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Rights and the Proportionality of Punishments on Homosexual Relations in Malaysia

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ABSTRACT

The protection of the human rights of LGBTQ+ people is a relatively new topic in international human rights law in this digital era. Over the years, in the context of sexual acts against the order of nature and emerging Islamic practice, engaging in homosexual behaviour is considered a crime punishable under the law, whereby people in the LGBTQ+ were being discriminated against and attacked by the community. Hence, with the calls for gender equality and human rights, this paper focuses on the debate about human rights in homosexual relations, which is gay or lesbian. The research methodology adopted is doctrinal legal research. This paper intends to examine the existence of equal rights given to the homosexual community, and the proportionality of punishments for homosexuality in Malaysia from the secular civil law and Islamic Law perspectives. Besides, a comparison is made between Malaysia and some other selected Asian countries from the psychological view and health conditions with recommendations to protect the rights of this group as a conclusion.



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1. Introduction

Sexual orientation is an attraction towards a person romantically, either for the same gender or for the opposite gender.¹ Gender identity is the internal sense of self-identity, whereby a person will self-consider either being male, female, or neither, which is separate from your biological sex.² People with a different sexual orientation or gender identity mostly fall under the umbrella term Lesbian, Gay Bisexual, Transgender, Queer, and many more (LGBTQ+). LGBTQ+ rights are emerging as a national human rights issue as evidence of stigma, discrimination, and criminalisation of same-sex sexual orientation and transgender behaviour in the country mounts, which amounts to an offence punishable under the law.

There is a growing global trend towards recognising and protecting LGBTQ+ rights, with many countries enacting legislation to combat discrimination based on sexual orientation and gender identity. International organisations, such as the United Nations, have emphasised the significance of equality and freedom of expression for all individuals.³ Malaysia, however, presents a unique situation as it has laws criminalising homosexuality and limited legal protection for LGBTQ+ individuals. It is crucial to acknowledge and protect LGBTQ+ rights due to their fundamental human rights, the promotion of social inclusivity and diversity, and the contribution to social progress and economic development.

For instance, on 21 July 2023, the Good Vibes Festival 2023 was cancelled due to the action of the two members of the English pop rock band 'The 1975' who were kissing on the stage and who criticised Malaysia's anti-LGBT law.⁴ This incident therefore raised a huge discussion among Malaysians as to whether LGBTQ+ should be accepted in Malaysia. Hence, it is crucial to educate the citizens on their fundamental human rights, the promotion of social inclusivity and diversity, and the contribution to social progress and economic development.

This paper merely focuses on homosexual behaviour, which is gay and lesbian. Specifically in Malaysia, homosexual sexual intercourse is prohibited under section 377A of the Penal Code, whereby any person who has a sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit

¹ Bryan A Garner, *Black's Law Dictionary* (10th edn, 2014).

² Garner, *Black's Law Dictionary* (n 1).

³ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) Art 2.

⁴ Jessie Yeung, "'White Savior Complex': Malaysia's LGBTQ Community Slams the 1975's Matty Healy's Onstage Kiss' *CNN* (25 July 2023) <<https://edition.cnn.com/2023/07/25/asia/matty-healy-the-1975-malaysia-lgbtq-intl-hnk/index.html>>.

carnal intercourse against the order of nature.⁵ Thus, so long as there is penetration between one and another, then it is sufficient to constitute an unlawful sexual connection.

In the subsequent sections, we shall examine Malaysia's legal system, societal viewpoints, some Asian countries' viewpoints on supporting or opposing LGBTQ+, and the psychological view of whether or not being attracted to the same gender constitutes a health condition. With this, this paper hopes to raise awareness of the crucial need for social inclusion and the advancement of basic human rights.

1.1 Problem Statement

By narrowing it down to focus on homosexuality, the laws in Malaysia do not recognise the existence of same-sex relationships and even punish those who commit carnal intercourse against the order of nature. Additionally, individuals in the homosexual community do not enjoy equal rights as normal couples, which is therefore in breach of human rights.

1.2 Objective

The objectives of this paper are to examine the existence of equal rights given to the homosexual community, and the proportionality of punishments on homosexuality in Malaysia.

1.3 Research Methodology

The research methodology used in this paper is based on doctrinal legal research, by referring to relevant local statutes such as the Federal Constitution, Penal Code, Human Rights Commission of Malaysia Act 1999, and Penal Codes from Sri Lanka, India, and Singapore, cases from Lexis Advance and journal articles as well as comparing civil and Islamic perspectives in Malaysia and comparing with some other selected Asian jurisdictions.

