

'To marry or not to marry: The law and sexuality rights in Malaysia'

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Introduction

The topic of my presentation focuses on the same-sex marriage debate for GLBTIQ persons (gay, lesbian, bisexual, transgender, intersex, queer and questioning) in Malaysia as represented in media texts analysed (as listed in References). The paper is structured in three parts. In the first section of the paper, I provide the local social-legal context; followed by the global context that affirms sexuality rights as human rights and the significance of the same-sex marriage debate and the need to go beyond that, in consideration of some wider implications.

Social-legal background

Part of the conservatism of Malaysia is accounted for by the high percentage of religious affiliation among Malaysians (98 per cent). Based on the 2010 Population and Housing Census of Malaysia (or Census 2010), of the total population of 28.3 million, with Malaysians consisting of 91.8 per cent, followers of Islam comprise 61.3 per cent, Buddhism 19.8 per cent, Christianity 9.2 per cent, Hinduism 6.3 per cent and Confucianism, Taoism and Tribal/folk/other traditional Chinese religion 1.3 per cent, other religion 0.4 per cent, no religion 0.7 per cent and unknown 1.0 per cent. In terms of ethnic composition which is similarly diverse, Malaysian citizens comprise: *Bumiputera* (Malay-Muslim, *Orang Asli* or original peoples of West Malaysia and Indigenous peoples of East Malaysia) 67.4 per cent, Chinese 24.6 per cent, Indians 7.3 per cent and others 0.7 per cent (Department of Statistics Malaysia, 2011: 9, 5).

Although the ethnic and religious majority in Malaysia are Malay-Muslims, Malaysia remains a secular democracy and not an Islamic State as the supreme law is the Federal Constitution, a colonial legacy of the British Empire (who ruled Malaya until 1957). Principles of equality are protected in the Constitution. For instance, in relation to the coexistence of religions in Malaysia, "Islam is the religion of the Federation (meaning Malaysia); but other religions may be practised in peace and harmony in any part of the Federation" (Article 3[1], Federal Constitution 2010). As such, a dual legal system for Muslims exists – Islamic (Syariah courts) and secular (civil courts) (Salbiah 2005) – where only the latter applies to non-Muslims. The Constitution further states that: "All persons are equal before the law and entitled to the equal protection of the law" (Article 8[1]) and "there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender" (Article 8[2]). The recent constitutional amendment to include 'gender' is an important step in "providing for gender equality under the law" although Malaysia "has yet to introduce legislation on gender equality" that is aligned with UN instruments such as CEDAW, the Convention on the Elimination of All Forms of Discrimination Against Women (Zarizana 2008).

The absence of legislation on gender equality is made worse by the existence of legislation that criminalises certain sexual practices that are classified as "unnatural offences"; Sections 377A, B, C, D and E of the Penal Code (Commissioner of Law Revision 2006a: 147-149). Legislation on marriage presumes heterosexuality as is evident from the Islamic Family Law (Federal Territories) Act 1984 as "Relationships prohibiting marriage" (Article 9) for example, refer mainly to incestuous relationships (Commissioner of Law Revision 2006b: 15-16). Legislation on marriage is not only heteronormative but also heterosexist as same-sex marriages are not permitted. For instance, in the Law Reform (Marriage and Divorce) Act 1976 (Article 6g), one of the grounds on which a

marriage is "void" is, "if the parties are not respectively male and female" (Commissioner of Law Revision 2006d: 43). The Syariah Criminal Offences (Federal Territories) Act 1997, under "An act preparatory to sexual intercourse out of wedlock" (Articles 25 and 26), states that a man found guilty of "*liwat*" (sexual intercourse between a man and man) or a woman found guilty of "*musahaqah*" (sexual intercourse between a woman and a woman) is liable to a fine not exceeding five thousand ringgit or imprisonment not exceeding three years or whipping not exceeding six strokes or any combination of the above (Commissioner of Law Revision 2006c: 17).

