THE ANWAR SAGA: SEXUALITY AND POLITICS IN CONTEMPORARY MALAYSIA

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Introduction

Internationally, sodomy laws - originally intended to control non-procreative sexual activity (Feree, 1988) - have been used to target homosexual activity for political purposes since the nineteenth century (Feree, 1988, p. 600; Obendorf, 2006, p. 178; Honen, 1999; A9). While these laws have been repealed in sixty nations - including the United States and Australia - as of May 2008 they still exist in eighty-six states which are members of the United Nations. This piece begins by exploring the factors contributing to the ultimate repeal of sodomy laws in the United States (‘US’) and Australia, as well as the factors militating against the repeal of such laws in Malaysia (Berman, 2008), having first outlined the limitations of comparative legal studies.

This paper then goes on to argue that sodomy laws in Malaysia should be repealed for the same reasons they have been repealed in the US and Australia. Comparison of historical experiences in relation to sodomy laws in all three contexts provides an insight into the evolution of the human rights movement globally. The repeal of these laws in many countries reflects advances in the human rights movement globally, and the increasing recognition that certain key principles of human rights – such as privacy, personal dignity, autonomy and equality – extend to rights regarding lesbian, gay, bisexual, transgender and intersex (LGBTI) people (Long, 2004, pp. 3, 17).

By focusing on one specific example of the deployment of sodomy laws within Malaysia to produce particular political outcomes, this paper examines the way in which issues concerning homosexuality often become entangled with political process. The discussion of one specific case draws upon a range of media articles documented in Appendix 1.1

Limits of Comparative Studies

The author recognises that there are limitations of engaging in comparative methodology. First, laws of each country are shaped by their own particular historical context. Though it is important to recognise the potential utility of law as a means of bringing about social change, it is just as important to acknowledge that a law or principle in a particular jurisdiction can represent distinct historical legal conventions, customary traditions and mores. There are thus limitations with historical accounts. (See, for example, the differences in the historical development of judicial review and the principle of separation of powers in individual countries: Berman, 2006, p. 12; Blackshield & Williams 2006, p.19-28; Yatim 2007, p. 5, 6).

Jansen (2006) has suggested that descriptions and comparisons between laws in domestic and overseas jurisdictions are inherently related to an author’s own impressions and perceptions that produce ‘choices’ (both conscious and subliminal) about what the law is and what the law should be (see also Kennedy, 1986). The author thus acknowledges

1 Articles that appear in the appendix are referred to throughout this paper by the number allocated to them.
that his own subjectivities (race, class, gender, socio-economic background, age, educational experience, sexual orientation, religious upbringing, etc.) shape his impressions about the sodomy laws in each context.

As a white western male, the author also recognises the particular difficulty in advocating a consistent approach to homosexual relations when the comparisons involve western and non-western legal systems. The author is also aware that the issue of 'globalisation' further complicates comparative methodology and advocating legal change brought about by emerging international norms of human rights risks being viewed by non-western countries as a form of colonialism that seeks to impose western neo-liberal values on non-western countries. Globalisation, with all its varied normative understandings in the western and non-western world, has certainly had an impact on all countries in the world (Dannemann, 2006, p. 409, 410).

**International Legislative Change**

The repeal of sodomy laws has been brought about to some extent in Australia and the US due to the international pressures flowing from the emergence and growth of discourse in human rights on a global level (Watt 2006, p. 579-592). One arguable consequence of globalisation is the greater sharing of information via the internet between marginalised communities (such as LGBTI communities) and movements of peoples between nation-states around the globe, resulting in different identities within nation-states and transcending national borders. This has resulted in a broadening of dialogue on issues of human rights and other related fields (e.g., religion, sociology, economics, biology, political science and history) and the initiation of certain basic standards of human rights that extend beyond territorial borders and systems of hierarchy (Cotterrell, 2006, p. 731; Long, 2004; Watt 2006, p. 581). The growing ineffectiveness of using sodomy laws as a political fear-mongering technique is also a testament to the impact of the globalising factors mentioned previously.