2. Malaysia's Perspective on Homosexuality

Perceptions of homosexuality in Malaysia are influenced by a combination of religious, cultural, and legal factors. The predominantly Muslim country follows Islamic principles and considers homosexuality sinful or morally unacceptable. Furthermore, Malaysian society is generally conservative towards homosexuality, with limited acceptance or recognition of LGBTQ+ rights. Hence, this created challenges and discrimination for the country's LGBTQ+ community, including limited legal protection, social prejudice, and restricted freedom of expression. It is therefore important to understand how homosexuality is viewed in Malaysia in the context of its religious and cultural landscape and laws.

⁵ Penal Code, s 377A.

2.1 Federal Constitution

Equal rights are critical to ensure every individual is treated fairly without discrimination. It lays the groundwork for a just and inclusive society by promoting diversity and creating environments where individuals can thrive despite their differences. In the case of homosexuality, equal rights imply legal recognition and protection, including anti-discrimination laws, marriage equality, and unrestricted access to healthcare. It protects LGBTQ+ people's freedom of expression and emphasises the importance of inclusive education in reducing stigma.

The laws in Malaysia's constitution ensure the protection of basic human rights standards, including gender, nationality, race, religion, and culture. This can be seen in Article 8(1) of the Federal Constitution, which states that all persons are equal before the law and entitled to equal protection of the law.⁶ Since people can be classified by their age, education level, ability, and occupation, the different needs of these people often need to be treated separately.

With that being said, the homosexual community should not be treated as a heterogeneous or vulnerable community as it is a form of discrimination. The community will have to go through harsh judgement by the public as they are not acceptable as the so-called 'normal humans'. In fact, it is suggested that the homosexual community of different sexual orientations should be treated equally like others, without any form of discrimination as to conform to Article 8(2) of the Federal Constitution, which emphasises that, except as expressly authorised by the Constitution, no law shall discriminate against citizens solely on the grounds of religion, race, descent, place of birth or gender.⁷

As such, based on the provisions outlined in Article 8(1) and Article 8(2) of the Federal Constitution, the criminalisation of homosexual acts as seen in section 377B of the Penal Code may be perceived as discriminatory based on sexual orientation. Also, criminal penalties, conversion attempts, and anti-LGBT rhetoric by government officials are considered discrimination and deprivation of human rights as if they specifically target individuals based on their sexual orientation, which may be seen as a violation of the constitutional guarantee of equal protection and non-discrimination.

2.2 Penal Code

Both sections 377A and 377B of the Penal Code collectively criminalise homosexual sexual intercourse. Section 377A of the Penal Code defines the prohibited acts that violate an individual's rights to privacy and autonomy in personal relationships while section 377B of the Penal Code expands on this definition by outlining punitive measures.

⁶ Federal Constitution, Art 8(1).

⁷ Federal Constitution, Art 8(2).

It is to be noted that section 377A of the Penal Code was inherited from the legacy of the British, which forbids sexual intercourse against the order of nature.⁸ The English law was then spread and imposed upon Malaysia. With that, Malaysia retained the provision upon independence and continues to criminalise same-sex sexual activity up until today.

However, not many people have heard of section 377A of the Penal Code, as before it gained notoriety, same-sex intimacy was less explored and was hardly prosecuted in Malaysia. Up until the case of *Public Prosecutor v Dato' Seri Anwar Ibrahim*,⁹ the accused, Dato' Seri Anwar bin Ibrahim was sentenced to nine years of imprisonment under section 377B of the Penal Code for committing carnal intercourse against the order of nature with Azizan bin Abu Bakar in May 1994. The charge of sodomy previously in the year 2000 against the current Prime Minister Dato' Seri Anwar Ibrahim served as an awakening call for sexuality rights in Malaysia and the society has begun to be concerned and to look into the human rights violations that the LGBTQ+ community suffer in Malaysia.

