

Rights Demanded by LGBT People: A Preliminary Refutation

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Abstract

The demand for a wider recognition of human rights as envisaged in many international conventions is not only directed to those living in traditional lifestyle, but also groups who are in LGBT relationships. This is reflected in many campaigns around the world for recognition and equal rights for LGBT people despite being opposed by many. Such campaigns could be seen manifested in many United Nations' declarations and documents such as the Yogyakarta Principles. Attitudes towards the campaigns vary greatly in different cultures and countries. While some support LGBT rights, including the legal recognition of same sex marriage, adoption by same sex couple, and anti-discrimination laws, an equally widespread rejection exists in predominantly Muslim nations and in Africa, as well as in parts of Asia and Russia. Opponents in the Muslim world opined that claims made by LGBTs contradict Islamic and moral principles and norms. This article provides an insight and evaluates the intellectual arguments supporting and opposing the recognition of unlimited individual rights of LGBTs by adopting a doctrinal and qualitative analysis of the concept of LGBT and their practices.

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Keywords

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Introduction

LGBT refers to groups of sexual orientation and gender identity or commonly known as same-sex relationships. Lesbian is a term used to describe female-identified people attracted romantically, erotically, and/or emotionally to other female-identified people. Meanwhile, gay is a term used in some cultural settings to represent males who are attracted to males in a romantic, erotic and/or emotional sense. Subsequently, bisexual is a person who is emotionally, physically, and/or sexually attracted to males or men and females or women. This attraction does not have to be equally split between genders and there may be a preference for one gender over others.¹ Transgender is a person who lives as a member of a gender other than that expected based on anatomical sex.²

Previously, same-sex relationship was not given a legal recognition as it cannot fit into the systems that are predominantly designed for heterogeneous couples. Therefore, the struggle to gain endorsement for their rights has led LGBT people to seek for legal recognition, both internationally and domestically. They demand that the meaning of human freedom as enshrined in Article 1 UDHR must be liberally interpreted as to include all forms of human relationships. Such a demand is reiterated in the statement on human rights

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1. Eli R. Green and Eric N. Peterson, "LGBTQI Terminology," 2–6, available at <http://www.lgbt.ucla.edu/documents/LGBTTerminology.pdf> (accessed October 28, 2014).
 2. The aetiology of this condition remains uncertain. It is now generally recognised as a psychiatric disorder, often known as gender dysphoria or gender identity disorder. It can result in acute psychological distress. Mary Welstead, *Reshaping Marriage and the Family: The Gender Recognition Act 2004 and the Civil Partnership Act 2004* (Cambridge: Cambridge University Press), 186.

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and sexual orientation and gender identity (SOGI) which is the French-Dutch-sponsored Declaration and read in the United Nations General Assembly by Argentina on 19 December 2008. These States called for the enjoyment of human rights without distinction of any kind, such as race, colour, sex, language, religion, politics, or other opinions, national or social origin, property, birth or other status, as set out in article 2 of the International Covenants on Civil and Political, Economic, Social and Cultural Rights, as well as in article 26 of the International Covenant on Civil and Political Rights. They also emphasised the principle of non-discrimination which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity.

Another reaffirmation of non-discrimination relating to SOGI has been stated in Yogyakarta Principles³ which provide binding international legal standards that require the States' compliance. The Yogyakarta Principles were drafted and developed at a meeting at Gadjah Mada University, Indonesia from 6–9 November in 2006.⁴ The principles are intended to be the universal guide or international principles to address the so-called abuse of the human rights of LGBTs. The principles outline the obligation of the States to respect, protect and fulfil the human rights of all persons regardless of their sexual orientation or gender identity.⁵ The concluding document

3. Members of the meeting include 29 distinguished experts from 25 countries with diverse backgrounds and expertise relevant to issues of human rights law. See "The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity," 7, a document available at http://www.rfsl.se/public/yogyakarta_principles.pdf (accessed November 25, 2014).
4. *Ibid.*
5. Michael O'Flaherty and John Fisher, "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles," *Human Rights Law Review* 8, no. 2 (2008): 207, available at <http://www.asiapacificforum.net/support/issues/sexual-orientation/downloads/yogyakarta-principles/sexual-orientation-gender-identity-and-international-human-rights-law-contextualising-the-yogyakarta-principles-2008> (accessed November 24, 2014).

contains 29 principles adopted unanimously by the human rights experts as well as recommendations to governments, regional inter-governmental institutions, civil society, and the UN itself.⁶ On 27 October 2007, the finalised Yogyakarta Principles was launched as a global charter for gay rights at the United Nations Human Rights Council in Geneva.⁷ The Yogyakarta Principles subsequently were presented at a United Nations event in New York on 7 November 2007 and were co-sponsored by Argentina, Brazil and Uruguay. Human Rights Watch, an international non-governmental organisation that conducts research and advocacy on human rights insisted that the first measure that needed to be taken would be the decriminalisation of homosexuality in 77 countries which still carry legal penalties for people in same-sex relationships, and repeal of the death penalty in the seven countries⁸ which maintain capital punishment for consensus sexual practice.⁹ Human rights and LGBT-rights groups took up the principles, and discussions have been featured in the gay press as well as academic papers and text books.

