

**Title** : Does our Malaysian Constitution protect the civil rights of the LGBTQ community?

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**ABSTRACT**

The Constitution can be classified as a written document that governs each state and in Malaysia, our constitution is called Federal Constitution. It is the supreme law of federation and any law contrary to it will be invalid and this has been stated under **Article 4(1)** of the Federal Constitution. The LGBTQ stands for lesbian, gay, bisexual, transgender and questioning. The population of this community has been rapidly increased throughout the development of the country. This community fights for their right in the constitution and claim to be given the same right as other citizens but did the Malaysian Constitution protect their civil rights.

**Keywords:** *Federal Constitution, Supreme Law, LGBTQ, Civil Rights.*

## **Introduction**

In Malaysia, the LGBT community is not recognized by society. Malaysians are very conservative in their view on LGBT and are treating it as a social ill. This is because the religious community despise the idea of changing one's gender. Although the position of Buddhists and Hindus are less clear in this matter, Muslims and Christians in Malaysia are of the position that it is morally wrong to have an interest towards the same gender or to have a desire to change what one was made to become. As a result, the general perception is that individuals who are LGBT are immoral. It could also be the conservativeness of the people of the country and our conformity to our beliefs that restrain us from supporting the LGBT community resulting in them being the outcast of the society. So, does the LGBTQ have the right to civil rights in the Malaysian Constitution that cannot be denied by society?

## Background

LGBTQ is an acronym that stands for lesbian, gay, bisexual, transgender, and queer or questioning. These terms are most commonly used to describe a person's sexual orientation or gender identity. Lesbians are women who have an instinct, desire, and attractiveness that is distinct from other women. Some lesbians may prefer to identify as gay or as gay women. Then, the second type is gay. It is an adjective used to describe persons who have long-lasting physical, romantic, or emotional feelings for others of the same sex. Women are sometimes referred to be lesbians. The next category is bisexual, which refers to someone who can create long-lasting physical, romantic, or emotional attachments to people of the same or different gender. People that were classified under the transgender umbrella may describe themselves using one or more of a wide variety of terms including transgender. Many transgender people are prescribed hormones by their doctors to align their bodies with their gender identity. Some of them undergo gender surgery as well.

Aside from straight and cisgender, queer is another word that can be used to describe sexual and gender identities that are not straight or cisgender. All members of the LGBTQ community may identify with the term "queer." Queer is sometimes used to convey that sexuality and gender can be complex and evolve and that they may not fit cleanly into either/or identities, such as male or female, homosexual or straight. Another kind is questioning, as found at the end of LGBTQ, which can also denote questioning. This word typically refers to someone who is still confused about their sexual orientation or gender identity<sup>1</sup>. Recently in our country, LGBTQ has developed so much. These kinds of people now have their society like activist LGBTQ and their followers who are ready to fight for their society and also defend for their right which still seems unclear in our country and did our constitution stated about their civil right. As an example, consider Nisya Ayub, as a Malaysian transgender activist who fights for the rights to be given to this kind of community. Nisya Ayub is also the co-founder of the community-run SEED Foundation and the transgender community campaign Justice for Sisters, and in 2016 she received the renowned International Women of Courage Award. Then another example is Irshad Manji who is a Canadian educator and also a lesbian due to her same-sex marriage. She is also the one who wrote the book with the title Trouble with Islam Today and Allah, Liberty and Love,

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<sup>1</sup> Defining LGBTQ. Retrieved March 21, 2020, from <https://gaycenter.org/about/lgbtq/>

which criticize Islam and both books have been banned in several Muslim countries including Malaysia.

### **Discussion or analysis.**

In our federal constitution, there is an article that stated fundamental liberties which safeguard the right of the people but the question is whether LGBTQ rights are also stated in the federal constitution. The matter pertaining to carnal intercourse against the order of nature has been specifically stated under *Section 377A of the Penal Code* and LGBTQ can be classified under this provision. Under this provision, any person is said to commit carnal intercourse against the order of nature if that person has a sexual connection with another person by the introduction of the penis into the anus or mouth of the other person. So basically, the element of penetration is sufficient to govern offence under this particular provision. The punishment for anyone who commits this offence is they can be imprisonment for a term which may extend to twenty years and also shall be liable to whipping as provided under *Section 377B of Penal Code*. LGBTQ is also prohibited in Islam and this has been clearly provided under Syariah Criminal Offences (Selangor) Enactment 1995 in Part IV which is regarding offences relating to decency. For example, any male person shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both if he wears a woman's attire or poses as a woman for immoral purposes in any public place as enshrined under *Section 30*<sup>2</sup>.