Based on Dato' Seri Anwar Ibrahim's case, Arifin Jaka J listed down four elements to be proven to charge a person under section 377B of the Penal Code. The elements are that the accused had carnal intercourse with a person; that such intercourse was against the order of nature; that the accused did the act voluntarily and that there was penetration. Hence, anyone who fulfils all the elements will be considered to commit sexual intercourse against the order of nature and shall be punished under section 377B of the Penal Code, with imprisonment for a term which may extend to twenty years, and shall also be punished with whipping.¹⁰

In short, both sections raise human rights concerns which are said to infringe on the rights to privacy, freedom of expression, and equality. Besides, the legal and ethical complexities surrounding these sections highlight the critical need for legal reforms that are consistent with human rights principles and international standards.

2.3 Human Rights Commission of Malaysia Act 1999

Other than that, the Human Rights Commission of Malaysia Act 1999 also serves as legislation to give legal protection to all citizens and at the same time to promote and educate on the importance of human rights in Malaysia through the mandate of the Human Rights Commission of Malaysia (SUHAKAM).

Section 4(1)(a) of the Human Rights Commission of Malaysia Act 1999 emphasises human rights awareness. It requires the Commission to provide education about human rights to the public.¹¹ In the context of homosexuality, this provision has the potential to

⁸ Penal Code, s 377A.

⁹ *Public Prosecutor v Dato' Seri Anwar Ibrahim* [2001] 3 Malayan Law Journal 193 (CA).

¹⁰ Penal Code, s 377B.

¹¹ Human Rights Commission of Malaysia Act 1999, s 4(1)(a).

challenge stereotypes and promote inclusion by providing comprehensive education on various sexual orientations.

Similarly, section 4(2)(a) of the Human Rights Commission of Malaysia Act 1999 also focuses on ensuring human rights, thereby requiring SUHAKAM to conduct research and disseminate and distribute the results of such research to better understand the needs of citizens.¹² In terms of homosexuality, this provision helps to delve into specific issues confronting the LGBTQ+ community and shedding light on discrimination. The dissemination of this provision therefore contributes to informed policymaking and interventions aimed at protecting individuals' rights, regardless of sexual orientation.

Beyond that, the Human Rights Commission of Malaysia Act 1999 emphasises the promotion of human rights awareness towards the public. In case there are any human rights violations, SUHAKAM may inquire into an allegation of the infringement of human rights subject to section 12(1) of the Human Rights Commission of Malaysia Act 1999.¹³ It serves as an avenue for the evaluation of discriminatory laws or practices that affect the LGBTQ+ community, to resolve and correct such concerns.

In short, while these rules do not specifically refer to sexual orientation or homosexual relationships, they do equip SUHAKAM with a thorough framework for addressing human rights concerns in general. As such, SUHAKAM can campaign for the rights of individuals, especially those in the LGBTQ+ community. Relating it to the homosexual community, the Human Rights Commission of Malaysia Act 1999 is a piece of legislation ensuring that all citizens, regardless of their sexual orientation, are entitled to equal protection and respect for their fundamental rights.

3. Islamic Law Perspective on Homosexuality

The Islamic position on homosexuality is important particularly in terms of creating societal norms, legal frameworks, and individual identities, especially within Muslim-majority nations, Malaysia. Islamic law, drawn from the Quran and Hadith offers a core ethical and moral framework that impacts many parts of life, including sexual views. Hence, recognising the Islamic perspective on homosexuality helps to contextualise the legal problems that LGBTQ+ people experience in various jurisdictions and offers an insight into potential contradictions between religious teaching and contemporary human rights norms.

Furthermore, the Islamic view on homosexuality further extends to family dynamics, interpersonal connections, and larger societal structures that influence LGBTQ+ persons' living experiences. With that being said, the discussion will include diverse interpretations of Islamic teachings that exist throughout the Muslim community and are becoming more sophisticated. Scholars and religious leaders are involved in continuing discussions to

¹² Human Rights Commission of Malaysia Act 1999, s 4(2)(a).

¹³ Human Rights Commission of Malaysia Act 1999, s 12(1).

reconcile traditional beliefs with changing contemporary views, to create places for inclusion and acceptance.

Historically, in early Islamic times, homosexuality was seen as a disease or sickness because it amounted to a will to penetrate other men. This 'will' is a sin in Islamic teachings. El-Rouayheb, a Professor of Arabic and Islamic Intellectual History at Harvard University notes that ever since the time of the first caliph Abu Bakr al Razi, the enjoyment of penetration between man and man was regarded as having a disease.¹⁴

In the Quranic verse, since there is no specific context for homosexuality, referring to unlawful intercourse as prescribed in *Surah Al-A'raf* 7:81 reads 'You approach men with lust instead of women. You are a person who goes beyond the limits'.¹⁵ Given this, not only are humans divided into two genders, but the opposite gender is attracted to the other. It has been agreed upon by most of the major doctrines within the Sunni and Shi'a traditions, including the Shafi School, that homosexual intercourse is analogous to heterosexual zina and, therefore is a sin.

