

Gender Recognition of Transsexuals in Malaysia: Charting the Way Towards Social Inclusion

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Abstract

Are you male or female? To most persons the answer to this question is given without any difficulty and with certainty. To transsexuals however the answer is unclear and the resulting uncertainties lead to social exclusion and marginalisation. Gender identity plays a pivotal role in a person's daily life and affects a wide spectrum of sociolegal and conventional interactions ranging from the very mundane such as which public lavatory to use, to some of the most critical aspects of life such as employment, education, marriage, healthcare and public persona. In Malaysia the absence of legal gender recognition for transsexuals post reassignment treatment has created a social environment which is unsustainable as it has resulted in social exclusion, inequality and prosecution. Objectives: To chart the way forward towards a more inclusive and socially just society there is a need to rethink the legal framework pertaining to the gender recognition of transsexuals in Malaysia and deconstruct the perceived socioreligious and other limitations which are widely used to justify the present state of non-recognition. Methodology: Doctrinal legal research/qualitative. Analysis: Analysis of Article 3 & 8 of Federal Constitution of Malaysia, National Registration Act 1959, s. 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992, Gender Recognition Act 2004(UK) and relevant case laws. Conclusion: Proposals for comprehensive legislative reforms to set out guidelines for gender recognition of transsexuals in Malaysia.

Keywords: Gender recognition, transsexuals, social inclusion.

1. Introduction

The current state of laws in Malaysia results in the social exclusion of the transsexual community at various levels as was elucidated in the judgment of the Court of Appeal in *Muhamad Juzaili Mohd Khamis & Others v. State Government Of Negeri Sembilan (2015)*¹, where his lordship Hishamudin Mohd Yunus JCA extensively referred to the expert opinion of Teh, Y. K a renowned sociologist as follows:

(In Malaysia, a law like section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 which criminalizes any male person who in any public place merely wears a woman's attire or poses as a woman:

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I. Stigmatizes transsexuals as deviants and in doing so:

(a) strips them of their value and worth as members of our society.

(b) affects their ability to freely engage in decent and productive work, and this results in them pursuing sex work as a source of income.

(c) affects the ability for transsexuals to move freely and reside within the borders of Negeri Sembilan without fear of persecution.

(d) affects their well-being, self-confidence and self-empowerment.

(e) impedes awareness-raising among members of society on the problems and troubles faced by transsexuals and how society can play a part in helping them.

II. Adversely affects society by depriving it of an entire class of individuals, that is transsexuals, who could contribute to its well-being.

III. Infringes the privacy of transsexuals by preventing them from making decisions and choices regarding their own bodies.

IV. Infringes the ability for transsexuals to express their identity through speech, deportment, dress and bodily characteristics.

Gender identity plays a pivotal role in a person's daily life and affects a wide spectrum of sociolegal and conventional interactions ranging from the very mundane such as which public lavatory to use, to some of the most critical aspects of life such as employment, education, marriage, healthcare and public persona. In Malaysia the absence of gender recognition for transsexuals post reassignment treatment has created a social environment which is unsustainable as it has resulted in social exclusion, inequality and prosecution.

Although there are various different factors which may contribute to the state of social exclusion and marginalisation of transsexuals as described above, including cultural and religious factors¹ however it cannot be denied that the state of laws in Malaysia on the subject of gender recognition of transsexuals plays a significant role. This paper will focus on the

impact of laws on gender recognition of transsexuals in Malaysia and the need to rethink the legal framework in order to chart the way towards social inclusion.

Transsexualism is recognised by both the American Psychiatric Association (APA)² and the World Health Organisation (WHO)³ as a manifestation of gender identity disorder (GID) a recognised medical disorder, in its most extreme form and gender reassignment has been diagnosed as a treatment. The medical profession in Malaysia generally adopts the same definitions as above and recognizes transsexualism as a medical condition and not a preference.⁴ For the purposes of this paper, the term transsexual therefore refers to those who are born with the biological characteristics of one sex but psychologically and socially identify with the opposite gender, and who intend to undergo or are undergoing or have undergone gender reassignment treatment.⁵ The reassignment treatment itself is a gradual process, which begins with counseling, followed by hormone treatments and only in cases where all international treatment protocols are satisfied culminates with gender reassignment surgery or a sex change operation.⁶ In Malaysia reassignment surgery was available in the early 1980s however following a fatwa issued by the National Fatwa Council in 1983 prohibiting sex change operations for Muslim transsexuals, reassignment surgery has been generally discontinued.⁷ Although it should be noted that the fatwa by itself is not legally binding on Muslims until given legislative effect and has no application to Non – Muslims in Malaysia. Nevertheless at present medical facilities for reassignment surgery is no longer available in Malaysia and transsexuals who wish to seek treatment must travel abroad.⁸

