed that at some stage of their life, they have encountered some form of discrimination due to their gender identity and expression.
- Challenges: Absence of official data on the total number of the transgender persons in Kuala Lumpur and Selangor.

THANK YOU

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