Besides, under the Syariah Courts (Criminal Jurisdiction) Act 1965, a person who committed unlawful sexual intercourse, including homosexual intercourse will be punished under section 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965.¹⁶ The punishment under Islamic law is usually based on the principle of reformation rather than retribution, which means that the punishment is meant to rehabilitate the offender and prevent them from repeating the offence, rather than merely punishing them for the sake of retribution. Hence, the Penal Code carries a heavier punishment than Islamic law.

By viewing the punishments above, all the punishments are deemed to be harsh and disproportionate towards the homosexual community as it had already violated Article 2 of the Universal Declaration of Human Rights which emphasises that human rights belong to everyone.¹⁷ Although there is no specific statement that includes human rights protection towards the LGBTQ+ community, the phrase 'other status' can be impliedly interpreted to include the LGBTQ+ community.

Beyond that, there are also Quranic verses that include human diversity and emphasise respect towards one's feelings. For instance, the Quranic verse *Surah Al-Isra'* (17:84) reads that 'Each one acts according to his own path...'.¹⁸ This verse can be interpreted as Islamic teachings accepting human diversity, including the acceptance of varied beliefs and practices other than Islam. Similarly, as per *Surah Ar-Rum* (30:21) '... He has created mates for you from your own kind...He has set between you love and mercy...'.¹⁹ This verse

¹⁴ Khaled El-Rouayhed, *Before Homosexuality in the Arab-Islamic World, 1500-1800* (University of Chicago Press 2005) <<https://press.uchicago.edu/ucp/books/book/chicago/B/bo3613572.html>>.

¹⁵ Al-Quran, 7:81.

¹⁶ Syariah Courts (Criminal Jurisdiction) Act 1965, s 2.

¹⁷ Universal Declaration of Human Rights, Art 2.

¹⁸ Al-Quran, 17:84.

¹⁹ Al-Quran, 30:21.

implies that love and happiness can be obtained even with same-sex partners. With that being said, the fact of different sexual orientations may also be accepted generally to comply with the principle of human diversity.

Having said that, emphasising the legalisation and normalisation of heterosexual behaviour through the institution of marriage does not affect the positive view of the Qur'an that praises sexual diversity and recognises homosexuality as a legal behaviour endowed by Allah.

4. Comparison between Malaysia and other Asian Countries

With its complex tapestry of cultures, religions, and cultural standards, Asia demonstrates a wide range of opinions regarding homosexuality. However, it is important to note that the development in Asian countries is unequal, with other countries maintaining more traditional stances and continuing to enforce laws that outlaw homosexuality. These nations' diverse paths reflect the complex interaction of cultural, societal, and legal elements that impact the views towards LGBTQ+ rights.

Hence, it is important to discuss and compare Malaysia and other Asian countries as such comparison helps to reveal Asia's diverse legislative framework, highlighting progressive reforms in certain countries and more conservative attitudes in others. Understanding this variability provides insights into how legal institutions affect the lives of LGBTQ+ people in various situations.

Furthermore, such a comparison highlights the common issues encountered by the LGBTQ+ community in many cultural contexts, creating solidarity and strengthening the collective voice for equal rights. In short, it is vital to make such comparisons between Malaysia and other Asian countries as it helps to gain an understanding of the complex interplay of cultural differences and legal elements defining LGBTQ+ experiences. It contributes to educated debates and development for a more inclusive and equitable future for Malaysia's LGBTQ+ community.

4.1 Countries Prohibiting Homosexuality

Countries that prohibit homosexuality will have laws to prosecute those who commit homosexual sexual intercourse against the order of nature. These legal structures reflect societal and cultural attitudes on same-sex relationships, which are frequently based on traditional values, religious beliefs, or conservative ideology. The ban of homosexuality in these countries goes beyond voicing disapproval whereby it turns into actual actions with legal ramifications. The ban is mostly based on moral or cultural judgements rather than objective grounds and the consequence is that the country is against homosexuality.