Comparisons and calls for uniform laws are accomplished with least difficulty by the comparativist in those situations in which there are not great differences between the legal systems of two countries. Each of the countries in this comparative piece share both similarities and differences in their legal systems. This makes such a comparison both more challenging and fruitful (Dannemann, 2006, p. 409-10).

Australia, the United States and Malaysia have federal systems of government. Australia and Malaysia are both monarchies based on the parliamentary Westminster system. Individual rights are expressly provided for in both the US and Malaysian Constitutions. Unlike the US Constitution, the rights in the Malaysian Constitution are subject to Parliament to uphold morality, public order or national security (Tan, 2007, p. 43-45; Davidson, 1998, p. 102-105; Goodroad, 1999). In addition, differences in historical development and independence from the British Empire mean there are essential discrepancies between these countries. Indeed, values cherished in the legal systems of Australia and the United States, such as separation of powers and judicial independence, have not actually been embraced for over twenty-five years in Malaysia. Differences in historical development help explain why such principles have only rhetorically been supported (Blackshield & Williams, 2006, p. 19-28; Yatim, 2007, p. 5, 6; Berman, 2006; Michaels, 2006, p. 378-380; Dannemann, 2006, p. 389-391).

In Australia, the Commonwealth Parliament passed legislation to comply with its obligations under the International Covenant on Civil and Political Rights (ICCPR), following the momentous decision of the United Nations Human Rights Committee in *Toonen* (see United Nations Committee on Human Rights, 2004), which resulted in the ultimate repeal of the sodomy laws in Tasmania (now repealed *Criminal Code Act 1924* (Tas), s. 112(a), (c)). International legal scholars and highly re-
spected members of the Bench, such as High Court Justice Michael Kirby, have persuasively reasoned that a certain 'transnational jurisprudence' has developed as one aspect of globalisation in most ultimate courts around the globe. This is clear from greater recourse to international human rights law in the process of constitutional interpretation. For example, four decisions of the European Court of Human Rights informed and were expressly relied upon by the majority justices in the landmark US Supreme Court decision in 2003 in *Lawrence v Texas* in which the sodomy laws were ruled unconstitutional (Honan, 1999; A9; Kirby, 2004; Koh, 2002; 2004). The repeal of these laws in the United States and Australia reflects advances in the human rights movement globally, and the growing legislative and judicial recognition that freedom to enjoy one's homosexuality is a key aspect of other basic fundamental human rights (Long, 2004, p. 9, 12).

Malaysia gained independence from the United Kingdom in 1957, and that year the Malaysian Constitution created a monarchy based on the Westminster system (Tan, 2007, p. 43-45; Davidson, 1998, p. 102-105; Goodroad, 1999). The Constitution was amended several times, and although free speech and expression as well as personal liberty, associational freedoms and equal protection of the laws are provided for, these rights can be abridged for a wide range of reasons. This allows for significant restrictions on freedom of expression as parliament can pass laws to suppress speech to maintain morality, public order or national security (Tan, 2007, p. 43-45; Davidson, 1998, p. 102-105; Goodroad, 1999; Fritz & Flaherty, 2003, p. 1373-1374). These restrictions were designed to protect and preserve harmony within Malaysia's multi-cultural, multi-racial and multi-religious population (Harding, 2007, p. 115-133). The Malaysian Constitution has been sufficiently adaptable to changing times, and represents "local, distinctively Malaysian values, historical, political and economic factors and also cultural traditions" (Harding, 2007, p. 115).

Despite Malaysia’s history as a pseudo-secular state (Smith, 2004, p. 361-363; Karean, 2006, p. 49), recently there have been suggestions by the ruling UMNO party that Malaysia is, and/or should formally become, an Islamic State (Harding, 2002; Karean, 2006). Due to the emerging Islamic movement, and the growing influence of the Islamic faith amongst members of the executive, legislative and judicial branches of Malaysian government, the country's pseudo-secular nature has increasingly been questioned. Liberal democracies such as the United States and Australia are committed to the ‘rule of law’ (Blackshield & Williams, 2006, p. 19-28; Yatim, 2007, p. 5, 6; Berman, 2006; Michaels, 2006, p. 378-380; Dannemann, 2006, p. 389-391), a separation of religion and state, free political expression and impartiality and independence of the judiciary. These features of liberal democracies are not evident in some Islamic states, and their manifestation presents a challenge for Malaysia.