Under Article 5 until 13 of the Federal Constitution, Part II of the Federal Constitution, the supreme law of the Federation has enshrined the basic rights and freedom that shall be enjoyed by every Malaysian citizen. There shall be no deprivation of a person's life or personal liberties save in accordance with law as clearly stated under *Article 5(1)* of the Federal constitution. The freedom and rights of a person who is a Malaysian have been clearly listed under the supreme law of the federation which is the Federal Constitution. They were listed under Art 5 until 13 of the Federal Constitution. For example, no deprivation of a person of his life or personal liberties save in accordance with law as provided under Article 5(1) of the Federal Constitution. This, in other words, means that as a human we have right to lives and live in whatever way that we chose as long as that path that we chose is not go contrary to any law in this country. So, since they are controlled by the governed existing law so people also have to abide by the law and cannot do as they pleased and freely abuse the freedom that was given to them. The LGBTQ community claimed that

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<sup>2</sup> Syariah Criminal Offences (Selangor) Enactment 1995 in Part IV

they should be given the same right as the other citizen even the fact that they are different. Generally, they did have a civil right that enshrined in the Federal Constitution but it is very limited than the other citizen. For example, you are free to live freely. However, if you get caught having a same-sex gender, you will be caught and can be brought to the court and can be summoned so as the law forbids it.

There is a lot of opinions stated that they should not be given any rights under Federal Constitution since they have done something contrary to the law. This has been clearly stated under **Section 377A** of Penal Code regarding carnal intercourse against the order of nature and **Section 377B** of Penal Code provided for its punishment. Then it has been forbidden also under Islam since it can be categorized as an offence that listed under Syariah Criminal Offences (Selangor) Enactment 1995 in Part IV. This is because Islam is the religion of federation but other religions may be practised in peace and harmony in any part of the Federation<sup>3</sup>. Then, **Article 3(4)** of the same statute stated that nothing in this Article derogates from any other provision of this Constitution. Former Prime Minister Najib Razak spoke of the importance of Islam in a June statement, adding that any aberrant characteristics such as liberalism, pluralism, and Lesbian, Gay, Bisexual, and Transgender people will not be recognized in the country. This statement is in line with what has been stated under Article 3 of the Federal Constitution. The former Education Minister, Dr Mashitah Ibrahim, warned that homosexuality goes against Islam and further stated that there is no constitutional freedom from discrimination for gay people living in Malaysia and **Article 8** of the Federal Constitution says there must be no discrimination of citizens in terms of religion or sex. 'Sex' has never been taken to signify sexual orientation; it will be interpreted as male and female and only these two-type people will get the protection under the Federal Constitution.<sup>4</sup>

To make it clearly regarding the offence we can refer to the case of **Public Prosecutor v Dato' Seri Anwar Ibrahim**<sup>5</sup>, in this case Dato' Seri Anwar Ibrahim (DSAI) was charged under Section 377B of the Penal Code for committing carnal intercourse against the order of nature to Mohd Saiful Bhukhari bin Azlan on 26 June 2008 between 3.01 p.m. to 4.30 p.m. at Unit 11-5-1, Desa Damansara Condominium, No. 99, Jalan Setiakasih, Bukit Damansara, Kuala Lumpur in the Federal Territory of Kuala Lumpur. Section 377B provides that whoever voluntarily commits carnal intercourse against the order of nature if found guilty

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<sup>3</sup> Article 3(1) of Federal Constitution

<sup>4</sup> Trust, H. D. (2020, January 9). Malaysia. Retrieved April 7, 2020, from <https://www.humandignitytrust.org/country-profile/malaysia/>

<sup>5</sup> [2015] 2 MLJ 293

shall be punished with imprisonment for a term which may extend to 20 years, and shall also be liable to whipping. The facts of the case are Mohd Saiful Bukhari bin Azlan (PW1), a young man age 22 years who initially worked as a volunteer but later became a paid member of staff as DSAI's private assistant in early March 2008. The PW1 made a police report alleging that DSAI had sodomised him at a condominium in Damansara on 26 June 2008. The report was made on 28 June 2008, two days after the alleged incident. Mohd Saiful said the incident took place after he and DSAI had completed discussing their work schedule at a unit of the Desa Damansara Condominium. The Federal Court dismisses the appeal and the sentence of 5 years' imprisonment imposed by the COA is hereby affirmed.