Sexuality rights as human rights

There is thus a disjunction between legislation on marriage and sexual relations in Malaysia and sexuality rights globally. The World Health Organisation (WHO) defines "sexuality" as:

a central aspect of being human throughout life [that] encompasses sex, gender identities and roles, sexual orientation, eroticism, pleasure, intimacy and reproduction. Sexuality is experienced and expressed in thoughts, fantasies, desires, beliefs, attitudes, values, behaviours, practices, roles and relationships. While sexuality can include all of these dimensions, not all of them are always experienced or expressed. Sexuality is influenced by the interaction of biological, psychological, social, economic, political, cultural, legal, historical, religious and spiritual factors (WHO 2010).

Sexuality is encompassing and constitutes an integral component of one's personhood. Related concepts such "sexual health" (holistic well-being in relation to sexuality) and "sexual rights" (the right to gender equality and equity regardless of a person's sex, gender and desire) are premised on the integrity accorded to a person's sexuality. Accordingly, the Yogyakarta Principles (International Commission of Jurists, 2007), the most incisive sexuality rights as human rights document, outlines 'Principles on the application of International human rights law in relation to sexual orientation and gender identity'. It affirms the full range of rights that is in line with such an understanding and practice of sexuality as all-encompassing. And it recognises the plurality and fluidity of one's "gender identity"¹ and "sexual orientation".² These rights include: the right to universal enjoyment of human rights, the right to equality and non-discrimination, the right to recognition before the law, the right to security of the person, the right to privacy, the right to freedom from arbitrary deprivation of liberty, the right to social security and to other social protection measures, the right to found a family, the right to participate in public life, etc.

'To marry, or not to marry, that is the question'

Within the local socio-legal framework and the global discourse of sexuality rights as human rights, I now proceed to discuss the significance of the same-sex marriage debate in Malaysia: the importance of marriage equality and in the next section, the need to go beyond that.

Given the prohibition of same-sex marriage in Malaysia, when it happens and involves Malaysians, it is highly newsworthy.³ These same-sex marriages that the media highlighted, include: Malaysia-born forty-something Ngeo Boon Lin who is a pastor who returned to Malaysia (from the US) with his African-American husband Phineas Newborn III to celebrate their wedding with the customary dinner reception for family and friends (The Associated Press 2012); the "gay marriage" between a Malay-Muslim, Ariff Alfian Rosli and his lover in Ireland (known only as Jonathan), in a civil court which caused an internet controversy (Yow 2011); and the only lesbian case involving Thomas and Apple, both in their 20s, who "had a traditional Chinese tea ceremony and wedding banquet for 400

guests" to solemnize their union as the tea ceremony is "regarded to be a quintessential Chinese wedding tradition" (News Editor 2011).

The media representations of these same-sex marriages are significant because they make visible what is essentially a highly sensitive therefore silenced topic in Malaysia. In doing so, they break the silence that surrounds the topic of sexuality rights in Malaysia. The breaking of silence unleashes diverse viewpoints that in turn, enable Malaysians to critically reflect on the conservatism in the country and homophobia directed at GLBTIQ persons. To illustrate, in the case of the pastor, he was accused of potentially promoting "extremism" especially among Malay-Muslims and authorities were urged to prevent his homecoming to Malaysia to celebrate his marriage. This follows the Prime Minister's speech who maintained that GLBTIQ persons exhibit behaviour that is part of a "deviant culture" that should not have any place in the country" (The Associated Press 2012). In the case of Ariff who is himself a Malay-Muslim, backlash turned unto hate speech when the photo of himself and his lover went viral over the internet. He was labelled a "disgrace" and told to "rot in hell", that looking at his wedding photos, made another "want to vomit". Others who were more 'compassionate' urged him to come home so that he could be "saved" having "strayed from the teachings of Islam" in diverting from the "true and noble (read straight) path" (Yow 2011). In response, pastor Ngeo says, "It's my right to celebrate my joy with the people I care about...The government can make noise, the religious conservatives can make noise, but they're not welcome here" (The Associated Press 2012). And Ariff replies his attackers: "I just want to get by without upsetting anyone or causing any trouble. My overriding concern is for my family" (Yow 2011).

