

**IN THE COURT OF APPEAL, MALAYSIA
(APPELLATE JURISDICTION)
PALACE OF JUSTICE, PUTRAJAYA**

CIVIL APPEAL NO. N-01-498-11/2012

Appellants



v.

Respondents

- (1) STATE GOVERNMENT OF NEGERI SEMBILAN
- (2) DEPARTMENT OF ISLAMIC RELIGIOUS AFFAIRS, NEGERI SEMBILAN
- (3) DIRECTOR OF ISLAMIC RELIGIOUS AFFAIRS, NEGERI SEMBILAN
- (4) CHIEF ENFORCEMENT OFFICER, ISLAMIC RELIGIOUS AFFAIRS, NEGERI SEMBILAN
- (5) CHIEF SYARIE PROSECUTOR, NEGERI SEMBILAN

[In the matter of the High Court of Malaya at Seremban, Negeri Sembilan,
Civil Suit No. 13-1-11]

[Plaintiffs

- (1) M [REDACTED]
- (2) S [REDACTED]
- (3) W [REDACTED]
- (4) A [REDACTED]

v.

Defendants

- (1) State Government of Negeri Sembilan
- (2) Department of Islamic Religious Affairs, Negeri Sembilan
- (3) Director of Islamic Religious Affairs, Negeri Sembilan
- (4) Chief Enforcement Officer, Islamic Religious Affairs, Negeri Sembilan
- (5) Chief Syarie Prosecutor, Negeri Sembilan]

Coram:

MOHD HISHAMUDIN YUNUS, JCA

AZIAH ALI, JCA

LIM YEE LAN, JCA

BRIEF JUDGMENT OF THE COURT

Introduction

This is only a brief judgment. A full judgment will be issued in due course.

This appeal is against the decision of the High Court of Seremban of 11 October 2012 that had dismissed the appellants' application for judicial review.

The application for judicial review is for a declaration that section 66 of the Syariah Criminal Enactment 1992 (Negeri Sembilan) ("section 66") is void by reason of being inconsistent with the following Articles of the Federal Constitution, namely, –

- (a) Art. 5(1);
- (b) Art. 8(1);
- (c) Art. 8(2);
- (d) Art. 9(2); and
- (e) Art. 10(1)(a).

The High Court of Seremban had dismissed the judicial review application; hence, the present appeal to this Court.

Background Facts

The three appellants are Muslim men. Medically, however, they are not normal males. This is because they have a medical condition called 'Gender Identity Disorder' ('GID'). Because of this medical condition, since a young age the appellants have been expressing themselves as women and showing the mannerisms of the feminine gender such as wearing women's clothes and using makeups. Indeed, they feel natural being such.

That the appellants are sufferers of GID is confirmed by a psychiatrist from the Kuala Lumpur Hospital; as well as by a psychologist. The evidence of these experts remains unrebutted.

In 1992 the legislature of the State of Negeri Sembilan enacted the Syariah Criminal Enactment 1992 (Negeri Sembilan). Section 66 of this Enactment makes it an offence for any Muslim male person to do any of the following in a public place: to wear a woman's attire, or to pose as a woman. Those convicted can be liable to a fine not exceeding RM1,000.00 or to

imprisonment for a term not exceeding six months or to both. This section makes no exception for sufferers of GID like the appellants. No explanation has been given by the State for this unfortunate omission.

Hence, as a consequence, the appellants have been repeatedly detained, arrested, and prosecuted by the religious authority of Negeri Sembilan acting pursuant to section 66 for cross-dressing.

The injustice and humiliation that they are subject to moved them to apply to the Court for this declaration.

Leave to apply for judicial review was granted on 4th November 2011 by Rosnaini Saub J.

Gender Identity Disorder: Medical Evidence

Diagnosis of appellants by psychiatrist Dr. Ang Jin Kiat

The appellants had been medically examined by one Dr. Ang Jin Kiat, a psychiatrist from the Kuala Lumpur Hospital, a Government hospital.

Dr. Ang's medical reports confirm that the appellants suffer from a medical condition known as 'Gender Identity Disorder' ('GID'). According to Dr. Ang's reports, the 'desire to dress as a female and to be recognized as a female is in keeping with this condition' and there is no 'scientifically proven pharmacological treatment or psychological therapy'. In other words, cross-dressing is intrinsic to the appellants' nature; and that this abnormal condition is incurable.

