IN THE COURT OF APPEAL, MALAYSIA

(APPELLATE JURISDICTION)

PALACE OF JUSTICE, PUTRAJAYA

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

Appellants

(1) MUHAMAD JUZAILI BIN MOHD KHAMIS

(2) SHUKUR BIN JANI

(3) WAN FAIROL BIN WAN ISMAIL

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, Judicial Review No. 13-1-11]

[Plaintiffs

(1) Muhamad Juzaili bin Mohd Khamis

(2) Shukur bin Jani

(3) Wan Fairol bin Wan Ismail

(4) Adam Shazrul bin Mohd Yusoff

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

FULL JUDGMENT OF THE COURT

Introduction

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.

Their application involves the interpretation of the Federal Constitution; and we pause for a moment here to reiterate that only the superior civil courts established under Part IX (The Judiciary) of the Federal Constitution have the jurisdiction to determine disputes on the interpretation of the provisions of the Federal Constitution. In ***Latifah Mat Zin v. Rosemawati Sharibun & Anor*** [2007] 5 CLJ 253 (the panel comprising Abdul Hamid Mohamad FCJ (as he then was), Arifin Zakaria FCJ (as he then was) and Augustine Paul FCJ) the Federal Court reminds us (at para. [76]) –

> Interpretation of the Federal Constitution is a matter for this court, not the syariah court.

Leave to apply for judicial review was granted on 4th November 2011 by Rosnaini Saub J, but the substantive judicial review application was heard by another Judge.

Gender Identity Disorder: Medical Evidence

Diagnosis of the 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' 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. In the expert opinion of the learned Professor,

> ***Conclusions***
>
> *41. Based on my experiences with the transsexual community in Malaysia, the research findings in my Book and from my study of gender issues as a sociologist, it is my opinion that, in Malaysia, a law like section 66 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 which criminalizes any male person who in any public place merely wears a woman's attire or poses as a woman:-*

I. Stigmatizes transsexuals as deviants and in doing so:-

(a) strips them of their value and worth as members of our society.

(b) affects their ability to freely engage in decent and productive work, and this results in them pursuing sex work as a source of income.

(c) affects the ability for transsexuals to move freely and reside within the borders of Negeri Sembilan without fear of persecution.

(d) affects their well-being, self-confidence and self-empowerment.

(e) impedes awareness-raising among members of society on the problems and troubles faced by transsexuals and how society can play a part in helping them.

II. Adversely affects society by depriving it of an entire class of individuals, that is transsexuals, who could contribute to its well-being.

III. Infringes the privacy of transsexuals by preventing them from making decisions and choices regarding their own bodies.

IV. Infringes the ability for transsexuals to express their identity through speech, deportment, dress and bodily characteristics.

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. Art. 74(2) reads –

> **(2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.**

The present legislation comes under the following sub-item of item 1 of the State List –

... 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. Art. 74(3) provides –

(3) The power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed to any particular matter by this Constitution.

The position of Islam under the Federal Constitution

Islam is declared by Art. 3(1) of the Federal Constitution to be the religion of the Federation.

Religion of the Federation

3. (1) Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.

The meaning of 'Islam' in Art. 3(1) is explained by the Supreme Court in ***Che Omar bin Che Soh v. Public Prosecutor*** [1988] 2 MLJ 55) (the panel comprising Salleh Abas LP, Wan Sulaiman SCJ, Seah SCJ, Hashim Yeop A. Sani SCJ (as he then was) and Syed Agil Barakbah SCJ), as follows (at p. 56):

> There can be no doubt that Islam is not just a mere collection of dogmas and rituals but it is a complete way of life covering all fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial. This way of ordering the life with all the precepts and moral standards is based on divine guidance through his prophets and the last of such guidance is the Quran and the last messenger is Mohammad S.A.W. whose conduct and utterances are revered. (See S. Abdul A'la Maududi, *The Islamic Law and Constitution*, 7th Ed., March 1980.)
>
> The question here is this: Was this the meaning intended by the framers of the Constitution? For this purpose, it is necessary to trace the history of Islam in this country after the British intervention in the affairs of the Malay States at the close of the last century.