The grave concern for acts of violence and discrimination based on sexual orientation and gender identity was further shown by the United Nations Human Rights Councils. Upon its resolution 17/19, the Human Rights Council requested

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6. “Yogyakarta Principles,” available at http://en.wikipedia.org/wiki/Yogyakarta_Principles (accessed November 24, 2014).
 7. At the International Lesbian and Gay Association (ILGA) Conference in Lithuania on 27 October 2007, Michael O’Flaherty, an Irish academic human rights lawyer, professor, and a member since 2004 of the UN Human Rights Committee said that, “All human rights belong to all of us. We have human rights because we exist—not because we are gay or straight and irrespective of our gender identities,” but that in many situations these human rights are not respected or realised, and that “the Yogyakarta Principles is to redress that situation.” See the aforementioned “Yogyakarta Principles.”
 8. The countries are Iran, Mauritania, Saudi Arabia, Sudan, United Arab Emirates, Yemen and Nigeria. See O’Flaherty and Fisher, “Sexual Orientation,” 208.
 9. *Ibid.*

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High Commissioner for Human Rights to submit the report¹⁰ of a study on discriminating laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity.

Countries and Organisations in Support of LGBT People

Though the demand includes a number of legal rights, what is actually common in this struggle is to legalise same-sex marriages and repeal discriminatory laws such as the offence of sodomy. Among the earliest countries which have legalised same-sex relationships include the Netherlands, Belgium, Canada, Spain, South Africa, Norway, Denmark, Sweden, Iceland, Finland, United States of America, New Zealand, France, and the United Kingdom. The Netherlands became the first country to legalise same-sex marriage i.e. in 2001. The Dutch Parliament passed the bill permitting same-sex couples to marry before it was signed into law on 21 December 2000 and became effective on 1 April 2001.¹¹ The new law provides that marriage is based on neutrality of sexes. The bill also gives same-sex marriage the same rights, protections and benefits accorded to heterosexual marriage which include the right to adopt a child. In 2003, Belgium made an amendment to its Civil Code to permit the legal recognition of same-sex marriage.¹²

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10. The report dated 17 November 2011 was submitted to the Human Rights Council Nineteenth Session (agenda items 2 & 8) as a follow up and implementation of the Vienna Declaration and Program of Action.
 11. Yuval Merin, *Same Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States* (Chicago: The University of Chicago Press, 2002), 126.
 12. Sean Cahill and Sarah Tobias, *Policy Issues Affecting Lesbian, Gay, Bisexual, and Transgender Families* (Michigan: The University of Michigan Press, 2007), 56.

In 2005, Canada formally legalised same-sex marriage through the Civil Marriage Act¹³ upon the approval of the new national policy by the Canadian Cabinet which considered marriage as a medium to publicly recognise the relationship between two adults.¹⁴ In the same year, Spain legalised same-sex marriage¹⁵ followed by South Africa a year later and Norway in 2009. Other European countries opted for the most extended model of the same-sex unions, i.e. the registered partnership.¹⁶ It has been adopted by Scandinavian countries such as Denmark in 1989, Sweden¹⁷ in 1995, Iceland in 1996, and Finland in 2002. It gives same sex couples the same

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13. The act received royal assent on 20 July 2004, and marked the completion of the final step in a movement to equalise between married and non-married opposite and same-sex couples. See Robin Fretwell Wilson, ed., *Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution* (Cambridge: Cambridge University Press, 2006), 361.
 14. Nurul Jannah binti Muhammad, "The Socio-Legal Aspect of Same Sex Marriage in Malaysian Context," (Master's dissertation, International Islamic University Malaysia, 2010), 35.
 15. Terry R. Lynch, *Gay Marriage: An Equality Too Far* (USA: Terry R. Lynch, 2013), 23.
 16. Linda C. McClain, *The Place of Families: Fostering Capacity, Equality, and Responsibility* (Massachusetts: Harvard College Publication, 2006), 205.
 17. For many years, Sweden has played a proactive role in strengthening and defending LGBT people's enjoyment of their human rights, both internationally and in each country. Sweden is playing an active role to ensure that all countries decriminalise sexual relationships between consenting adults of the same sex. It emphasises the situation for LGBTs in its dialogues with other countries as well as within the framework of the UN Human Rights Council's universal periodic review mechanism. It also took a strong proactive role in efforts to produce the resolution for LGBT's rights that was adopted by the UN Human Rights Council in June 2011. This has led to the placement of LGBT issue on the UN agenda for the first time. The resolution was followed by a report by the UN High Commissioner for Human Rights on legislation that discriminates against LGBT people and violence against them, and by a unique panel discussion on the subject in March 2012 with the participation of Sweden's Hans Ytterberg, former Ombudsman against Discrimination because of Sexual Orientation and expert on LGBT issues. Ministry for Foreign Affairs (Sweden), "Sweden is taking a proactive role in international LGBT efforts," available at <http://www.government.se/sb/d/17191/a/221203> (accessed November 27, 2014).

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package of marital rights, benefits, and obligations¹⁸ but with a few exemptions. Firstly, it does not offer parental rights as provided by marriage and secondly it prohibits the dissolution of marriage in churches. Furthermore, same-sex couples could only register their relationships in civil ceremony.¹⁹

Based on this model, Germany has permitted life partnerships since 2001 while France has provided the *Pacte Civile de Solidarite* and United Kingdom passed the Civil Partnership Act 2004. The Act extends most of the rights and responsibilities of marriage to same-sex couples by offering a civil union type of partnership. Switzerland, Portugal, New Zealand, and Argentina permitted same-sex couples to enter into civil union.²⁰ In the United States, the proponents of same-sex marriage started challenging the constitutionality of states' laws prohibiting such marriage as early as the 1970's. In 1971, the first lawsuit seeking for legalisation of same-sex marriage was filed, i.e., *Baker vs Nelson*.²¹ The court rejected the application made by Richard Jack Baker to obtain legal status for his marriage to James Michael McConnell and ruled that the institution of marriage as a union of man and woman uniquely involving the procreating and rearing of children within the family is as old as the book of Genesis. As such, they did not have the fundamental right to marry.²²

Massachusetts was the first state to officially legalise same-sex marriage, i.e., in 2003. By 2010, another six states followed Massachusetts to officially approve same-sex marriage and they are Connecticut, the District of Columbia, Iowa, Maine, New Hampshire, and Vermont.²³ At present, laws legalising

18. Ibid.

19. Nurul, "The Socio-Legal Aspect," 36.

20. Ibid.

21. Kathleen E. Hull, *Same-Sex Marriage: The Cultural Politics of Love and Law* (Cambridge: Cambridge University Press, 2006), xiii.