Dr. Ang Jin Kiat's medical reports are unrebutted by the respondents.

Consultant Psychiatrist's Opinion, by Dr. Deva Dass

Dr. Deva Dass, a Consultant Psychiatrist, by an affidavit, provides further opinion on GID. Dr. Deva Dass states that GID is also referred to as 'Transsexualism', and those who suffer from it are called 'Transsexuals'. He states that GID is not a preference and is ineradicable, and that wearing clothing of the opposite sex occurs among sufferers of GID.

Dr. Deva Dass's affidavit also exhibits excerpts from a medical authority, namely, the **Diagnostic and Statistical Manual of Mental Disorders**, Fourth Edition (DSM IV-TR), published by the American Psychiatric

Association, Washington DC. These excerpts explain the diagnostic features of GID. Gender Identity Disorders are characterized by strong and persistent cross-gender identification accompanied by persistent discomfort with one's assigned sex.

The following excerpts are illustrative:

In boys, the cross-gender identification is manifested by a marked preoccupation with traditionally feminine activities. They may have a preference for dressing in girls' or women's clothes or may improvise such items from available materials when genuine articles are unavailable... There is a strong attraction for the stereotypical games and pastimes of girls..... They avoid rough-and-tumble play and competitive sports and have little interest in cars and trucks or other nonaggressive but stereotypical boys' toys..... More rarely, boys with Gender Identity Disorder may state that they find their penis or testes disgusting, that they want to remove them, or that they have, or wish to have, a vagina.

Adults with Gender Identity Disorder are preoccupied with their wish to live as a member of the other sex. This preoccupation may be manifested as an intense desire to adopt the social role of the other sex or to acquire the physical appearance of the other sex through hormonal or surgical manipulation. Adults with this disorder are uncomfortable being regarded by others as, or functioning,

in society as, a member of their designated sex. In private, these individuals may spend much time cross-dressed and working on the appearance of being the other sex. Many attempt to pass in public as the other sex. With cross-dressing and hormonal treatment (and for males, electrolysis) many individuals with this disorder may pass convincingly as the other sex.

According to Dr. Dass –

The sufferer from this anomaly feels he should have been the other gender – “a female spirit trapped in a male body” – and is quite unconvinced by scientific tests that show him to be indisputably male.

Clinical Psychologist’s Report

Besides the two psychiatrists’ evidence/reports above, the appellants have also tendered a report by one Ms. Vizla Kumaresan; a Clinical Psychologist.

The report confirms that the appellants psychologically identify themselves as women.

Likewise, Ms. Kumaresan’s psychological reports, exhibited in the respective affidavits of the appellants, have not been rebutted by the respondents.

Sociologist's evidence

In further support of the appellants' case, affidavits are also filed by one Professor Teh Yik Koon, a renowned Malaysian sociologist, explaining that a law like section 66 has adverse effects on transsexuals and on Malaysian society.

What the appellants' evidence established

The evidence furnished by the appellants, therefore, establish that GID is an attribute of the appellants' nature that they did not choose and cannot change; and that much harm would be caused to them should they be punished for merely exhibiting a manifestation of GID i.e. cross-dressing.

The legislative competence of the State Legislature of Negeri Sembilan on matters pertaining to the religion of Islam

Article 74(2) of the Federal Constitution read with List II (State List), item 1, of the Ninth Schedule empowers State Legislatures to legislate on matters pertaining to the religion of Islam. The present legislation comes under the sub-item –

... creation and punishment of offences by persons professing the religion of Islam against precepts of that religion ...

However, the exercise of this legislative power is not without constitutional limitations; for, Article 74(3) of the Federal Constitution stipulates that the legislative powers of the States are exercisable subject to any conditions or restrictions imposed with respect to any particular matter by the Federal Constitution.

Laws inconsistent with the Federal Constitution are void.

Article 4(1) of the Federal Constitution declares that the Federal Constitution is the supreme law of the Federation and any law passed which is inconsistent with the Federal Constitution shall, to the extent of the inconsistency, be void.