'To marry, or not to marry, that is not the only question'

Breaking the silence on a taboo topic and non-legal (same-sex marriages) or 'criminal' sexuality practices (gay and lesbian sex) is important as "silence is what feeds the beast of oppression" says, Pang Khee Teik, a key sexuality rights advocate (Leach 2012a). But that alone is inadequate and needs to be supported by other strategies. In this sense, to marry or not to marry is not the only question.

Firstly, sexuality, like race and religion, are heavily politicised in Malaysia. As Jerome Kugan, one of the founding members of *Seksualiti Merdeka* (sexualities festival) states, "We're just waiting for the election to be over...At the moment the government are looking for any opportunity to create a media storm. And we don't want to give them that. So our strategy is to lay low for a while" (Leach 2013a). When sexuality is used as a political tool to advance political careers especially to secure votes among conservative (Malay-Muslim) groups in Malaysia, GLBTIQ persons, already marginalised are an easy target. The Deputy Prime Minister says that "LGBT rights activists are 'poisoning' the minds of Muslims" (Leach 2013b) and "LGBT people need counselling" to "'curb' LGBT 'spread'" (Leach 2012a). Others have called for a gay rehabilitation centre to "'combat' homosexuality" as it is a "'disease' that will destroy Malaysia" (Leach 2012b) as well as "secular laws" to outlaw same-sex marriage altogether for all races and religions (Potts 2013). A counter measure, as Pang states (founder of the banned *Seksualiti Merdeka* in 2011), is an educational "sensitisation workshops for anyone who wants to understand sexual orientation and gender identities better" and that these are founded on "human rights principles (e.g. Yogyakarta Principles) and scientific knowledge" (Leach 2012b). As these media texts show, homophobia is "state-sanctioned" (Leach 2012a) – it is the government that is leading anti-homosexual campaigns – so a comprehensive sensitisation education should involve politicians and religious leaders to re-orientate their biases and fear of GLBTIQ persons and their sexualities.

Secondly, legalising, not just de-criminalising same-sex marriage is inadequate if other rights for GLBTIQ persons are not safeguarded. As sexuality is a "central aspect of being human throughout life" (WHO 2010), the full ambit of sexuality rights should be affirmed rather than isolated rights. As stated in the Yogyakarta Principles, this includes the "right to recognition everywhere as a person before the law [where persons] of diverse orientations and sexual identities shall enjoy legal capacity in all aspects of life" (Principle 3, International Commission of Jurists, 2007: 11-12). But it also extends and is interrelated to 28 other principles (some of which are listed above). As such, as Jackson Yee comments, "the idea of getting two men into marriage or union without affording them [the right] to enjoy sexual pleasure of which is an offence under 377 of penal code, would just defy the meaning of any mentioned possible union of two" (Yee 2012). When asked to comment on Vietnam's "abolishing a ban on same-sex marriage" which many consider as ground-breaking (Bloomberg 2015), S. Thilaga, co-founder of Justice for Sisters,⁴ she says:

It's great that those who want to get married now have a nearer option to do so. However, the condition in Malaysia is completely hostile, so I don't understand how people getting married abroad would help to solve that...Marriage should not be the only definition of victory for the gay community. There is still bullying in schools and hate crimes, so people still can't express themselves openly (Tam 2013).

Thilaga's viewpoint is noteworthy as Vietnam's new marriage law may now recognise same-sex marriages but its government still "does not recognise [same-sex couples] or provide legal protections in cases of disputes" (Bloomberg 2015). So an appropriate, effective and meaningful strategy is that which leads to substantive justice: where a holistic legal reform, premised on the full breadth of sexuality rights in recognition of all gender identities and sexual orientations, is aimed at. Another viewpoint is given by Pang who says, those who support "marriage equality...it is a sign of progress" (Tam 2013). But for him, "there are many who see marriage as nothing more than a social pressure to marry, a legal officiation of a personal relationship". So he argues that, the issue "transcends sexuality as legal economic and social privileges afforded to married people create an inequality between married and unmarried individuals that many no longer question". He adds that, "it is not the most important right...whether gay or straight... [as] the state has no business regulating private relationships". Regulating the sexuality of its citizens and privileging the heterosexual subject and heterosexual marriage for the sake of the nation's sustainability and progress, is what Michel Foucault in *The History of Sexuality*, terms as the "technology of sex" (1990: 123). In Malaysia, as it is in most of the other Southeast Asian countries,⁵ Foucault's "technology of sex" is prevalent as heterosexism remains the basis of governance, legal and judicial systems.