Sodomy laws still exist in Malaysia and carry a sentence of up to twenty years’ imprisonment and whipping (Ottoson, 2008). Failure to repeal the sodomy laws in Malaysia reflects the resistance to emerging international human rights norms in domestic jurisdictions, in which political leaders and the judiciary view such developments as encroachments on state sovereignty and national identity (Kirby, 2004).

**The Anwar Saga**

Malaysian sodomy laws were enforced in 1998, in a case lasting over one year, against Anwar Ibrahim, the former Deputy Prime Minister of Malaysia. This was designed to destroy his political career after Anwar disagreed with the economic policies of the former Prime Minister, Mohammed Mahathir, on how to respond to the encircling Asian economic crisis in 1997. Anwar also levelled charges of corruption and cronyism amongst the ruling elite, and demanded a more open-minded and robust media, free from meddling by the few privileged governing leaders (Obendorf, 2006;
In mid-2000, Anwar was sentenced to a nine-year prison term after being found guilty of engaging in acts of sodomy with another male. The prominence of the sodomy trial and subsequent conviction demonstrated the power of vilifying the homosexual ‘other’ through use of the term ‘sodomy’ and all of its associated connotations (Long, 2004; Obendorf, 2006). The conduct of the trial raised genuine concerns about procedural fairness, and highlighted scepticism amongst Malaysians and the international community about the impartiality and independence of the judiciary. The trial and subsequent conviction eroded public faith about the dispensation of criminal justice, thereby undermining confidence in the ability of the judiciary to uphold the ‘rule of law’ (Aun, 2007). Perhaps it was a reflection of political, social and cultural changes that, after serving almost six years in prison, Anwar’s conviction was overturned by two judges of the Federal Court of Malaysia in 2004 (Aun, 2007, p. 286-287; A5). Though finding evidence that Anwar was involved in homosexual activities, the Federal Court of Malaysia overturned the conviction on the basis the violation of the sodomy laws was not proven beyond a reasonable doubt by the prosecution (Aun, 2007, p. 286-287).

Anwar and an opposition alliance (which included his People’s Justice Party) enjoyed a political resurgence in the elections in March 2008. Malaysia’s ruling party had governed since independence in 1957, but in these elections it failed to win a two-thirds majority and the opposition alliance gained control of five states and one third of Parliament (A17; A18; A20). The previous charges and trial of Anwar for sodomy played no role in the recent election, which was decided on other factors including inflation, increasing crime rates and perceptions of corruption (Harding, 2007, p. 120-122). This demonstrated an unwillingness to malign Malaysia’s homosexuals for political purposes. It also demonstrated that the previous trial was insufficient to destroy Anwar’s political aspirations, as the issues that influenced the outcome were the ones he had raised before his conviction. Overturning Anwar’s sodomy conviction and other recent developments in Malaysia also reflect the impact of globalisation and the growing interaction between evolving international human rights norms and domestic attitudes. This may result in a greater tolerance of homosexuality and less of a discrepancy between the rhetoric and reality of liberal democratic legal principles as procedural fairness, judicial impartiality and independence (Aun, 2007, p. 289-290).

Unfortunately, recent developments suggest such conclusions are overstated, at least in the short term. Anwar recently sued (for defamation) a male assistant who filed a complaint with the police over alleged acts of sodomy. Anwar took refuge in the Turkish embassy, fearing assassination and concerned that further trumped-up charges would provoke widespread public outrage and create political instability in the nation (A2; A4; A8; A15; A22; Beach, 2008). Anwar subsequently left the Turkish Ambassador’s residence after receiving government assurances of his personal safety (A21). There had been a ban on Anwar seeking political office until after April 2008. After the disastrous results for the ruling party in the recent elections, Anwar was seeking to enter parliament via a by-election, with the prospect of ultimately becoming the next Prime Minister (A15; A23). As a result of the new allegations, Anwar initially decided to defer a planned announcement to run as a candidate (A6), and asserted that the latest political manoeuvre was “clearly a desperate attempt by the... regime to arrest the movement of the Malaysian people towards freedom, democracy and justice” (A22). He addressed public rallies of more than twenty thousand supporters in early July, and accused the ruling elite of responsibility for many of the problems facing the country, including escalating fuel prices, corruption and lack of compassion (A3; A16; Murray, 2008).