Part II (Arts. 5 to 13) of the Federal Constitution guarantees the fundamental liberties of all Malaysians.

Reading Art. 74(3) and Art. 4(1) together, it is clear (and this legal position is not disputed) that all State laws, including Islamic laws passed by State

legislatures, must be consistent with Part II of the Federal Constitution (which guarantees the fundamental liberties of all Malaysians).

Section 66 of the Syariah Criminal Enactment 1992 (Negeri Sembilan)

Section 66 is a State enacted Islamic law made pursuant to List II (State List), Item 1, of the Ninth Schedule of the Federal Constitution. The State Enactment was passed by the State Legislative Assembly of Negeri Sembilan on 3rd August 1992 and came into force on 1st June 1993. Section 66 reads:

Bahasa Malaysia version

Mana-mana orang lelaki yang memakai pakaian perempuan atau berlagak seperti perempuan di mana-mana tempat awam adalah melakukan satu kesalahan dan hendaklah apabila disabitkan dikenakan hukuman denda tidak melebihi satu ribu ringgit atau penjara selama tempoh tidak melebihi enam bulan atau kedua-duanya.

English Version

Any male person who, in any public place wears a woman's attire or poses as a woman shall be guilty of an offence and shall be liable on conviction to

a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

Mufti's Opinion

The State in response to the appellants' constitutional challenge, have filed an affidavit by the learned Mufti of the State of Negeri Sembilan. In his affidavit the learned Mufti opines that the prohibition of a male Muslim dressing or posing as a woman is a precept of Islam ('the Mufti's Opinion').

The Mufti's Opinion is tendered to explain that the offence prescribed by section 66 is in accordance with the precepts of Islam.

We wish to make it clear here that whether or not section 66 is consistent with the precepts of Islam is not in issue in the present case. Indeed, this is conceded by Mr. Aston Paiva, the learned counsel for the appellants.

But Mr. Paiva makes a pertinent point, and that is that, the Mufti's Opinion, remarkably, fails to address the issue that is crucial for the purpose of the present constitutional challenge: what is the position in Islam as to the

appropriate dress code for male Muslims who are sufferers of GID, like the appellants?

Whether section 66 is in breach of art. 5(1) of the Federal Constitution

Art. 5(1) of the Federal Constitution guarantees that no person shall be deprived of his life and personal liberty save in accordance with law.

The Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507 has held that –

- (i) other freedoms may be found embedded in the “life” and “personal liberty” limbs of art. 5(1); (at [13])
- (ii) “in accordance with law” in art. 5(1) refers to a law that is fair and just and not merely any enacted law however arbitrary or unjust it may be; (at [20]) and
- (iii) when a law is challenged as violating a fundamental right under art 5(1), art 8(1) will at once be engaged: (at [19])

Infringement of the right to live with dignity

In ***Lembaga Tata tertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi K Perumah*** [2000] 3 CLJ 224 Gopal Sri Ram JCA (as he then was) in delivering the decision of the Court of Appeal explained that the word 'life' in Art. 5(1) includes the right to live with dignity. In his words, (at p. 239) –

... it is the fundamental right of every person within the shores of Malaysia to live with common human dignity.

The learned Judge quotes what Bhagwati J said in the Indian Supreme Court case of ***Francis Coralie v. Union of India*** AIR [1981] SC 746 at p. 753:

But the question which arises is whether the right to life is limited only to protection of limb or faculty or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and commingling with fellow human beings.

Section 66 prohibits the appellants and all other male Muslim sufferers of GID from cross-dressing, and punishes them for any breach of the prohibition. The learned counsel for the appellants argues that the profound effect of section 66 is that the appellants and other GID sufferers are perpetually at risk of arrest and prosecution simply because they express themselves in a way which is part of their experience of being human. The very core identity of the appellants is criminalized solely on account of their gender identity. The learned counsel submitted that section 66 is irreconcilable with the existence of the appellants and all other GID sufferers. A more disturbing effect of section 66 is that it builds insecurity and vulnerability into the lives of the appellants and other Muslim male persons with GID. The existence of a law that punishes the gender expression of transsexuals, degrades and devalues persons with GID in our society. As such, section 66 directly affects the appellants' right to live with dignity, guaranteed by Art. 5(1), by depriving them of their value and worth as members of our society.