22. Kathleen A. Lahey and Kevin Alderson, *Same-Sex Marriage: The Personal & the Political* (Ontario: Insomniac Press, 2004), 22.

23. John Anderson, *Conservative Christian Politics in Russia and the United States* (Oxon: Routledge, 2014), 138.

such a marriage are or will be in effect in more states including California, Delaware, Hawaii, Illinois, Maryland, Minnesota, New Jersey, New York, Rhode Island, and Washington State.²⁴ In early 2011, President Obama instructed the US Attorney General to stop defending Defence of Marriage Act (DOMA).²⁵ Later in July of the same year, the President announced that he would support its abolition, to be replaced by a bill called the Respect for Marriage Bill that would not discriminate on the basis of sexual orientation.²⁶

As for New Zealand, the Parliament on 17 April 2013 gave final approval to a measure that legalises same-sex marriage. The approval made the Pacific Island nation the 13th country in the world to permit gays and lesbians to marry. The measure was signed by the country's governor-general in a process named as royal assent on 19 April 2013. The law was in effect in August 2013 and not only does it legalise same-sex

24. "Gay marriage around the World," available at <http://www.pewforum.org/2013/12/19/gay-marriage-around-the-world-2013/> (accessed November 28, 2014).

25. In the early 1990's, the Hawaii Supreme Court ruled that the state's denial to issue marriage licenses to same-sex couples as unconstitutional and ordered the state to begin issuing licenses to such couples. This ruling raised possibility that Hawaii might lead the way to legalise gay marriages. Conservatives feared that under the 'full faith and credit' clauses of the constitution other states would also have to recognise marriage legitimised in Hawaii, though the state legislature passed a law limiting marriage only to male and female partners. In response, conservative activists began to organise various campaigns to defend traditional marriage. Consequently, US Congress passed and President Clinton signed the Defence of Marriage Act in 1996, which established a federal definition of marriage as a legal union between one man and woman and declared that states will not be required to recognise same-sex marriage performed in other states. In other words, the states have the capacity to make their own decisions on marriage. Dozens of individual states passed similar legislations stating that they will not recognise same-sex marriages performed elsewhere. Fearful that the judges might not enforce DOMA or that the Supreme Court might over-rule local measures, leading Catholic and evangelical conservatives pushed for a constitutional amendment that would define marriage once and for all, and in 2004, President George W. Bush announced the support for the Family and Marriage Amendment. See Hull, *Same-Sex Marriage*, 136.

26. *Ibid.*

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marriage, but it also expands the rights for the couples to adopt children.²⁷

In UK, the Marriage (Same Sex Couples) Bill was introduced into Parliament on 24 January 2013. The Bill went through a number of stages in the House of Commons and House of Lords. The Bill was welcomed particularly by gay rights campaigning group while others opposed the Bill including some members of the House of Commons, leading Muslims and others. After months of debate, on 17 July 2013, Queen Elizabeth II gave her royal assent to the bill. The new law is only applicable to England and Wales as Scotland and Northern Ireland are semi-autonomous and have separate legislative bodies to decide many domestic issues, including the definition of marriage.²⁸ The Marriage (Same Sex Couples) Act 2013 expressly excludes same sex couples, however devoutly Anglican, from this rights to be wed in their local Anglican parish, while still maintaining the right of an opposite sex couple, regardless of any religious affiliation or practice, to be married in an Anglican Church in England or Wales.²⁹

Besides efforts to legalise same-sex marriage, UK law has given recognitions to transgender since 2004 with the formulation of Gender Recognition Act 2004. Similarly to same-sex marriage, Gender Recognition Bill also faced bitter debate in Parliament before it was accorded the Royal Assent. The transgender people who obtain a full gender recognition certificate from a Gender Recognition Panel, consisting of legal and medical experts, will be given treatment for all legal purposes as a member of their acquired gender rather than of their gender at birth.³⁰

What is notable in rights demanded by LGBT people particularly with regard to marriage and having a family is

27. See the aforementioned “Gay marriage.”

28. Ibid.

29. Daniele Gallo, Luca Paladini and Pietro Pustorino, eds., *Same-Sex Couples before National, Supranational & International Jurisdictions* (Heidelberg: Springer, 2014), 191.

30. Welstead, *Reshaping Marriage*, 190.

purely to fulfil the desire of the same-sex attracted couple. Meanwhile the needs and best interest of the children of the marriage seem to be completely ignored. Disclosures made by the children of same-sex marriage³¹ demonstrated that they have been exposed to sexual confusion and sexual experimentation because of the influences they encounter while growing up in their household environments. Besides that, their foremost right to be raised by their own biological parents had also been deprived. The gender of parents matters to ensure a healthy development of the children. By nature, fathers inculcate virtue and sense of duty, enforce discipline, determine boundaries and direction, and set lifelong examples for children. However, fathers are not able to carry children in their wombs, give birth, and breast-feed their babies. It takes mothers to deliver those special duties and nurture their children that cannot be in any way duplicated by fathers. These unique differences provide lifelong benefits to children. It cannot be duplicated by same attracted sex parents playing different gender roles or attempting to substitute for the absent male or female role model in the family. The biological, physiological, psychological and other differences of men and women; fathers and mothers granted by the Almighty are in fact meant for both sexes to protect and complement each other.³²

LGBT Fight for Recognition: Influence and Footing in Malaysia

The struggles of LGBTs to gain recognition at international level also have an influence on domestic affairs. For example, Seksualiti Merdeka (Sexuality Independence) is held annually

31. For instance, see Dawn Stefanowicz, *Out from Under: The Impact of Homosexual Parenting* (Washington: Annotation Press, 2007).