After having said the above, Salleh Abas LP, delivering the unanimous decision of the Supreme Court, proceeded to trace the history of Islam after

the British intervention in the Malay States and came to the following conclusion (at p. 56):

> Thus, it can be seen that during the British colonial period, through their system of indirect rule and establishment of secular institutions, Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only. (See M.B. Hooker, *Islamic Law in South-east Asia*, 1984.)
>
> In our view, it is in this sense of dichotomy that the framers of the Constitution understood the meaning of the word 'Islam' in the context of Article 3. If it had been otherwise, there would have been another provision in the Constitution which would have the effect that any law contrary to the injunction of Islam will be void. Far from making such provision, Article 162, on the other hand, purposely preserves the continuity of secular law prior to the Constitution, unless such law is contrary to the latter.

In short, the Supreme Court takes the position that it was the intention of the framers of our Federal Constitution that the word 'Islam' in Art. 3(1) be given a restrictive meaning.

But what is more important for the purpose of our judgment is the fact that Art. 3(4) qualifies the status of Islam in following terms:

...

(4) Nothing in this Article derogates from any other provision of this Constitution.

What Art. 3(4) means is that Art. 3(1) is subject to, among others, the fundamental liberties provisions as enshrined in Part II of 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. The Art. Reads –

Supreme law of the Federation

4. (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka which is inconsistent with this 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. It provides –

> **Liberty of the person**
>
> **5. (1) No person shall be deprived of his life or personal liberty save in accordance with law.**

The Federal Court (the panel comprising Richard Malanjum CJ (Sabah & Sarawak), Zulkefli Makinudin FCJ (as he then was) and Gopal Sri Ram FCJ) 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 para. [13] of the judgment);

(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 para. [20] of the judgment); 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 para. [19] of the judgment)

Infringement of the right to live with dignity

In ***Lembaga Tatatertib 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 (the other members of the panel comprising Siti Norma Yaakob JCA (as she then was) and Mokhtar Sidin JCA) 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 necessaries 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. In ***Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor.*** [1996] 1 MLJ 261 Gopal Sri Ram JCA,

in delivering the majority judgment of the Court of Appeal (the other majority member being Ahmad Fairuz J (as he then was); NH Chan JCA dissenting) said (at p. 288) –

> Adopting the approach that commends itself to me, I have reached the conclusion that the expression 'life' appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment.

The above principle was approved by the Federal Court (the panel comprising Richard Malanjum CJ (Sabah & Sarawak), Hashim Yusof FCJ and Gopal Sri Ram FCJ) in ***Lee Kwan Woh v. PP*** [2009] 5 CLJ 631 where Gopal Sri Ram FCJ in delivering the judgment of the Court said (at p. 643 para [14]) –

> **[14]** When art. 5(1) is read prismatically and in the light of art. 8(1), the concepts of 'life' and 'persona liberty' housed in the former are found to contain in them other rights. Thus, 'life' means more than mere animal existence and includes such rights as livelihood and the quality of life (see ***Tan Tek Seng***'s case).

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. This Art. provides –

> **Equality**
>
> **8. (1) All persons are equal before the law and entitled to the 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. In Venkateshwara ***Theatre v State of Andra Pradesh and Ors*** [1993] 3 SCR 616 at p 637A the Supreme Court of India held –

> Just as a difference in treatment of persons similarly situate leads to discrimination, so also discrimination can arise if persons who are unequals, i. e. differently placed, are treated similarly. In such a case failure on the part of the legislature to classify the persons who are dissimilar in separate categories and applying the same law, irrespective of the differences, brings about the same consequences as

> in a case where the law makes a distinction between persons who are similarly placed. A law providing for equal treatment of unequal objects, transactions or persons would be condemned as discriminatory if there is absence of rational relation to the object intended to be achieved by the law.

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. The Article reads –

> (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishment or carrying on of any trade, business, profession, vocation or employment.