In short, the countries that outlaw homosexuality usually have laws that penalise same-sex activity under the pretence of being against the order of nature. These laws not only reflect societal and cultural prejudices but also lead to the violation of human rights. The

legal ban on homosexuality becomes a weapon for imposing societal standards and upholding traditional values, at the expense of the LGBTQ+ community's rights and well-being. Examples of countries used in the discussion are Saudi Arabia and Sri Lanka.

4.1.1 Saudi Arabia

Saudi Arabia criminalises homosexuality. Despite there being no written law on sexual orientation or gender identity, due to the applicability of Shariah Law as its national law, judges use uncodified principles of Islamic law to sanction people involved in homosexual relationships or any relationship that is against the order of nature such as homosexuality.²⁰ As a result, those convicted of homosexuality in Saudi Arabia could be sentenced to death, imprisonment, and caning.

As of June 2022, the Saudi government sought to censor what it considered LGBTQ+ representation items to prevent the chances of promoting homosexuality.²¹ Hence, the strict compliance with Shariah laws and the actions of the Saudi government prohibiting homosexuality, clearly show the illegality of homosexuality.

4.1.2 Sri Lanka

Section 365 of the Sri Lankan Penal Code criminalises consensual same-sex conduct, punishing those who commit such offences with up to 10 years in prison and a fine.²²

According to the International Lesbian, Gay, Bisexual, Transgender, and Intersex Association, multiple arrests occur each year and detainees are often subjected to torture in the form of beatings and forced anal and vaginal examinations.²³ This shows discrimination and violence against LGBTQ+ people in Sri Lanka, depriving their community of basic rights. The government made an announcement in 2017 that its Human Rights Action Plan will be updated by adding an addendum prohibiting discrimination against sexual orientation. However, as of 2022, there have been no further attempts to repeal section 365 of the Sri Lankan Penal Code.

In addition, the constitutionality of section 365 of the Sri Lankan Penal Code may not be challenged because there is no power to judicial review given to the Supreme Court. Sections 365 and 365A were held to be unenforceable following the decision of the Supreme

²⁰ 'Legal and Judicial Structure' (*The Embassy of The Kingdom of Saudi Arabia*, 2019) <<https://www.saudiembassy.net/legal-and-judicial-structure-0>>.

²¹ Zahid Mahmood and Yousuf Basil, 'Rainbow-Colored Toys and Clothing Are Seized in Saudi Arabia for Indirectly "Promoting Homosexuality"' *CNN* (19 June 2022) <<https://edition.cnn.com/2022/06/19/middleeast/saudi-arabia-rainbow-colored-toys-ban-intl/index.html>>.

²² Penal Code 1883 (Sri Lanka), s 365.

²³ Niluka Perera, *Living Without Legal Protection: Constant Fear From Stigma, Discrimination and Violence Against LGBTIQ Community in Sri Lanka* (LIGA Asia 2021) 19 <<https://www.ilgaasia.org/publications/srilanka-lgbtiq-rights-report-2021>>.

Court of Sri Lanka in *Officer-in-Charge, Police Station, Maradana v Wimalasiri and Jeganathan*.²⁴ However, the court noted that ‘sodomy’ is still considered an ‘indecent act’ in Sri Lanka and remains a criminal offence. Ultimately, the court increased the sentence from one year to two years.

4.2 Countries Accepting Homosexuality

Asian countries such as Taiwan, India, and Singapore are prominent examples of significant progress in creating an inclusive environment to protect individuals from persecution based on sexual orientation. Such a movement of accepting homosexuality is a significant divergence from more conservative historical attitudes and therefore indicates a growing acknowledgement of LGBTQ+ individuals’ rights and dignity.

Also, the legislative advances made in Taiwan, and India as well as the shifting discourse in Singapore highlight the possibility for positive shifts in views towards the LGBTQ+ community across the continent. With that being said, these trends call into question prevalent notions of the region being consistently conservative in terms of sexual orientation.

The following discussion will delve into the specific situations and progress in the acceptance of homosexuality in these Asian countries.

4.2.1 Taiwan

Taiwan was previously rooted in conservative social norms influenced by Confucian values but has since undergone a major shift towards embracing LGBTQ+ rights.

In May 2017, Taiwan’s Constitutional Court made a landmark ruling, declaring the ban on same-sex marriage unconstitutional.²⁵ The court gave the government a two-year timeframe to make the necessary legal changes. Consequently, on May 17, 2019, Taiwan became the first country in Asia to legalise same-sex marriage, marking a significant advancement for LGBTQ+ rights in the region.