32. Allāh proclaims, “The Believers, men and women, are protectors one of another: they enjoin what is just, and forbid what is evil: they observe regular prayers, practise regular charity, and obey Allah and His Messenger. On them will Allah pour His Mercy: for Allah is Exalted in Power, Wise.” *Al-Tawbah* (9): 70.

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in Malaysia since 2008 to create awareness on human rights of people and communities of different sexual orientations and gender identities. The banning of the event in 2011 was considered as intensifying hostility towards the lesbian, gay, bisexual, transgender, intersex, and queer (LGBTIQ) community in Malaysia. The government in particular had been criticised as making effort to politicise issues regarding sexual orientations and gender identities and at the same time encouraging hatred, stigmatisation, discrimination, and persecution of LGBTIQs.³³

The following step taken by local LGBT rights defenders, in particular, the Coalition of Malaysian NGOs in the UPR Process (COMANGO) was the preparation of a report which became the lobbying resource and basis for the Malaysian Universal Periodic Review (UPR) in October 2013. The UPR is a mechanism for reviewing human rights records and performances of all 193 UN Member States. The Member States involved in this review consist of a four-year cycle. Amongst the issues or demands contained in the COMANGO's 11 March 2013 report were the ratification of certain international human rights such as the treaty of the International Covenant on Civil and Political Rights (ICCPR), including the ones that allow unbridled freedom of religion, ratification of International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD), recognition of SOGI rights as human rights by Malaysia, denial of right to privacy, the stifling of the inter-and intra-religious freedom in Malaysia, etc. Issues highlighted in the report come together with certain recommendations. For example, for SOGI rights, the recommendations include the repeal of S377A of the Penal Code which criminalises consensual anal and oral sex;

33. Knowledge and Rights with Young People through Safer Spaces, Seksualiti Merdeka, Justice for Sisters and PT Foundation, "Malaysia: Human Rights Violation against Lesbian, Gay, Bisexual, Transgender, Intersex and Queer Persons," March 2013, 1, available at <http://wao.org.my/file/file/Coalition%20of%20Sexual%20Orientation%20and%20Gender%20Identity%20SOGI%20Malaysia%20UPR%202013%20Submission.pdf> (accessed June 12, 2014).

the need for sensitisation and human rights training by the police, religious authorities, prosecutors, and the judiciary; prosecution of offenders who commit violence, particularly against LGBTIQs; the need for amendment and repeal of laws to be in compliance with Yogyakarta Principles and other UN conventions, ratification of ICERD and provision of institutional legal framework for adopting international obligations into domestic laws. As for the right to privacy issue, the report recommended that the Shariah Criminal Act and Enactments that deny the right to privacy be repealed or amended.³⁴ The call for repealing and amending anti-sodomy laws including section 377A of the Penal Code and the various Shariah Enactments is ultimately aspiring to allow same-sex marriage.³⁵

Apart from this, there were cases brought to the courts involving transsexuals, those who underwent sex-reassignment surgery, applying for gender changes in their identification document. Such cases are *J-G v. Pengarah Jabatan Pendaftaran Negara*³⁶ and *Wong Chiou Yong v. Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara*.³⁷ In the recent case of *Muhammad Juzaili bin Mohd Khamis & 2 Ors v. State Government of Negeri Sembilan & 4 Ors*,³⁸ the three accused who were biologically male were charged under section 66 of the Syariah Criminal Enactment 1992 (Negeri Sembilan) for wearing woman's attire and posing as women in a public place. They made an attempt to challenge the validity of the State law of Negeri Sembilan

34. Coalition of Malaysian NGOs in the UPR Process, "Stakeholders Report on Malaysia for the 17th Session in the 2nd Cycle of the HRC's Universal Periodic Review," 9 and 16, available at <http://www.awam.org.my/web/wp-content/uploads/2012/11/Comango-Report-11Mar2013-FINAL-+-Annexure.pdf> (accessed December 3, 2014).

35. Najibah Mohd Zin, "Reservasi CEDAW menurut Perspektif Islam," paper presented at *Seminar Hak Asasi Manusia dan Islam di Malaysia: Teori, Hakikat Semasa, dan Hala Tuju Masa Depan*, November 27, 2013, at Grand Hall, IKIM.

36. [2005] 4 CLJ 710.

37. [2005] 1 MLJ 551.

38. [2015] MLJU 65.

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to the High Court. However, their case was turned down due to lack of jurisdiction. They then appealed to the Court of Appeal on the ground that the conviction under section 66 of the state enactment had caused injustice and humiliation to them as they were suffering from Gender Identity Disorder. Later, in its judgement, the Court of Appeal held that section 66 is void by reason of being unconstitutional and supposedly inconsistent with Articles 5(1), 8(1) 8(2), 9(2), and 10(1)(a) of the Federal Constitution. The judgement, viewed by numerous concerned Muslims as an attempt to recognise transgender people and transexualism in Malaysia, almost immediately garnered international attention to the extent that Human Rights Watch—the US-based rights group which eventually published a report titled “I’m Scared to be a Woman” and addressed human rights abuses against transgender people in Malaysia—gave a special address to the ruling “as an important victory for the rights of transgender people in Malaysia.”³⁹

With due respect to the judgement of the competent court, various parties, including national leaders, legal experts⁴⁰ and practitioners, as well as individuals, voiced out

39. Transgenders, as claimed by the rights group, face worsening prosecution with abuses including arrests and physical and sexual assaults by religious authorities and the police. See Human Rights Watch, “I’m Scared to be a Woman: Human Rights Abuses against Transgender People in Malaysia,” September 2014, 27 and 34, available at https://www.hrw.org/sites/default/files/reports/malaysia0914_ForUpload.pdf (accessed June 20, 2014). See also “Executive Summary,” x–xi, available at <http://www.equalrightstrust.org/ertdocumentbank/execsum.pdf> (accessed January 1, 2015); as well as, “Malaysia: Court Victory for Transgender Rights,” available at <http://www.hrw.org/news/2014/11/07/malaysia-court-victory-transgender-rights> (accessed November 10, 2014).