Conclusion

To synthesise the discussion above, media representations of marriage equality are important as they break the silence on a taboo topic. And when different viewpoints are heard especially those of sexuality rights advocates, the silent majority (or the public) have an opportunity to critically reflect on anti-homosexual campaigns and hate speeches by the very people who are given the responsibility to protect rather than harm. They can then begin to assess for themselves the legitimacy of these different viewpoints – which viewpoints are based on fear and prejudice and which are based on acceptance and human rights for all. Hopefully, they can, in time, recognise that the concerns of GLBTIQ persons should concern them as fundamentally, all humans are interconnected and the government is equally capable of suppressing "LGBT and freedom of religion movements" (Zurairi 2013).

However, marriage equality is not the only or most important sexuality right as the full ambit of sexuality rights as human rights must be affirmed. This includes the right to self-determination – where couples and individuals are able to freely decide for themselves if marriage is the best or most desirable option for them. The legal reform that is needed is as all-encompassing as the full breadth of sexuality rights. And the political will to realise that is indispensable given the fact that homophobia – the fear and hatred of GLBTIQ persons – are largely state-sponsored.

In that sense, realistically, Malaysia has far more to go. Such conversions of the heart and holistic legal reform that can only come about with sincere political will and meaningful strategies that lead to substantive gender-sexual justice for all, seem impossible goals to reach. Where the concept of marriage equality is still perceived as “liberal, western-style human rights” that runs counter to Islamic Law (Malay Mail 2014), many will continue to resist adopting any sexuality rights on that flawed basis. But there are individuals who know that this is a “false choice” (Nayak 2013) or who have reconciled these seemingly opposing truths (Matsuoka 2007) - universalism (sexuality rights as human rights) and cultural relativism (e.g. Islamic fundamentalism or Asian values). It is thus fitting to conclude with Pang Khee Teik who is an example of such an individual, whose vision holds more hope and promise for all:

I long for the day when people are simply given the choices to determine who they are, who they love and who they want to tell that to, while their families and communities are allowed to support them. And that together, we are recognised through our love for each other rather than our hate (Tam 2013).

Endnotes

¹ “Gender identity” (International Commission of Jurists, 2007: 6) refers to:

each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

² “Sexual orientation” refers to: “each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender” (International Commission of Jurists, 2007: 6).

³ There are alternative models of ‘marriage’ that are practiced by same-sex or different sex couples in other countries and these include: “domestic partnership, civil partnership, registered partnership, civil union and reciprocal beneficiary” (Yee 2012). In Malaysia, the understanding and practice of same-sex partnerships are fluid and some of these models may well be adopted in

private. There are also unions solemnized by the GLBTIQ-friendly church, the Good Samaritan Kuala Lumpur (<http://www.gsmalaysia.com/>).

⁴ Justice for Sisters is a grassroots campaign that aims to create awareness of the violation of rights of *mak nyahs*, male to female transgender persons in Malaysia. For more details, see: (<https://justiceforsisters.wordpress.com/about/>).

⁵ The exception is Thailand that decriminalized homosexuality in 1956 and is drafting a law that seeks to offer GLBTIQ persons "the same legal rights as heterosexual couples" (Tam 2013). But this initiative has stalled with the rise of the military government in May 2014 (Bloomberg 2015). Cambodia, Burma and Laos "have not put the issue on its legislative agenda" says deputy Asia director at Human Rights Watch, Phil Robertson. He add that, the Catholic-majority Philippines is "considering laws to ban same-sex marriage", whilst Indonesia like Malaysia has "entrenched discriminatory views" against homosexuals and in Brunei, "the new penal code sets out that those seeking to be involved in gay marriage could face whippings and long prison sentences".

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