In short, Taiwan has emerged as a trailblazer and a leader in promoting LGBTQ+ rights within Asia, paving the way for greater equality and understanding as the nation actively promoted education and acceptance of diverse sexual orientations.

²⁴ *Officer-in-Charge, Police Station, Maradana v Wimalasiri and Jeganathan* [2016] Supreme Court of the Democratic Socialist Republic Sri Lanka No 304/2009 <https://www.supremecourt.lk/images/documents/sc_appeal_32_11.pdf>.

²⁵ ‘Interpretation No 748 (Same Sex Marriage Case)’ [2017] Constitutional Court of Republic of China (Taiwan) <<https://cons.judicial.gov.tw/en/docdata.aspx?fid=100&id=310929>>.

4.2.2 India

Historical documentary evidence shows that homosexuality has been prevalent in India throughout history. This is illustrated in the Indian text *Vātsyāyana*, which illustrated an entire chapter on erotic homosexuality among the Indians.²⁶ Due to the continuance of implementation of section 377 of the Indian Penal Code, homosexuality is not being accepted among the Indian community and is considered an offence under the law.²⁷

Years later, in February 2017, the Ministry of Health and Family Welfare opined that it is normal that adolescents will be attracted to anyone of the same or opposite sex, so long as the relationship is based on mutual consent and respect.²⁸

On 6 September 2018, homosexuality was legalised in India. This can be seen in the landmark decision of the Supreme Court of India, *Navtej Singh Johar v Union of India thr. Secretary Ministry of Law and Justice*.²⁹ The court invalidated section 377 of the Indian Penal Code by decriminalising all consensual sex among adults, including homosexual sex. Furthermore, a ruling by the Supreme Court of India in the case of *Deepika Singh v Central Administrative Tribunal*³⁰ broadens the definition of ‘family’ to include queer relationships, thereby providing homosexual couples with the same rights and benefits as married couples.

As a result, LGBTQ+ rights have been legalised and the community can obtain the same rights and benefits as individuals in heterosexual relationships.

4.2.3 Singapore

Singapore is also one of the countries that chose to legalise homosexual relationships after India. In early 2019, LGBTQ+ people were protected from threats or acts of violence by relevant authorities. With the amendment of the Maintenance of Religious Harmony Act 1990, there are laws and legislations that protect the LGBTQ+ community from religiously motivated violence. With that being said, Singapore is taking a leap to improve its laws and ensure the human rights of the LGBTQ+ community.

Most recently, on 29 November 2022, the Parliament of Singapore officially passed the repeal of section 377A of the Singapore Penal Code.³¹ This means that any homosexual

²⁶ Mallanaga Vātsyāyana, *Kamasutra: A New, Complete English Translation of the Sanskrit Text* (OUP 2002).

²⁷ Kishita Gupta, ‘Is Homosexuality Legal in India’ (*iPleaders*, 26 September 2022) <<https://blog.iplayers.in/is-homosexuality-legal-in-india/>>.

²⁸ ‘Homosexual Attraction Is OK; “No” Means No: Health Ministry Rises Above Indian Stereotypes’ *Financial Express* (21 February 2017) <<https://www.financialexpress.com/india-news/homosexual-attraction-is-ok-no-means-no-health-ministry-rises-above-indian-stereotypes/560227/>>.

²⁹ *Navtej Singh Johar v Union of India through Secretary Ministry of Law and Justice* [2018] 4 Madras Law Journal Reports (Criminal) 306 (SC).

³⁰ *Deepika Singh v Central Administrative Tribunal* (2002) Supreme Court Cases OnLine 1088 (SC).

³¹ Penal Code 1871 (Singapore), s 377A.

relationship that occurred after the introduction of the repeal of section 377A, is not an offence under the law. Prime Minister Lee Hsien Loong explained that the rationale for the repeal is to bring the country's laws in line with prevailing social customs and to enable the nation to move forward in unity.³²

In short, Singapore's attitude towards LGBTQ+ issues has shifted towards a more liberal stance whereby homosexual relationship is no longer a crime punishable under the law.