40. Former Chief Justice of Malaysia, Tun Abdul Hamid Mohamad expressed concern that the judgement will lead to legalising same sex marriage. He also pointed out that there are tendencies amongst judges to make reference to other countries’ Supreme Court such as the U.S. and India, when their constitutions vary from ours. The values that we rate highly are also different from theirs. Thus, our judges should not be influenced by the western interpretation of human rights. This must be given due attention as it will lead them to consider a highly liberal interpretation of constitutional provisions pertaining to liberty or freedom. Abdul Hamid Mohamad, “Hak Asasi Manusia: Penyalahgunaan dan Cabaran kepada Orang Melayu dan Islam di Malay-

their shock and dissatisfaction towards the decision. The State Religious Authorities were also urged to appeal to the Federal Court. There were also calls for certain matters to be given due consideration. Amongst them are the position of Islam as the religion of the Federation as provided in Article 3 (1), the power of the State as provided in Ninth Schedule, State List that is to create and punish offences by persons professing the religion of Islam against precepts of that religion, and the freedom of the Shariah Court as provided by Article 121 (1A) in executing judgement of Shariah offences which lies in the state jurisdictions.

Other important facts that should not be ignored are that Islam is the religion of the state of Negeri Sembilan⁴¹ and the Yang di-Pertuan Besar is the head of the Muslim religion in the state.⁴² As an Islamic state, Negeri Sembilan has the freedom to enact any law to promote its precepts and protect the religion from any doctrine, practices, and life orientation that will endanger the religion of Islam and Muslims as a whole. At the same time, as the head of Muslim religion, the opinion of the Yang di-Pertuan Besar pertaining to the issue and the relevant law should also referred to as well.

Arguments of Supporters of LGBT Rights

The basis for the support for LGBTs as has always been insisted by their advocates and supporters relies on rights

sia,” paper presented in Forum Hak Asasi Manusia dalam Tradisi Islam, Alor Setar, May 7, 2015, available at <http://tunabulhamid.my/index.php/speech-papers-lectures/item/757-hak-asasi-manusia-penyalahgunaan-dan-cabaran-kepada-orang-melayu-dan-islam-di-malaysia> (accessed May 14, 2015).

41. The Laws of the Constitution of Negeri Sembilan, 1959, art. 2, available at <http://www.ns.gov.my/flipbook/TheLawsOfTheConstitutionOfNS1959/files/thelawsoftheconstitutionofns1959.pdf> (accessed November 30, 2014).
42. The Laws of the Constitution of Negeri Sembilan, 1959, art. vi (2), available at <http://www.ns.gov.my/flipbook/TheLawsOfTheConstitutionOfNS1959/files/thelawsoftheconstitutionofns1959.pdf> (accessed November 30, 2014).

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and equality. As the Secretary-General insisted in his speech on Human Rights Day 2010, if there was tension between cultural attitudes and universal human rights, rights must then win the day. To materialise equal rights for and protection for LGBTs, he called for a collective attempt to repeal laws that criminalise homosexuality which allow discrimination on the basis of sexual orientation or gender identity and encourage violence.⁴³

On the same note, Amnesty International stated that regardless of their sexual orientation or gender identity, people should be given opportunities to enjoy their human rights. Although the Universal Declaration of Human Rights does not explicitly mention sexual orientation or gender identity, evolving conceptions of international human rights law include a broad interpretation to include rights and the protection of the rights of LGBT people.⁴⁴

Rights of LGBTs, in particular, gays, to equal treatment was also reiterated by a retired judge,

As we have integrated more and more minorities into the American mainstream, a smaller minority deserves the same consideration. Gay people are not asking others to necessarily accept their choice and they are making no attempt to recruit others to become gay. All that they are requiring is to be given equal treatment from a human rights point of view. As time goes on, the more liberal attitudes of our young people will carry the day. When the change takes place, the United States will become an even

43. Human Rights Council, Annual Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, "Discriminatory Laws and Practices and Acts of Violence against Individuals based on Their Sexual Orientation and Gender Identity," 17 November 2011, 3, available at http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf (assessed November 30, 2014).

44. Amnesty International USA, "About LGBT Human Rights," available at <http://www.amnestyusa.org/our-work/issues/lgbt-rights/about-lgbt-human-rights> (accessed November 11, 2014).