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 in public. 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)(a) of Art. 8. This Clause (5)(a) 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 states:

(5) This Article does not invalidate or prohibit –

(a) any provision regulating personal law;

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 ...**

Thus section 66 is not personal law.

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. It provides –

Prohibition of banishment or excluded from the Federation

9. (1) ...

(2) Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.

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 male 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 v. Menteri Dalam Negeri Malaysia*** [2007] 1 CLJ 19; and ***Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors*** [2011] 9 CLJ 50), 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. It provides –

> **Freedom of speech, assembly and association**
>
> **10. (1) Subject to Clauses (2), (3) and (4) –**
>
> **(a) every citizen has the right to freedom of speech and expression;**

...

(2) Parliament may by law impose –

(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence.

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 States 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:

> Next it must be observed that Article 10(2) of the Federal Constitution provides that only Parliament may by law impose those restrictions referred to in Article

10(2), (3) and (4) of the Federal Constitution. Therefore even if any such restriction purported to have been imposed by the Constitution of the State of Kelantan was valid, and it is not, it is clear that the restriction could not be imposed by a law passed by any State Legislature. That would be another ground why Article XXXIA of the Constitution of Kelantan should be invalidated.

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 since it is a law purporting to restrict freedom of speech and expression but it is a law not made by Parliament.

Moreover, any restriction on freedom of expression must be reasonable. In ***Sivarasa Rasiah*** the Federal Court held –

[5] The other principle of constitutional interpretation that is relevant to the present appeal is this. Provisos or restrictions that limit or derogate from a guaranteed right must be read restrictively. Take art. 10(2)(c). It says that 'Parliament may by law impose --- (c) on the right conferred by para (c) of cl. (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.' Now although the article says 'restrictions', the word 'reasonable' should be read into the provision to qualify the width of the proviso. The reasons for reading the derogation as 'such reasonable

restrictions' appear in the judgment of the Court of Appeal in ***Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia*** [2007] 1 CLJ 19 which reasons are now adopted as part of this judgment.

(See also ***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 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 para. [2] of the judgment).

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 para. [11] of the judgment). 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 para. [19] of the judgment). The Court explores a myriad of international human rights conventions and norms (at paras. [21] – [24] of the judgment), case laws on transsexuals, and legislation in other countries on transgenders (at paras. [35] – [42] of the judgment) and ruled 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 para. [53] of the judgment);

The Court considers the stigmatization and discrimination faced by transgenders in society (at para. [55] of the judgment) and ruled as follows:

(a) that the word 'sex' in Art. 15 (**our Art. 8(2)**) of the Indian Constitution includes 'gender identity' (at para. [59] of the judgment);

(b) that 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 paras. [62] – [66] of the judgment); and

(c) that 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 paras. [67] – [68] of the judgment).

The Indian Supreme Court, in granting the appropriate directions (at para. [129] of the judgment), held:

> 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 para. [77] of the judgment).

In this appeal, in arriving at our decision we are much guided by the above learned and inspiring judgment of the Indian Supreme Court. In particular, we adopt the following passages in the judgment:

ARTICLE 19(1)(a) AND TRANSGENDERS

[62] Article 19(1) of the Constitution guarantees certain fundamental rights, subject to the power of the State to impose restrictions from exercise of those rights. The rights conferred by Article 19 are not available to any person who is not a citizen of India. Article 19(1) guarantees those great basic rights which are recognized and guaranteed as the natural rights inherent in the status of the citizen of a free country. Article 19(1) (a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which includes one's right to expression of his self-identified gender. Self-identified gender can be expressed through dress, words, action or behavior or any other form. No restriction can be placed on one's personal appearance or choice of dressing, subject to the restrictions contained in Article 19(2) of the Constitution.

[63] We may, in this connection, refer to few judgments of the US Supreme Courts on the rights of TG's freedom of expression. The Supreme Court of the State of

Illinois in the ***City of Chicago v. Wilson et al.,*** 75 Ill.2d 525 (1978) struck down the municipal law prohibiting cross-dressing, and held as follows –

> "the notion that the State can regulate one's personal appearance, unconfined by any constitutional strictures whatsoever, is fundamentally inconsistent with "values of privacy, self-identify, autonomy and personal integrity that ..... the Constitution was designed to protect."