4.3 Comparison to Malaysia

According to Article 121(1A) of the Federal Constitution, Malaysia practises a dual legal system that consists of secular civil law and Islamic law.³³ Both laws prohibit carnal intercourse against the order of nature and such offence will be punished with whipping or imprisonment under the Penal Code, whilst in Islamic law, such offence will be punished with 100 lashes.³⁴

As of Article 2 of the Universal Declaration of Human Rights, the law emphasises the freedom from discrimination, without distinction of any kind including minorities and vulnerable communities.³⁵ Article 2 actively advocates that human rights belong to everyone, laying the foundation to stand against discrimination and act as a shield for the protection of minorities and vulnerable groups.

Countries such as Taiwan, India, and Singapore have progressive approaches to LGBTQ+ rights, which marked the legalisation of homosexuality based on mutual consent and respect, which is sharply in contrast to Malaysia's current legal stance, notably under sections 377A and 377B of the Penal Code. Malaysia's punishment towards homosexual individuals is said to be disproportionate and harsh as it has violated the rights to privacy, freedom of expression, and freedom from discrimination. This necessitates an examination of the legal framework's compatibility with international human rights standards, as well as the possibility of legal reforms to bring it in line with the current global norms.

Subsequently, the punishment under section 377B of the Penal Code is assessed in light of the consensual nature of the acts and the absence of harm to others, calling to the question of proportionality of the punishment and sparking the debate about the appropriateness of the legal response.

Thus, the laws in Malaysia should develop, grow, and change with the needs of the people. Malaysia should step out from the traditional way of thinking and grant mutual

³² Tham Yuen-C, 'NDR 2022: Govt Will Repeal Section 377A, but Also Amend Constitution to Protect Marriage From Legal Challenges' *The Straits Times* (22 August 2022) <<https://www.straitstimes.com/singapore/politics/ndr-2022-govt-will-repeal-section-377a-decriminalise-sex-between-men>>.

³³ Federal Constitution, Art 121(1A).

³⁴ Al-Quran 24:2.

³⁵ Universal Declaration of Human Rights, Art 2.

respect, equal rights, and protection to homosexual relationships in this digital era. There is no need to establish new laws stating specific rights or to create new international human rights standards. All that is needed is to protect those who are committed to homosexual relationships, from violence and discrimination.

5. Psychological View and Health Conditions

In order to comprehend the legal frameworks impacting the LGBTQ+ community, it is also important to dive into the psychological perspectives and health conditions of homosexual persons to comprehend the legal frameworks that affect LGBTQ+ individuals. The psychological characteristics of being LGBTQ+ are critical to managing mental health difficulties such as anxiety and depression, which are frequently aggravated by social discrimination. This offers legal reforms that prioritise mental health support and ensure equal rights for individuals by defending against the discrimination towards LGBTQ+ community.

Beyond that, harsh punishments under section 377B of the Penal Code made a significant impact on psychological well-being and health conditions. The fear of legal repercussions frequently forces individuals to conceal their identities, impeding the formation of critical supportive networks for mental health.

Hence, the discussion of psychological views and health issues highlights the impact of discriminatory laws on the well-being of such a population by shining a light on the mental health inequities they experience while also examining the proportionality of punishments towards such a community.

Generally, people often see homosexuality as a psychological condition that needs to be treated and cured. Originally, homosexuality was categorised as a form of mental disorder under the first edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-I) in 1952.³⁶

After decades of research and clinical experience, it concluded that these orientations represent the normal form of human experience. Therefore, DSM-III³⁷ and the eleventh revision of the International Classification of Diseases (ICD-11)³⁸ revised all conditions related to sexual orientation and concluded that these orientations represent normal forms of the human experience and attraction.

³⁶ The Committee on Nomenclature and Statistics of the American Psychiatric Association, *Diagnostic and Statistical Manual: Mental Disorders* (1st edn, American Psychiatric Association 1952) <<https://www.turkpsikiyatri.org/arsiv/dsm-1952.pdf>>.

³⁷ Task Force on Nomenclature and Statistics of the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3rd edn, American Psychiatric Association 1987) <<https://aditpsiquiatriaypsicologia.es/images/CLASIFICACION%20DE%20ENFERMEDADES/DSM-III.pdf>>.

³⁸ 'ICD-11: International Classification of Diseases 11h Revision' (World Health Organization, 2022) <<https://icd.who.int/en>>.