2. Findings and Discussion

2.1 *The Marginalisation Of The Trans Community In Malaysia*

Anthropological studies and historical records suggests' that traditionally members of the trans community enjoyed a high degree of social and cultural acceptance in Malaysia or at the very least were not subject to overt discrimination.⁹ However a series of legislative initiatives which can be traced back to the 1980s together with the growing influence of Islam marked the beginning of the criminalisation of the community which in turn became the catalyst for the current state social and cultural marginalisation, isolation and discrimination faced by transsexuals.

Human Rights Watch in its report on the abuses against transgendered persons in Malaysia identified two levels of discrimination against members of the community.¹⁰ The first cause of the marginalisation and discrimination can be traced back to the criminalisation of transsexuals primarily under Islamic law or Syariah Law in the case of Muslims and under civil laws in the case of Non - Muslims. All states in Malaysia as well as the Federal Territories have Syariah Criminal Enactments or Ordinance which not only prohibits a man from posing as a woman but it criminalises any act of cross dressing by a man.¹¹ Syariah Law only applies to Muslims, Non -Muslim transsexuals may face prosecution under civil law for cross dressing and can be charged for indecent behavior.¹² These criminal provisions in turn result in arbitrary arrest on unclear grounds as there is no clear definition as to what constitutes “a man posing as a woman” in the first place and there are many reported cases of abuse of authority, harassment and violation of rights.¹³ The second level of marginalisation is much broader and includes discrimination in access to health care, employment, housing, education, and government services. This second broader level of marginalization arguably flows from the initial criminalisation of transsexuals both under Islamic Laws and Civil Laws. At present in Malaysia there are no laws providing specific protection against discrimination on grounds of gender identity, thus leaving transsexuals without legal protection against the discrimination and marginalisation which they face. The right to equality and equal protection under the law is however enshrined in the Federal Constitution of Malaysia.¹⁴ Thus setting of the legal framework which paves the way for the gender recognition of transsexuals and decriminalisation of transsexuals will be essential to chart the way forward towards social inclusion. Such a framework will be a two pronged approach, involving both specific laws and guidelines for the gender recognition of transsexuals post reassignment treatment as members of the opposite gender and the repeal of laws which currently criminalises transsexuals.

2.2 The Present Legal Framework in Malaysia

The issue of recognising the post reassignment gender of transsexuals has been raised before the Malaysian courts in several landmark cases, judges have generally refused to accord recognition on grounds that only Parliament is seized with the authority to remedy the situation as recognition involves highly complex issues of not only law but also of policy and religion. The cases before the courts have generally been petitions to alter the gender identity of the applicants in the national registration identity card to reflect the applicant's gender post

reassignment.¹⁵ It should be noted however that the reluctance on the part of Malaysian Judges to provide gender recognition is by no means without exception as can be seen in the decision of the High Court in the case of *J.G v Pengarah Jabatan Pendaftar Negara(2005)*¹⁶. Justice James Foong (as His Lordship then was) in allowing the application to alter the national registration identity card to reflect the applicant's gender post reassignment reiterated the need to take a progressive approach to the question based on the medical evidence and that the courts should not abdicate from the responsibility and shrink from its duty to grant relief where justice is due.