Apart from that, the controversial issue that recently arises is when this community asked for equality. In general, they still have the right under *Article 8(1)* of the Federal Constitution that all persons are equal before the law and entitled to the equal protection of the law and *Article 8(2)* of the Federal Constitution provides that except as expressly authorized by this Constitution, discrimination against people solely based on religion, race, descent, place of birth or gender shall not exist in any law or any act of appointment under a public authority or the administration of any law relating to the acquisition, possession or disposal of property or the establishment or exercise of any business, trade, profession, occupation or work. These two articles mean that all persons are equal before the law and are entitled to the equal protection of the law. In general, nobody can be discriminated against on the grounds of religion, race, and descent, place of birth or gender and so on. This can be supported in the case of *Su Liang Yu*<sup>6</sup> that stated that no person shall be denied equality before the law or equal protection of the law but Article 8 does not prevent Parliament from making law based on or according to some classification.<sup>7</sup>

The article above applies only to the person that did not go contrary to law but this LGBTQ community had made something that contrary to law in line with what has been stated under Penal Code and also in Islam, so supposedly they did not have any civil rights in Federal Constitution. However, the LGBTQ community still have right as a human being means they cannot be discriminated in their workplace especially. This is because if there is no one willing to employ them, they may become a useless person and the worst they may become a criminal which for an example involve in prostitution for 'mak nyah' or same sex

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<sup>6</sup> [1976] 2 MLJ 128

<sup>7</sup> Mukhlis, H. (2014, October 2). Article 8 right to equality and its exceptions. Retrieved April 7, 2020, from <https://www.slideshare.net/HabibJoelAlMukhlis/article-8-right-to-equality-and-its-exceptions> .



relationship to gain money to support their life. Then, they also have the right to be treated in a good way by the public means that they should not be insulted by the public and isolated from the public. In other words, they cannot be repressed, persecuted and mistreated especially at work. Plus, it has been stated by Datuk Dr Mujahid Yusof Rawa who is a Minister in the Prime Minister's Department in Dewan Rakyat that the government itself is concerned and also took into account the public's concerns pertaining to this LGBTQ's issue that has already become some of the Malaysian cultures. (LGBT) is a community that must still abide by related laws that existed in our country, Malaysia. However, the minority community's fundamental human rights will still be protected in line with what has been stated in the Malaysian Constitution as well as local culture and Islam as the official religion of the Federation. Mujahid, who is in charge of Islamic affairs and also minister of Islamic affairs, stated that regardless of how one feels about the LGBT lifestyle, the community should not be discriminated especially in the workplace which he said that any discrimination (against the LGBT community) at the workplace will only push these community into the sex industry.<sup>8</sup>

Apart from that, the LGBTQ community actually has the right to express their opinion as this right has been stated under 10(1)<sup>9</sup> that subject to Clauses (2), (a) every citizen has the right to freedom of speech and expression; b) all citizens have the right to assemble peaceably and without arms;(c) all citizens have the right to form associations. However, 10(2) of the Federal Constitution provided for its restriction or limitation which Parliament may by law impose on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence. Then clause (c) of the same article stated that on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality. However, this community was put under this restriction. This is because they cannot actually express any speech on the aspect that regarding the

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<sup>8</sup> Mallow, M. S. (2018, July 20). Anti-discrimination law will protect LGBT from harm, not legitimise their sexual orientation. Retrieved April 7, 2020, from <https://www.nst.com.my/opinion/letters/2018/07/392543/anti-discrimination-law-will-protect-lgbt-harm-not-legitimise-their>

<sup>9</sup> Federal Constitution.

morality as their action is against the nature of human being and they also actually restricted by constitution to form an association that against the morality.

Hence, what has been upheld by the LGBT activist is actually wrong under Federal Constitution but they still claim that they have the right to do so. For an example Nisya Ayub who is one of the activists that fight for the right of LGBT. She is the founder of the transgender rights group Justice for Sisters. She also claims that their right also should be secured even the law and Islam itself forbids what they have been doing. This kind of people is the reason why the population of LGBTQ in our country keep increasing throughout the year.

## **Conclusion**

In conclusion, the phenomenon of LGBTQ is one of the highly debated issues that occurred in Malaysia. This community has a great influence throughout Malaysia. This is because the activist of this community is mostly the influential person in politics especially so they can easily enter this country and spread their culture. LGBT is mostly prohibited by the major religions in the world as it is not only a sheer violation of marriage institutions but also symbolic of disrespect for human beings as it contradicts the very nature of man's creation. The provisions for fundamental liberties in the Malaysian constitution are reflective of a concern for the basic fundamental rights that should be enjoyed by every citizen in Malaysia. Even this community claimed their civil rights in the constitution, the fact is they are supposed to not be given right under Federal Constitution. This is because obviously, LGBTQ is a punishable crime not only under Islamic law but also under the Penal Code of Malaysia. But as a human, they still enjoy certain right which is same with other Malaysians.

The spread of LGBTQ culture needs to be stopped as soon as possible because this culture is not only can cause damage to the image of our country but also can ruin the real identity of Malaysian and especially Muslims since Malaysia are an Islamic country. So, to deter the spread of this community, the government should enforce the law that more strict so that they will scare to do the same offence in the future for an example if these communities were caught red-handed, they should be put in prison, their day of the remand should be extended, fine and amount of whipping that supposed to be imposed on them also should be increased. Apart from that, the number of police patrol and the religious officer in the suspicious area should be increased also so that the spreading of this LGBTQ culture can be decreased and controlled by the government.

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