In 2016, the Malaysian government, JAKIM ran an app 'Hijrah Diri' on Google Play to help the conversion of the LGBTQ+ community.³⁹ However, the app was removed by Google in 2022 as it attempted to deceive users or facilitate dishonest behaviour.⁴⁰ Therefore, it is safe to say that conversion therapy is a harmful practice that can cause long-term harm to those receiving it.

Besides that, there are also concerns about the health conditions of homosexual relationships, stating that there is a higher risk in homosexual communities to be tested Human Immunodeficiency Virus (HIV) positive which could lead to acquired immunodeficiency syndrome (AIDS). However, a person can be infected with HIV through having sexual intercourse, by sharing needles, by blood transfusions, or even through breastfeeding.⁴¹ Therefore, throwing blame on the homosexual relationship remains a stereotype and is unfair.

In short, criminalising consensual same-sex relationships promotes stigmatisation, fear and isolation which leads to increased stress and mental health challenges for the LGBTQ+ community. The severity of punishment, combined with the fact that no one was harmed, raises ethical concerns about proportionality and human rights violations. Furthermore, the threat of whipping poses physical and psychological risks, contradicting global efforts to advocate for LGBTQ+ rights and equality. Hence, the call for legal reforms is vital to address these disparities which demonstrates Malaysia's commitment to fostering a more inclusive and just legal framework.

6. Conclusion and Recommendations

This paper has discussed the rights of homosexual relations regarding sexual intercourse against the order of nature and its proportionality of punishments in Malaysia. Certainly, human rights violations based on sexual orientation or gender identity and the punishment towards homosexual relations constitute legitimate areas of human rights concern in Malaysia.

The punishment towards consenting adults who commit carnal intercourse against the order of nature is way too harsh and disproportionate since same-sex attraction is not a disease nor a mental disorder, and it occurs naturally according to scientific evidence indicating the combination of biological and hormonal factors. It is not a choice but rather a result of a complex interplay of various factors during an individual's growth and development. The acceptance of homosexuality as a natural occurrence is therefore crucial as

³⁹ Mohd Shairawi Bin Mohd Noor, 'Bayan Linnas Siri Ke-249: Sekatan Aplikasi "Hijrah Diri" Jakim: Dimana Kebebasan Yang Diperjuangkan?' (*Pejabat Mufti Wilayah Persekutuan*, 26 March 2022) <<https://muftiwp.gov.my/perkhidmatan/artikel-soal-jawab/5179-bayan-linnas-siri-ke-249-sekatan-aplikasi-hijrah-diri-jakim-dimana-kebebasan-yang-diperjuangkan>>.

⁴⁰ Rebecca Ratcliffe, 'Malaysian Government's "Gay Conversion" App Pulled by Google Play' *The Guardian* (17 March 2022) <<https://www.theguardian.com/world/2022/mar/17/malaysian-governments-gay-conversion-app-pulled-by-google-play>>.

⁴¹ 'UNAIDS Global AIDS Update 2022' (2022) <<https://doi.org/10.18356/9789210019798>>.

it emphasises the importance of embracing diversity and understanding the fluidity of human sexuality within the natural variations.

The law should develop, grow, and change with the needs of the people. With this, Malaysians should adopt a more liberal attitude towards those who engage in homosexual relationships instead of judging them or classifying them as heterogeneous. The government should further educate citizens on the provisions of the Federal Constitution, and give equal rights and protection to citizens. This involves a thorough examination of current laws, including those governing sexual orientation, to verify the consistency with constitutional rights of equality and non-discrimination. With that being said, the urge for a more liberal approach is based on the recognition that cultural norms, attitudes, and perceptions shift throughout time. Malaysia should accept diversity and acknowledge the rights of everyone, regardless of sexual orientation. This transformation in mentality is not about questioning established ideas, but about recognising Malaysia's variety and granting everyone equal rights.

With due respect towards the Islamic religion, it is proposed that homosexual relations should gradually be accepted in Malaysia in this digital era. It is important to stress that advocating for acceptance does not imply supporting or encouraging such relationships. The goal is to create an atmosphere in which different points of view and personal preferences are acknowledged and appreciated. In particular, allowing the expression of themselves and choosing their life partners is a crucial component of developing religious freedom and personal autonomy. This suggestion underlines that the freedom of non-Muslims to make their own decisions should not impede on or influence Muslim beliefs and practices. Hence, sections 377A and 377B of the Penal Code should be repealed accordingly to pave a better way for development and move forward in unity.

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