Justice Foong's decision in *J.G* is an isolated exception which has bucked the general judicial approach to the question of gender recognition of transsexuals in Malaysia. It is evident that the predominant conclusion in cases for post reassignment gender recognition has been one of rejection and it is also clear that the primary reason for this is revolves around perceived religious sensitivities within the fabric of Malaysian society. Although the demographic make of Malaysia is multicultural and multi –religious, the dominant religion is Sunni Islam. Malaysia is a Muslim majority country and the unique position of Islam as the official religion of the state is provided for in the Constitution. Article 3 of the Federal Constitution of Malaysia provides as follows:

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

Thus it is irrefutable that Islam as the religion of the state and as the religion professed by a majority of Malaysians has an indelible impact on the question of the post reassignment gender of transsexuals in Malaysia. The impact of wider social implications and religious sensitivities has been clearly alluded to by the judiciary as being one of the primary reasons why the issue of gender recognition of transsexuals cannot be remedied by way of a judicial pronouncement but can only be remedied by way of express legislation. In Malaysia the position of Islam on the issue of gender recognition of transsexuals is without doubt a principal factor that influences any discussion on the future of the law.

The question on the potential conflicts between the fundamental liberties provisions of the Federal Constitution and Islamic Law on the issue of transsexuals was recently considered by the Malaysian courts in *Muhamad Juzaili Mohd Khamis & Ors v State Government Of Negeri*

*Sembilan & Ors(2015)*¹⁷. His Lordship Hishamudin Mohd Yunus JCA delivering the judgment of the court concluded that the provisions of s.66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 clearly conflicted with the fundamental right to equality and equal protection under the law as enshrined under Article 8(1) as it subjects the three appellants who suffer from Gender Identity Disorder to the same treatment as a normal Muslim male , thus treating those who are unequal as the same as those who are normal and thereby is not only discriminatory but also denies the appellants equal protection under the law in these words:

Just as a difference in treatment of persons similarly situate leads to discrimination, so also discrimination can arise if persons who are unequals, ie, differently placed, are treated similarly.....Section 66 is therefore unconstitutional as it offends art. 8(1) of the Federal Constitution, and is therefore void.¹⁸

His Lordship went to consider the if s.66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 contravened Article 8(2) of the Federal Constitution as it only prohibits a male Muslim from cross dressing in public while not criminalising a female Muslim who appears in male attire in public. His Lordship ruled that this amounted to gender discrimination which is prohibited under Article 8(2) of the Federal Constitution and therefore s.66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 is unconstitutional and void.

Although the Court of Appeal's landmark decision in the Negeri Sembilan transgender case was applauded by human rights activist, civil society groups and some members of the legal fraternity in Malaysia as a step in the right direction in the protection of constitutional rights of all Malaysians, it was however not without its critics. The critics have largely argued that transgenderism is prohibited by Islam and the Court of Appeal's decision which contravenes Islamic law principles is wrong as it ignores the special position of Islam under Article 3(1) within the Malaysian Constitution. The Federal Court in Malaysia has since overruled the Court of Appeal's decision following an appeal by the State Government of Negeri Sembilan and Department of Islamic Religious Affairs of Negeri Sembilan in a decision handed down on 8 October 2015.¹⁹ The apex Court concluded that the failure to obtain leave as required under Article 4(3) and (4) resulted in both the High Court and the Court of Appeal incompetent to hear the case and as such the decisions in both courts will be set aside. Be that as it may it

cannot be ignored that the Federal Court only overruled the Court of Appeal's decision purely on the issue of jurisdiction and had not in fact ruled on the Court of Appeal's reasoning in reaching its conclusion that s.66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 is unconstitutional and void.

3. Conclusion

Malaysia is a vibrant multi religious and multi - cultural country with a history of tolerance and inclusion. It is this cultural identity from more tolerant past which we must embrace to ensure that Malaysians of all walks of life including members of the transgender community are not deprived of their constitutional rights and end the current state of social marginalisation. Evidence suggest that criminalisation of transsexuals in Malaysia has been the catalyst for the social exclusion, thus the premise of this paper is that by ending the criminalisation and introducing a legal mechanism for gender recognition by way of legislative reforms the framework for greater social inclusion can be set forth. Therefore legal reforms which allows gender recognition and decriminalisation are the first necessary steps in charting the way forward to greater social inclusion.