We find merit in this argument. As long as section 66 is in force the appellants will continue to live in uncertainty, misery and indignity. They now come

before this Court in the hope that they may be able to live with dignity and be treated as equal citizens of this nation.

We, therefore, hold that section 66 is inconsistent with Art. 5(1) of the Federal Constitution in that the section deprives the appellants of their right to live with dignity.

Therefore, section 66 is unconstitutional and void.

Infringement of right to livelihood/work

There is yet another reason as to why section 66 is inconsistent with Art. 5(1). It has also been established by judicial authorities that the word 'life' in Art. 5(1) means more than mere animal existence: it also includes such rights as livelihood and the quality of life (see ***Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor.*** [1996] 2 CLJ 771 and ***Lee Kwan Woh v. PP*** [2009] 5 CLJ 631 at p. 643 para [14]).

The effect of section 66 is that it prohibits the appellants and other sufferers of GID who cross-dress from moving in public places to reach their respective places of work.

The appellants submit that section 66 has the inevitable effect of rendering their right to livelihood/work illusory, for they will never be able to leave their homes, cross-dressed, to go to their respective places of work without being exposed to being arrested and punished under section 66. Section 66 is therefore inconsistent with Art. 5(1).

Whether section 66 contravenes Art. 8(1) of the Federal Constitution

Article 8(1) of the Federal Constitution guarantees equality before the law and equal protection of the law.

In the present appeal, the object of section 66 is to prohibit all male Muslims from cross-dressing or appearing as a woman in a public place.

But the appellants are male Muslims suffering from Gender Identity Disorder (GID), where the desire to dress as a female and to be recognized as a female is part of the said medical condition; and that there is no scientifically proven pharmacological treatment or psychological therapy for such medical condition.

In this appeal, we accept the appellants' argument that they, as male Muslims suffering from GID, are in a different situation as compared to normal male Muslims. They and the normal male Muslims are not under like circumstances and are thus unequals. Being unequals, the appellants should not be treated similarly as the normal male Muslims. Yet section 66 provides for equal treatment. It does not provide for any exception for sufferers of GID like the appellants. The State, although does not dispute the existence of sufferers of GID among male Muslims such as the appellants, yet does not explain for such a serious legislative omission. In other words, the State and the impugned section simply ignore GID sufferers such as the appellants, and unfairly subject them to the enforcement of the law. As a consequence, section 66 places the GID sufferers in an untenable and horrible situation. They could not dress in public in the way that is natural to them. They will commit the crime of offending section 66 the very moment they leave their homes to attend to the basic needs of life, to earn a living, or to socialize; and be liable to arrest, detention and prosecution. This is degrading, oppressive and inhuman. Thus the inclusion of persons suffering from GID in the section 66 prohibition discriminates against them. Therefore, section 66 is inconsistent with Art. 8(1) of the Federal Constitution as it is

discriminatory and oppressive, and denies the appellants the equal protection of the law.

The Indian Supreme Court has in a number of cases laid down the proposition that Art. 14 of the Indian Constitution (our Art. 8(1)) guarantees that unequal objects, transactions or persons should not be treated equally. Just as a difference in treatment of persons similarly situate leads to discrimination, so also discrimination can arise if persons who are unequals, that is to say, are differently placed, are treated similarly: ***Venkateshwara Theatre v State of Andra Pradesh and Ors*** [1993] 3 SCR 616 at p 637A.

Section 66 is therefore unconstitutional as it offends Art. 8(1) of the Federal Constitution, and is therefore void.

Whether section 66 contravenes Art. 8(2) of the Federal Constitution

Art. 8(2) of the Federal Constitution states that in any law there shall be no discrimination against citizens on the ground of gender.

It is submitted by the learned counsel for the appellants that section 66 is inconsistent with Art. 8(2). The appellants are male Muslims. Section 66 only

prohibits male Muslims from cross-dressing or from posing as a woman in public. But this section does not prohibit female Muslims from cross-dressing as a man or from posing as a man. It is argued that section 66 thus subjects male Muslim persons like the appellants to an unfavourable bias vis-à-vis female Muslim persons. Therefore, section 66 is discriminatory on the ground of gender, and is inconsistent with Art. 8(2).