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fairer country to a small minority of its people that deserve equality.⁴⁵

The same sentiment is shared by another author, “The ideal of equal treatment and equal respect for all people regardless of race, ethnicity, sex, sexual orientation, national origin, and religion is an important goal, one that contemporary societies are still working to achieve.”⁴⁶

Meanwhile, supporters of same-sex marriage, who have been fighting vigorously for LGBT rights, stated that same-sex marriages can, and in many cases, do foster the same virtues that any godly or heterosexual marriage should. Such virtues include love, commitment, raising children, taking care of family, and aiding the community.⁴⁷ Other writers defended the changes on the institution of marriage by arguing that it is not a static one; it has changed significantly over time. According to them, a strong institution endures by accommodating social and cultural shifts; a weak one is brittle and easily undermined. Allowing committed lesbian and gay men to enter into marriage will modify the institution of marriage, but it will not undermine it.⁴⁸

It can be seen from the above arguments that the main reason for recognising LGBT rights is to satisfy the needs of individuals despite the fact that the practice challenges the traditional pattern of human relationship and creates other legal challenges. Human desire and lust, in fact, know no limit. It is the role of the religion and sound reason that make man aware of his real nature and guide them to control their

45. Craig B. Brown, *Blind Justice* (North Carolina: Righter Publishing Company, Inc. 2009), 147–8.

46. Barbara MacKinnon and Andrew Fiala, *Ethics Theories & Contemporary Issues* (Stamford: Cengage Learning, 2014), 175.

47. Tricia Andryszewski, *Same-Sex Marriage: Moral Wrong or Civil Right* (Minneapolis: Twenty First Century Books, 2008).

48. Sean Cahill and Sarah Tobias, *Policy Issues Affecting Lesbian, Gay, Bisexual, and Transgender Families* (Michigan: The University of Michigan Press, 2010), 69.

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boundless desire. Humans are not beasts of the jungle who act freely in accordance to their desires. Lustful freedom is only appropriate to animal life but not human.⁴⁹ Such limitless or lawless freedom is well accepted in most western societies. This is hardly surprising as religion plays a minimal role or function in their lives. Nevertheless, the problem facing other societies of the world including Muslims is that this understanding had been aggressively promoted and forced on them by westerners. To address this challenge, it is again the role of religion and its law to keep Muslims on the right path as well as to avoid them from falling into destructions by imitating the lifestyle of those societies.

Countries and Organisations which Do Not Recognise LGBT Rights

As a response to SOGI human rights statement jointly-sponsored by the Netherlands and France and delivered by Argentina on December 2008, the OIC countries stated their opposition. The alternative joint statement read by Syria on behalf of 57 States, questioned the “so-called notions” of sexual orientation and gender identity, suggest that such notions “have no legal foundations in any international human rights instrument.” The OIC countries further questioned the effort to focus on certain persons on the grounds of their abnormal sexual interests and behaviours while ignoring the glaring instances of intolerances and discrimination in various parts of the world whether due to colour, race, gender, or religion. They also highlighted that their opposition was not only based on “concern about the lack of legal grounds, or the said statement delves into matters which fall essentially within the domestic jurisdiction of States counter to the commitment in the United Nation Charter to respect the sovereignty of States

49. Mohd Sani Badron, “Liberty which Befits Human Dignity,” available at <http://www.ikim.gov.my/index.php/ms/the-star/8538-liberty-which-befits-human-dignity>(accessed April 28, 2015).

and the principle of non-intervention . . . more importantly, it arises owing to the ominous usage of those two notions. The notion of orientation spans a wide range of personal choices that expand way beyond the individual's sexual interest in copulatory behaviour with normal consenting adult human beings, thereby ushering in the social normalisation and possibly legitimisation of many deplorable acts including paedophilia. The latter is often suggested to attribute particular sexual interests or behaviours to genetic factors, a matter that has been scientifically rebuffed repeatedly."⁵⁰

The OIC Group on Human Rights and Humanitarian Issues including Malaysia have been consistent in their position towards the rights demanded under the theme sexual orientation and gender identity in Human Rights Council convened in Geneva on 14 February 2012. Those States refused to accept resolution 17/19 pertaining to LGBT rights and withdrew from the panel of rights on the basis of sexual orientation and gender identity.⁵¹

Malaysia reiterated its stance on this issue when denying the demand to integrate LGBT rights in the Declaration of ASEAN Human Rights on 17 and 18 November 2012. The Director of Community Affairs Development, ASEAN Secretariat, Danny Lee, affirmed that the declaration itself is a landmark decision. It will not be an easy task when it involves 10 countries with different constitutions. Total freedom could not be achieved in ASEAN countries as there are multi-religions and ethnicity."⁵²

50. Philip Alston and Ryan Goodman, *International Human Rights: The Successor to International Human Rights in Context* (Oxford: Oxford University Press, 2013), 232. See also ARC International, "UN General Assembly Joint Statement on Sexual Orientation & Gender Identity," 4, available at <http://www.sxpolitics.org/wp-content/uploads/2009/03/unga-statement-backgroundunder.pdf> (accessed December 6, 2014).

51. Azril Mohd Amin, "Semakan Berkala Sejagat: *Universal Periodic Review*, Taklimat kepada Pimpinan NGO Islam berhubung dengan UPR dan ancaman tuntutan COMANGO," available at <http://akarimomar.wordpress.com/2013/09/30/video-taklimat-proses-upr-dan-ancaman-tuntutan-comango> (accessed September 30, 2013).

52. "UPR: Pendirian Malaysia Sebelum Ini," available at <https://akarimomar.wordpress.com/2013/09/28/upr-pendirian> (accessed December 27, 2014).