4. References

- ¹Muhamad Juzaili Mohd Khamis & Others v. State Government Of Negeri Sembilan [2015] 1 [Malaysian] Current Law Journal 954 ,CA(Mal).
- ²Teh, Y. K. (2001) *Mak Nyahs (Male Transsexuals) in Malaysia: The Influence of Culture and Religion on their Identity*. IJT 5,3,
- ³American Psychiatric Association (APA). (May 2013). *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* .5th edition.
- ⁴World Health Organisation's *International Statistical Classification of Diseases and Related Health Problems* (ICD-10, Version 2010), (<http://apps.who.int/classifications/icd10/browse/2010/en#/F64.0>) (Retrieved on 20.7.2014).
- ⁵Teh, Y. K. (2001) *Mak Nyahs (Male Transsexuals) in Malaysia: The Influence of Culture and Religion on their Identity*. IJT 5,3 and *Muhamad Juzaili Mohd Khamis & Others v State Government Of Negeri Sembilan*. [2015] 1 [Malaysian] Current Law Journal 954 CA(Mal),CA.

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⁶Whittle S, *Respect & Equality Transsexual & Transgendered Right* (2002), Cavendish Publishing, London, xxiii.

⁷World Professional Association for Transgender Health (WPATH) *Mission Statement* (<http://www.wpath.org/>)(Retrieved 8.6.2014) and Para 1 Annex 1 United Kingdom *Home Office Report of the Interdepartmental Working Group on Transsexual People* (April, 2000) .

⁸4th National Fatwa Council Conference 13-14 April 1983.

⁹Human Rights Watch Report :*I am Scared to Be a Woman : Human Rights Abuses Against Transgender People in Malaysia 2014*,at pg 57-58.

¹⁰Michael Peletz, *Gender Pluralism: Southeast Asia Since Early Modern Times* (New York: Routledge, 2009), pp. 58-59 & 189-190 and Human Rights Watch Report:*I am Scared to Be a Woman : Human Rights Abuses Against Transgender People in Malaysia 2014* at pg 8.

¹¹Human Rights Watch Report: *I am Scared to Be a Woman : Human Rights Abuses Against Transgender People in Malaysia 2014* .

¹²s.28 Syariah Criminal Offences (Johor) Enactment 1997,s.66 Syariah Criminal (Negeri Sembilan) Enactment 1992, s.7 Syariah Criminal Code(Kedah) Enactment 1988,s.7 Syariah Criminal (Kelantan)Code 1985, s.72 Syariah Criminal(Malacca) Enactment 1991,s.34 Syariah Criminal(Pahang) Enactment 2013,s.28 Syariah Criminal Offences(Penang) Enactment 1996,s.55 Crimes Syariah(Perak) Enactment 1992,s.7 Criminal Offences in the Syarak(Perlis) Enactment 1991,s.92 Syariah Criminal Offences (Sabah)Enactment 1995,s.25 Syariah Criminal Offences(Sarawak) Ordinance 2001,s.30 Syariah Criminal Offences (Selangor)Enactment 1995,s.33 Syariah Criminal Offences(Terengganu) Enactment 2001,s.28 Syariah Criminal Offences(Federal Territories) Act 1997.

¹³s. 21 Minor Offences Act 1955.

¹⁴Human Rights Watch Report :*I am Scared to Be a Woman : Human Rights Abuses Against Transgender People in Malaysia 2014* at pg 20-31.

¹⁵Article 8 (1), of the Federal Constitution of Malaysia.

¹⁶See *Wong Chiou Yong (P) v Pendaftar Besar Jabatan Pendaftaran Negara*[2005] 1 [Malaysian] Current Law Journal, 622,HC(Mal) and *Kristie Chan v. Ketua Pengarah Jabatan Pendaftaran Negara*[2013] 4 [Malaysian] Current Law Journal, 627,CA(Mal).

¹⁷*J.G v Pengarah Jabatan Pendaftar Negara* [2005] 4 [Malaysian] Current Law Journal, 710,HC (Mal).

¹⁸*Muhamad Juzaili Mohd Khamis & Others v. State Government Of Negeri Sembilan* [2015] 1 [Malaysian] Current Law Journal 954, CA (Mal).

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¹⁹*Muhamad Juzaili Mohd Khamis & Others v. State Government Of Negeri Sembilan* [2015] 1 [Malaysian] Current Law Journal 954, CA (Mal) at page 970.

²⁰*State Government Of Negeri Sembilan & Ors v Muhamad Juzaili Mohd Khamis & Ors* [2015], FC (Mal), Civil Appeal No : 01(f)-8-20-2015(N)& 01-2/2015(N), <<http://www.kehakiman.gov.my/en?q=en/node/628>> (Federal Court of Malaysia Website) accessed 19 December 2015.