With respect, we find that there is merit in this argument. We therefore rule that section 66 also violates Art. 8(2) of the Federal Constitution – and is void.

With respect, we are unable to accept the argument of Encik Iskandar Dewa, the learned State Legal Adviser of Negeri Sembilan, that section 66 is ‘personal law’ for the purpose of Clause (5) of Art. 8. This Clause (5) of Art. 8 permits the making of personal laws that discriminate on account of gender or other factors that are enumerated in Clause (2) of Art. 8. It must be appreciated that section 66 is not enacted pursuant to the particular sub-item of Item 1 of List II of the Ninth Schedule that refers to personal law:

... Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts;

Section 66 is in fact enacted pursuant to that particular sub-item of Item 1 of List II that states –

... creation and punishment of offences by persons professing the religion of Islam against precepts of that religion ...

Whether section 66 is inconsistent with Art. 9(2) of the Federal Constitution

Article 9(2) of the Federal Constitution guarantees freedom of movement within the Federation.

Section 66 is explicit in criminalizing any Muslim man who in any public place wears a woman's attire or poses as a woman.

Thus, section 66 cannot be said to merely *restrict* the appellants' freedom of movement. The impact of section 66 is more severe than that: it has the effect of *denying* the appellants and sufferers of GID of the right to move

freely in public places. In effect, the appellants and other Muslim sufferers of GID will never be able to leave their homes and move freely in the State of Negeri Sembilan without being exposed to being arrested and punished under section 66. In other words, section 66 *denies* the appellants and other male Muslim sufferers of GID of their right to freedom of movement.

As such, we accept the argument that section 66 is inconsistent with Art. 9(2) of the Federal Constitution.

However, even if we were to regard section 66 as a *restriction* and not as a *denial* of the right to move freely within the country, still, such restriction, according to judicial authorities (see ***Sivarasa Rasiah***; ***Dr. Mohd Nasir Hashim*** and ***Muhammad Hilman***), must be subject to the test of reasonableness. However, we hold that section 66 is an unreasonable restriction of the appellants' right to freedom of movement – and hence unconstitutional as being inconsistent with Art. 9(2) of the Federal Constitution.

Whether section 66 is in breach of Art. 10(2) of the Federal Constitution

Art. 10(1)(a) of the Federal Constitution guarantees freedom of expression.

A person's dress, attire or articles of clothing are a form of expression, which in our view, is guaranteed under Art. 10(1)(a).

Professor Shad Saleem Faruqi in his book **Document of Destiny, the Constitution of the Federation of Malaysia**, expresses the view that even "symbolic speech" like the manner of one's dressing and grooming can be treated as part of one's freedom of expression.

We find support for the above view from the landmark American Supreme Court case of ***Tinker v Des Moines Independent Community School District*** 393 U.S. 503 (1969) [IAP(2), Tab 73]. In ***Tinker***, it was held that a school regulation which prohibited students from wearing black armbands to silently protest against the United State's Government's policy in Vietnam was violative of the First Amendment to the United States Constitution, which guaranteed free speech: (pg 513 – 514)

Section 66 directly affects the appellants' right to freedom of expression, in that they are prohibited from wearing the attire and articles of clothing of their choice.

Art. 10(2)(a) states that only Parliament may restrict freedom of expression in limited situations; and so long as such restrictions are reasonable.

The State Legislative Assemblies in Malaysia (and this includes the State legislature of Negeri Sembilan) have no power to restrict freedom of speech and expression. Only Parliament has such power. This is confirmed by the Supreme Court in ***Dewan Undangan Negeri Kelantan & Anor. v Nordin Salleh & Anor*** [1992] 1 CLJ 72 (Rep) at 82.

Section 66 is a State law that criminalizes any male Muslim who wears a woman's attire or who poses as a woman in a public place. Hence, section 66 is unconstitutional.

Moreover, any restriction on freedom of expression must be reasonable (see ***Sivarasa Rasiah; Dr. Mohd Nasir Hashim and Muhammad Hilman***). Clearly, the restriction imposed on the appellants and other GID sufferers by section 66 is unreasonable. Thus, also from the aspect of reasonableness, section 66 is unconstitutional.