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The OIC countries demonstrated their position towards LGBT rights in the dialogue held with the High Commissioner for Human Rights, Navi Pillay, in the 24th Session of the Human Rights Council (9-27 September 2013). For example, Pakistan, speaking on behalf of the Organization of Islamic Cooperation, asserted that the organisation had consistently raised its reservations about “controversial” notions that had not been universally agreed, such as lesbian, gay, bisexual and transgender rights. As such, in this respect, the organisation could not support any initiative by the High Commissioner. This statement is further elaborated by Saudi Arabia when it insisted the rights of lesbian, gay, bisexual and transgender people were against Islamic Shari’ah, which is applied in the country.⁵³

Among the world countries and outside the circle of Muslim countries, Russian political leaders and religious leaders obviously exhibited their oppositions towards the relationship between gays, same-sex marriages, and related matters. In his address to Council of Europe, Patriarch Aleksii, the primate of Russian Orthodox Church described homosexuality as a sickness and as a sin compared to theft. He also rejected the idea that human rights could encompass the justification of immoral activity. In addition, he attacked gay pride rallies as effectively propagandising and advertising sin. He even supported the mayor of Moscow, Yury Luzhkov, who frequently made clear his opposition to gay pride marches and explained his decision to ban them every year from 2006. Aleksii suggested that the desire of gays to organise a parade in Moscow would not help strengthen the family as the foundation of a strong state.⁵⁴ These opinions influenced the legislators in around ten regions during 2011–2012 to approve local laws that prohibited the promotion of homosexuality. In June 2013, the State Duma passed a law making the “propaganda of non-traditional sexual relations” among minors as a criminal

53. ARC International, “Reports of the 24th Session of the Human Rights Council,” 2, available at <http://arc-international.net/wp-content/uploads/2013/07/HRC24-Report.pdf> (accessed December 24, 2014).

54. Anderson, *Conservative Christian Politics*, 143.

offence, effectively making it illegal to circulate materials defending gay rights or equating homosexual and heterosexual relations. Signing this into law, President Putin stressed that this was simply aimed at protecting children from such information. Several days later, he also signed into law a ban on same-sex couples adopting or having custody of children, and both of these laws came around the same time as one making it a crime to offend the religious feelings of citizens. Patriarch Kirill of Orthodox Church insisted that serious attempts need to be taken to ensure that sin is never sanctioned in Russia by state law as it would mean that the nation has embarked on a path of self-destruction.⁵⁵

Similarly to advocates of LGBT rights, there are also many works written by opponents of the group. The arguments given by them focused on the importance of marriage and family institution. This is due to the fact that the survival of the society and the nation itself relied on the family institution. It is also well known that it is the moral values and principles that would help strengthen the family institution and, in particular, individuals in the family. One of the writers stated that the reason marriage was singled out for special legal attention is that it is the only human relationship that can produce the next generation of babies as well as connect those babies to both their mothers and fathers. It was understood that at any age getting men and women attracted to the opposite sex into stable marital unions aims at protecting the interests of children and society in a stable social order. The writer further argued that marriage as a universal social institution is grounded in certain universal features of human nature and that when men and women have sexual relationships, they make babies. Reproduction may be optional for individuals but not for societies. Societies that fail to have “enough” babies would fail to survive. Babies are most likely to grow to functioning adulthood when they have the care and attention of both their parents. The writer concluded that marriage

55. *Ibid.*, 145.

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is intrinsically aimed at an enduring, exclusive, sexual union between a man and a woman because managing procreative consequences of human sexual attraction is at the core of its reason for existence.⁵⁶

The importance of marriage and the interest of the children are further urged by another writer. Marriage, according to him has a distinctive place in the civil society. It is a partnership not only between man and woman with the omnipresent creator God but also a contract between the unborn children and society itself. This is so because the family or marriage is the fabric of the society and the traditional values that are taught within are translated in the commitment to civil engagement. Marriage is a fundamental institution and the most stable environment for raising children. Redefining marriage would only make marriage adult-centred rather than child-centred. It would also create all kinds of consequences to the normal formation of children. Besides, it may even physiologically cause injury to children and lead to the decline of marriage in society, more broken families and, as a result, the decline of the birth rate.⁵⁷

Another writer who focuses on the importance of relationship between parents and children argued that same-sex marriage would only contribute to more children growing up fatherless. According to the writer, the encouragement of homosexual relationships that is intrinsic in the legalisation of same-sex “marriage” would thus result in an increase in the number of children who suffer a specific set of negative consequences that are clearly associated with fatherlessness. The writer rejected the argument of homosexual activist which emphasises the importance of having two parents, instead of both a mother and a father as social science research does not

56. Marry Gallagher, “(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppleman,” *University of St. Thomas Law Journal* 2, no. 1 (2004), available at <http://ir.stthomas.edu/cgi/viewcontent.cgi?article=1047&context=ustlj> (accessed December 29, 2014).

57. Lynch, *Gay Marriage*, 8–9.

support this statement. For instance, Dr. Kyle Pruett of Yale Medical School has demonstrated in his book, *Fatherhood*, that fathers and mothers contribute differently to parenting. He also declared that children need to connect to fathers, from deep within their biological and psychological being, and to live life whole. Some lesbian couples are deliberately creating new children in order to raise them fatherless from birth. It is quite striking to read for example the model “Donor Agreement” for sperm donors offered on the Human Rights Campaign website, and to see the extent in which they are legally prepared to go in ensuring that the actual biological father plays no role in the life of a lesbian mother’s child. Remarkably, in a study carried out pertaining to children conceived through sperm donation, 38% of donor offspring born to lesbian couples revealed that it was deliberately wrong to conceive a fatherless child.⁵⁸

With regard to the position of international law and domestic law, a local writer⁵⁹ stated that the latter must be given paramount consideration. There are provisions which prohibit homosexual relationships and acts such as Section 377 of the Penal Code, Section 11 of the Islamic Family Law (Federal Territories), as well as Section 69 of the Law. Furthermore, Reform Act. Section 377 of the Penal Code contains the offences of “carnal intercourse against the order of nature” and “gross indecency.” Section 11 of the Islamic Family Law (Federal Territories) considers marriage as void unless all the conditions according to *Hukum Syarak* are fulfilled as stipulated, and that the marriage must be between a man and woman. On the same note, Section 69 of LRA also considers marriage as void if the parties of the marriage are of same-sex. In other words, both provisions prohibit same-sex marriage. It can be concluded that international treaties or conventions are not legally binding. This is clearly stated in Clause 5 of the Vienna

58. Sprigg, *The Top Ten Harms of Same-Sex Marriage*, available at <http://downloads.frc.org/EF/EF11B30.pdf> (accessed December 29, 2014).