[64] In ***Doe v. Yunits et al.,*** 2000 WL3316 (Mass. Super.), the Superior Court of Massachusetts, upheld the right of a person to wear school dress that matches her gender identity as part of protected speech and expression and observed as follows:

> "by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with the gender. In additional, plaintiff's ability to express herself and her gender identity through dress is important for her health and well-being. Therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her identity."

[65] Principles referred to above clearly indicate that the freedom of expression guaranteed under Article 19(1)(a) includes the freedom to express one's chosen gender identity through varied ways and means by way of expression, speech, mannerism, clothing etc.

[66] Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A transgender's personality could be expressed by the transgender's behavior and presentation. State cannot prohibit, restrict or interfere with a transgender's expression of such personality, which reflects that inherent personality. Often the State and its authorities either due to ignorance or otherwise fail to digest the innate character and identity of such persons. We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognize those rights.

ARTICLE 21 AND THE TRANSGENDERS

[67] Article 21 of the Constitution of India reads as follows:

> **"21. Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law."**

Article 21 is the heart and soul of the Indian Constitution, which speaks of the rights to life and personal liberty. Right to life is one of the basic fundamental rights and not even the State has the authority to violate or take away that right. Article 21 takes all those aspects of life which go to make a person's life meaningful. Article 21 protects the dignity of human life, one's personal autonomy, one's right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans. In ***Francis***

Coralie Mullin v. Administrator, Union Territory of Delhi (1981) 1 SCC 608 (paras 7 and 8), this Court held that the right to dignity forms an essential part of our constitutional culture which seeks to ensure the full development and evolution of persons and includes "expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human beings".

[68] Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender, as already indicated, constitutes the core of one's sense of being as well as an integral part of a person's identity. Legal recognition of gender identity is, therefore, part of right to dignity and freedom guaranteed under our Constitution.

The learned High Court Judge's Grounds of Judgment

At paragraph 19 of her grounds of Judgment, the learned Judge erroneously speculates 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 kemudaratan 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.

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 peruntukan 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. Section 11 states –

Perbuatan seseorang yang tidak sempurna akal

11. Tidaklah menjadi kesalahan apa-apa jua yang dilakukan oleh seseorang yang pada masa melakukannya, oleh sebab akalnya tidak sempurna, tidak berupaya mengetahui keadaan perbuatan itu atau bahawa apa yang dilakukannya adalah salah atau berlawanan dengan undang-undang.

Section 84 of the Penal Code states –

Act of a person of unsound mind.

84. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

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

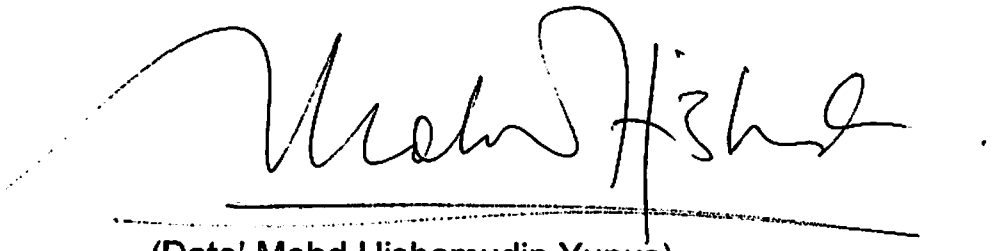
We hold that section 66 is invalid as being unconstitutional. It is inconsistent with Arts. 5(1), Art. 8(1) and (2), Art. 9(2), and Art. 10(1)(a) of the Federal Constitution.

The appeal is 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.

(Appellants' counsel not asking for costs.)

[Appeal allowed; application for judicial review granted; each party to bear own costs.]



(Dato' Mohd Hishamudin Yunus)
Judge, Court of Appeal
Palace of Justice
Putrajaya

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

Date of full grounds of judgment: 2 January 2015.

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

SALINAN DIAKUI SAH

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