Perhaps due to these developments, Prime Minister Badawi announced he would not
serve his full term. The current Deputy Prime Minister, Najib, would ordinarily become his successor, although his role in the latest attempt to sensationalise allegations of sodomy against Anwar have rebounded on him. Najib has been accused of having an affair with a Mongolian woman who has since been murdered. A close associate of the Deputy Prime Minister has been accused of involvement in the murder of this woman. It has also been suggested in media reports that Najib may have engaged in acts of sodomy (which are non-gender specific in Malaysia) with the murder victim (A19; Berthelsen, 2008). The political opposition filed a motion to debate the issue of the loss of public confidence in the ruling government, although the Speaker refused to allow the motion to be debated (Y-Sing, 2008). The relative lack of concern over the allegations against Najib suggests that the ruling elite in Malaysia believe homosexual acts of sodomy can be used more effectively than heterosexual acts of sodomy as a political ploy.

In late July, Anwar’s wife (Dr Wan Azizah Ismail) the President of Parti Keadilan Rakyat (Anwar’s Peoples Justice Party is commonly known as PKR) stood aside from her seat in Parliament in order to allow Anwar to run in a by-election scheduled for August 26, 2008 (Ting, 2008). Then, on August 7, 2008, Anwar was formally charged in the Sessions Court with sodomy and now faces up to twenty years’ imprisonment (A1). He was released on bail to campaign for the Parliamentary seat vacated by his wife (A1). He was released on bail to campaign for the Parliamentary seat vacated by his wife (A1). In early July, polling data suggested merely 6% of the respondents believed the accusations of sodomy were genuine: a firm majority of Malays believed that the accusations of sodomy were politically motivated. The election results suggest that the new charges of sodomy had little, if any, impact on the outcome of the by-election. Anwar received approximately 66% of the votes cast, notwithstanding alleged attempts to manipulate the outcome of the by-election (A14), and has now been sworn in as a Member of Parliament (and formally appointed as Opposition Leader) (A7). As Anwar observed following his larger than expected victory: “The message is clear, we in Permatang Pauh and in Malaysia, we demand change for freedom and justice ... [w]e want an independent judiciary, we want the economy to benefit the vast majority not the corrupt few…” (Hamid, 2008).

These developments demonstrate there is arguably a continued willingness to use fear of the homosexual ‘other’ for political purposes in an effort to destroy the rising political popularity and aspirations of Anwar. The recent events in Malaysia are retrograde, and in the short term dampen optimism amongst international human rights advocates to foster a greater understanding and respect for the basic international human rights principles of privacy, dignity, autonomy and equality – as reflected in the freedom to form intimate associational homosexual relationships. The events have troubling implications for a more robust political process, which allows dissenting voices to be embraced openly. Advocates of the values in liberal democracies can only hope these events do not spiral down to repeat the mistakes of the past, when principles of procedural fairness, judicial independence and impartiality as well as the rule of law were cast aside to maintain a hold on political power (A15; A23).

Time will reveal whether the hopeful signs of change lacked substance. I am confident that the long-term impact will be to strengthen the movement for greater freedom to enjoy one’s own homosexuality. Public reaction to the recent events certainly provide hope that homosexual fear-mongering is a ploy that seems to have failed. It is unclear whether Badawi’s recent announcement of his plans to step down as Prime Minister and hand over power to the current Deputy Prime Minister will mollify an increasingly dissatisfied populace, and whether Anwar will ultimately prevail in his attempt to realise his political aspirations (A19; Berthelsen, 2008). The factual circumstances in Malaysia arguably reflect ‘the backward looking and the forward looking’ in relation to recognition of freedom to enjoy one’s
own homosexuality as an aspect of basic human rights principles (Kirby, 2004).