59. Najibah, “Reservasi CEDAW.”

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Declaration and Programme of Action⁶⁰ that the promotion and protection of human rights and fundamental freedoms of States must take into consideration the significance of national and regional particularities and various historical, cultural and religious backgrounds. On a related note also, Azril Mohd. Amin—head of delegation of Muslim NGOs-Observers’ Delegation to Malaysia’s 2013 Universal Periodic Review and Executive Director of the Centre for Human Rights Research and Advocacy (CENTHRA)—is of the opinion that in respect of the LGBT debate, the Muslim agenda must contend that almost all human ethnic and culture groupings at the time of the writing of the UDHR, understood the term “family” to mean the normal, heterosexual basis of the family. Any deviations from this norm would never mean to be included in the usage of the terms of the Declaration.⁶¹

Arguments of Opponents of LGBT Rights

The opposition towards the demand of LGBT people came from voices of various groups of people, nations, and faiths around the world. In other words, it does not only come from certain adherents to faiths such as Islam. As mentioned before, the opponents put forth strong arguments to support their stance. For Muslims, *ḥaqq* (right) is a very serious matter for it is one of the names of Allah and carries the meaning of Truth.⁶² Thus, any right which one claims must be right and based on the truth whereas something which is wrong could

60. Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

61. Azril Mohd Amin, “Beyond Comango’s Demand,” an article available at <http://azrilmohdamin.com/2014/03/01/beyond-comangos-demands/> (accessed December 27, 2014).

62. *Ḥaqq* (right) could be found in several places in the Qur’ān. It carries a variety of meanings which include justice, truth that is opposed to falsehood, a legal claim, an obligation, something that is proven and an assigned portion. In special reference to justice, Islam’s commitment to justice and its advocacy of human dignity could not be sustained without the recognition of rights. Mohamad Hashim Kamali, *Shari’ah Law: An Introduction* (Oxford: Oneworld Publications, 2008), 201.

not be claimed as one's right. Islam's perspective on rights and liberties is different from that of the west. Rights and obligations in Islam are inter-related and reciprocal. Rights are deemed as privileges that one should obtain whereas obligations are duties which one should deliver to others. There is greater emphasis on obligation that is indicative in Muslims leaning of *sharī'ah*. Western jurisprudence otherwise tends to emphasise rights in tandem with its stronger individualist leaning.⁶³

In Islam, there is no dichotomy between individual's aspiration and that of society. It is *sharī'ah* that binds them together and ensures that they share the same life goal. In addition, *sharī'ah* teaches them the true meaning of freedom. Man is considered as having liberty when he is free from ignorance of his own self, God, and his destiny apart from God's purpose for his creation, and what will keep him safe or lead him to destruction in the hereafter. If each and every individual in the society is aware of these important things, they would be hindered from having any conflict among them.

In reference to marriage and family institution, Muslims are taught that they are fully responsible in preserving and protecting them. This is done through the maintenance of healthy family life⁶⁴ and the institution of marriage and provision of penalties for those who corrupt it⁶⁵ and destroy its values.⁶⁶ Family or progeny is one of the five necessities⁶⁷ (*al-darūriyyat al-khamsah*) which are preserved and protected by the *sharī'ah*. Preservation and protection of progeny and family is very important as it also affects other necessities, in particular, the religion (*dīn*). A good, strong, and stable family will surely contribute for the establishment of a strong and contributive

63. Ibid., 201–2.

64. This includes reproduction for it guarantees the continuation of a good progeny.

65. Such as, by committing adultery.

66. Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Petaling Jaya: The Other Press, 2003), 207.

67. The other four necessities are religion (*dīn*), life, intellect, and wealth. Necessary interests are those without the protection of which there would be disorder and chaos in society. Ibid., 199.

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society which in the end may bring benefits to the religion and the people at large, whereas a weak or destroyed family would only harm the society as well as religion.

There is, however no divine guidance as a source of reference for western society. Thus, they depend on the moral standards established by their own hands to address what is right or wrong, and permissible or not permissible. Those moral standards are considered as social constructs, made by people for the people. Unfortunately, as admitted by them, the moral standards keep changing over time and among societies. Those moral or ethical standards are also said to have no divine origin nor derived from any scientific discovery.⁶⁸ As there is no divine interference or influence to determine an act as right and wrong, the human will and desire serve as the main determining factor. As we generally know, every person has his or her own desire which is different from one to another. Besides, the desire which is not guided by God's revelation will only lead human to commit wrongdoings.⁶⁹ All these will only bring countless and endless conflicts in the society.

Conclusion

There is no doubt that every human being must be respected and properly addressed. However the extent of the interpretation of these rights create confusion and conflicts which give rise to different understanding and practices as reflected in the LGBT movements. As the West emphasised on individual rights while Islamic law sanctions on public rights as measurements for legal recognition, the two approaches will never meet. Therefore, preference to protect the public interest must prevail in the formulation of legal rulings rather than individual interest which may differ from one person to another.

68. Urban Jonsson, "Human Rights Approach to Development Programming," UNICEF, 2003, 13 http://www.unicef.org/rightsresults/files/HRBDP_Urban_Jonsson_April_2003.pdf (accessed May 13, 2015).

69. The Qur'ān—in *Yusuf* (12): 53—reminds us that, "...the (human soul) is certainly prone to evil unless my Lord do bestow His Mercy"