National Legal Services Authority v Union of India and others

We accept the submission of learned counsel for the appellants that the issues in the Indian Supreme Court case of **National Legal Services Authority v Union of India and others**, Writ Petition (Civil) No. 400 of 2012 (decided on 15-4-2014) are directly on point with most of the issues herein. On 15-4-2014, the Indian Supreme Court in **National Legal Services Authority v Union of India and others**, Writ Petition (Civil) No. 400 of 2012 [IAP(4), Tab 124] decided on a writ petition filed by the National Legal Services Authority on behalf of the transgender community of India (transgender community), who sought a legal declaration of their gender identity than the one assigned to them, male or female, at the time of birth; and their prayer is that non-recognition of their gender identity violates Art. 14 (our Art. 8(1)) and Art. 21 (our Art. 5(1)) of the Constitution of India (at [2]).

In this case cited the Indian Supreme Court begins by defining transgenders as 'persons whose gender identity, gender expression or behavior does not conform to their biological sex' (at [11]). The Supreme Court considers the nature of 'gender identity' as being 'a person's intrinsic sense of being male, female or transgender or transsexual person' (at [19]). The Court explores a

myriad of international human rights conventions and norms (at [21] – [24]), case laws on transsexuals, and legislation in other countries on transgenders (at [35] – [42]) and rules as follows:

... any international convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into those provisions.....of the Constitution to enlarge the meaning and content thereof and to promote the object of constitutional guarantee (at [53]);

The Court then considers the stigmatization and discrimination faced by transgenders in society (at [55]) before finding that –

- (a) the word ‘sex’ in Art. 15 (**our Art. 8(2)**) of the Indian Constitution includes ‘gender identity’ (at [59]);
- (b) the guarantee under Art. 19(1)(a) (**our Art. 10(1)(a)**) of the Indian Constitution includes the right to expression of one’s gender through dress, and that ‘[n]o restriction can be placed on one’s personal appearance or choice of dressing.....’ (at [62] – [66]); and

(c) Art. 21 (**our Art. 5(1)**) protects the dignity of human life and one's right to privacy, and that '[r]ecognition of one's gender identity lies at the heart of the fundamental right to dignity'(at [67] – [68]).

The Indian Supreme Court, in granting the appropriate directions (at [129]), said:

discrimination on the basis of.....gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution. (at [77]).

In this appeal, we are inclined to adopt the Indian Supreme Court's decision in this case that we have cited.

The learned High Court Judge's Grounds of Judgment

At paragraph 19 of her grounds of Judgment, the learned Judge erroneously speculates as follows:

X

error in HC judgement;
erroneously speaks as follows:

Sek. 66.....adalah bagi mengelakkan kesan negative kepada masyarakat iaitu mengelakkan perbuatan homoseksual dan lesbian yang menjadi punca merebaknya HIV.

At paragraph 22 of her grounds of judgment the learned Judge makes the further disturbing remarks. She said section 66 was enacted –

digubal untuk digunapakai kepada pemohon-pemohon bagi mencegah kemudatan yang lebih besar. Apabila transeksual berpakaian wanita tetapi secara biology adalah lelaki dan mempunyai kelamin lelaki dan oleh kerana mempunyai nafsu, mereka akan terjebak dalam hubungan homoseksual, satu punca HIV" (at [22]).

In our judgment, the above remarks and findings of the learned High Court Judge, with respect, are unsupported by, and contrary to, evidence and is tainted by unscientific personal feelings or personal prejudice.

Whilst on our disturbing observation about prejudice, perhaps it is relevant to highlight here the Malaysian Government's 2010 UN General Assembly (UNGASS) Country Progress Report on HIV/AIDs states:-

(R/P 2(4), p. 667) *"Transgendered person or transsexuals are labelled as sexual deviants and often shunned by society in Malaysia. As a result of such stigmatization and discrimination, the majority of those in this community are unable to obtain employment and thus end up doing sex work".*

In the present case, we note with much disquiet that the learned Judge seemed particularly transfixed with '*hubungan homoseksual*' in her reasoning. We wish to stress here that such reasoning is without basis and is grossly unfair to the appellants and other male Muslim sufferers of GID. The present case has absolutely nothing to do with homosexuality. As what we have said earlier, this case is about male Muslim persons with a medical condition called Gender Identity Disorder (GID). But, unfortunately, there was a complete failure on the part of the learned Judge to appreciate the unrebutted medical evidence before her.