Conclusion

As stated earlier in this piece, repealing of the sodomy laws in the US and Australia has been brought about to some extent in both contexts due to the international pressures flowing from the emergence and growth of discourse in human rights on a global level (Watt, 2006, p. 579-592) One arguable consequence of globalisation is the greater sharing of information via the internet between marginalised communities (such as LGBTI communities) and movements of peoples between nation-states around the globe, resulting in a broadening of dialogue on issues of human rights and other related fields, and the initiation of certain basic standards of human rights that extend beyond territorial borders and systems of hierarchy (Watt, 2006, p. 581; Cotterrell, 2006, p. 731; Long, 2004). The growing ineffectiveness of using the sodomy laws as a political fear-mongering tool is also a testament to the impact of the globalising factors mentioned previously.

Dignity, autonomy, and the acceptance of diversity are fundamental aspects of prohibitions on discrimination on the basis of sexual orientation (Long, 2004, p. 17). There should be universal recognition of the rights of all individuals to live their lives free of discrimination and persecution. However, as one comparative methodologist - Roger Cotterrell - has explained, diversity can be confronting between different nations and to groups (whether marginalised or part of the mainstream) within particular nations: “Here the politics of difference becomes a politics of resistance to standardisation and a fierce assertion of identity: the other refuses to disappear: it subsists, it persists, it is the hard bone on which reason breaks its teeth” (Cotterrell, 2006, p. 731) Thus, it is not surprising that the promotion of universal values, such as diversity, is met with resistance.

The repeal of sodomy laws will not result in the elimination of homophobia, which is perpetuated by a complex mix of historical, political, religious and other factors that remain relevant in all three countries. Nonetheless, as with human rights principles generally, it is extremely important symbolically to begin with the repeal of sodomy laws. Addressing homophobia requires multi-disciplinary approaches that transcend changes in the law and include the involvement of, and consultation with, communities to foster a greater understanding and respect for international human rights principles of privacy, dignity, autonomy and equality – as reflected in the freedom to form intimate homosexual relationships (Flood & Hamilton, 2005; Long, 2004, p. 17).

Human Rights Watch has emphasised the importance of beginning a discourse between those seeking to preserve their cultural traditions and those seeking to advance international human rights norms. Advocates of the recognition of freedom with regard to sexual orientation have been resisted because we are arguably at “the most vulnerable edge of the human rights movement” (Long, 2004, p. 2). Human rights campaigners are often portrayed in a variety of discursive fora not as advancers of the virtue of diversity, but rather as outsiders eroding state sovereignty and undermining cultural, religious and communal traditions and mores. Discussions between communities concerned with preserving cultural, religious and communal traditions and those interested in advancing domestic application of international human rights norms regarding sexual orientation will take place, as Scott Long points out, “only if true conservatives, who respect the past because they grapple with its complexities, dismiss the false ideologies of cultural uniformity that exploit sexuality with no other real goal than to reject, exclude and destroy” (2004, p. 17). As Long goes on to suggest:

“Parochialism] not only pits ‘culture’ against rights, it paints a sombre picture of society in which sexuality – and, implicitly, a range of other human experiences – demands continual and restrictive state scrutiny and con-
trol. Against this bleak and onerous vision, rights activists must reassert basic principles of personal freedom; but they must also affirm that human beings require the autonomous enjoyment of their sexualities to lead satisfying, fulfilled, fully human lives... rights activists must see defending sexual rights not as a distraction from their traditional preoccupations, but as a necessary and logical development. Human rights are the possessions of embodied human beings, whose dignity is bound up with the capacity to inhabit and experience their bodies as their own. Everyone deserves the free enjoyment of their sexuality. No one who does not hurt other people should be a prisoner of others' consciences’ (Long, 2004, p. 3).

Like human rights generally, sexual freedoms have come a long way. Nonetheless, they still have a long way to go, as the political abuse of the sodomy laws in Malaysia demonstrates.

**Author Note**

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Appendix 1