In paragraph 24 of the grounds of judgment the learned High Court Judge concludes that –

Falsafah Peruntukkan Sek. 66 adalah untuk mencegah kemudaratan yang lebih besar kepada masyarakat, maka ianya mengatasi kepentingan peribadi atau kebebasan peribadi tertuduh".

With great respect, we accept the submission of the learned counsel of the appellants that such a conclusion renders constitutional adjudication and the role of the Judiciary as protectors of the Constitution illusory. As well put by Mr. Aston Paiva –

The Constitution exists precisely so that the minority cannot be subject to the tyranny of the majority.

Whether male Muslim GID sufferers are persons of unsound mind

With respect, we are unable to accept the submission of Encik Iskandar Ali, the learned State Legal Advisor of Negeri Sembilan, that section 66 is not prejudicial to the appellants as they are persons of unsound mind and hence entitled to the defence accorded by section 11 of the Syariah Criminal Enactment 1992 (Negeri Sembilan) the wordings of which are similar to section 84 of the Penal Code. Our short answer to this is that in the absence of medical evidence it is absurd and insulting to suggest that the appellants and other transgenders are persons of unsound mind.

Conclusion

We hold that section 66 is invalid as being unconstitutional. It is inconsistent with Arts. 5(1), Art. 8(1) and (2), Art. 9(2), and Art. 10(1)(a) of the Federal Constitution.

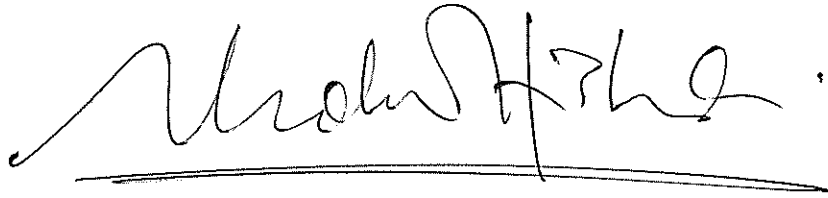
The appeals are allowed.

We, therefore, grant the declaration sought in prayer B (1) of the Judicial Review application but in the following terms: that section 66 of the Syariah Criminal Enactment 1992 (Enactment 4 of 1992) of Negeri Sembilan is inconsistent with Art. 5(1), Art. 8(1) and (2), Art. 9(2), and Art. 10(1)(a); and is therefore void.

~~We award costs to the appellants.~~ *Each party to bear their own costs.*

Deposit refunded to the Appellants. Jc

[Appeal allowed; application for judicial review granted; ~~costs to the appellants.~~



(Dato' Mohd Hishamudin Yunus)

Judge, Court of Appeal

Palace of Justice

Putrajaya

Date of decision and brief grounds of judgment: 7 November 2014

Aston Paiva and Fahri Azzat (Messrs Kanesalingam & Co.) for the appellants

Iskandar Ali bin Dewa (State Legal Adviser, Negeri Sembilan) and
Muhammad Fairuz Iskandar (Asst. State Legal Adviser, Negeri Sembilan
(State Legal Adviser's Office, Negeri Sembilan) for the respondents

Suzana Atan, Senior Federal Counsel, for the Attorney-General's Chambers,
as amicus curiae



Farez Jinnah for the Bar Council, as amicus curiae

Nizam Bashir for Human Rights Watch, as amicus curiae

The following are on watching briefs:

PS Ranjan (Malaysian Mental Health Association and Pertubuhan Wanita dan Kesihatan)

Honey Tan Lay Ean (Malaysian Aids Council; PT Foundation Bhd; Women's Aid Organisation (WAO); SIS Forum Bhd-Sisters in Islam; All Women's Action Society (AWAM); Persatuan Kesedaran Komuniti Selangor (EMPOWER)

New Sin Yew (Malaysian Centre for Constitutionalism and Human Rights)