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وَتَبَرِّئُكَ رَبِّي بِإِسْلَامٍ أَنْبَاءُ رَجَسْنَا مَلِيئِينَ

THE SOCIO-LEGAL ASPECT OF SAME-SEX
MARRIAGE IN MALAYSIAN CONTEXT

BY

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A dissertation submitted in partial fulfilment of the
requirements for the degree of Master of Comparative
Laws

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ABSTRACT

This dissertation examines the socio-legal impacts of the same-sex marriage; addressing three types of relationships i.e. homosexuals, lesbians and transsexuals. Currently not recognized in Malaysia, however this research is undertaken to identify relevant issues surrounding such relationships especially on matters that relate to human rights. This study is based on the premise that same-sex marriage is harmful and contributes to the damage of family social structure. For this reason, relevant statutory provisions in Malaysia and selected countries will be examined, involving selected literature relevant to the subject and internet materials since access to literature in countries where same-sex marriage have been recognized are limited. This task is accomplished by studying the social and legal problems faced by those who approve same-sex marriage and the issues involved, in order to bring out the justification for any approval or rejection of such marriage. Relevant cases being decided on this matter are also referred to assist this study. This study concludes that same-sex marriage warrants no legal recognition, appreciating the fact that human rights never socially and legally violate the nature and norms of human life, leading to the erosion of society social structure. It is hoped that this research will serve as a contribution in protecting and safeguarding the legal heterosexual marriage since it is a contract that covers both legal and social aspects of human life. Hence any violation of such contract would not only affect the welfare and interest of parties involved, but also of society at large.

ملخص البحث

يتناول هذا البحث على الآثار القانونية المرتبة بزواج مثليي الجنس، ويضرب هذه الأمثال إلى ثلاثة أنواع منها مثليون مثليات الجنس والمتخنث. في العصر الحاضر، لا يُعترف هذا الزواج في ماليزيا، وتركز هذه الدراسة على القضايا القانونية والاجتماعية المختلفة خاصة في مسائل التي تتعلق بحقوق الإنسان. وتستند هذه الدراسة إلى أن زواج مثليي الجنس يؤدي إلى الضرر، ويسهم هذا الضرر في العلاقات العائلية والاجتماعية. ولهذا السبب، بحثت الباحثة على على الأحكام القانونية المتعلقة بها في ماليزيا وبلدان مختارة. ويتكون هذا البحث أيضا عن دراسة مشكل القانونية والاجتماعية التي تواجهها من الذي يوافق على هذا زواج مثليي الجنس والمسائل التي تتعلق بها من أجل إبحاث على الأحكام القانونية سواء كان موافقا أم رفضا. بحثت الباحثة في دراستها أن هذا زواج مثليي الجنس ليس فيه اعتراف عن الأحكام القانونية من حيث القانون والاجتماعي إلا يهلك طبيعة و حياة الإنسان. ومن أجل ذلك، أن يكون هذا البحث مساهمة إلى الآخرين في حماية قانونية عقد زواج مثليي الجنس لأن هذا العقد يؤثر على جوانب القانون والاجتماعي في حياة الإنسانية.

APPROVAL PAGE

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DECLARATION

I hereby declare that this dissertation is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

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Signature

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**THE SOCIO-LEGAL ASPECT OF SAME-SEX MARRIAGE
IN MALAYSIAN CONTEXT**

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*Untuk maa dan abah,
Haji Muhamad bin Othman
Dan
Hajjah Che Dayang binti Che Sulaiman,
Terima kasih atas cinta dan pengorbanan...*

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International Covenant on Civil and Political Rights 1966
Islamic Family Law (Federal Territories) Act 1984 (Act 303)
Minor Offences Act 1955 (Act 336)
National Registration Act 1959 (Act 78)
Penal Code (Act 574)
Syariah Criminal Offences (Federal Territories) Act 1997(Act 559)
Universal Declaration of Human Rights 1948

LIST OF ABBREVIATIONS

A.H.	Anno Hegirae, the Islamic calendar
All ER	All England Law Report
a.s.	<i>'alaihiissalam</i> , peace be upon him
CLJ	Current Law Journal
etc.	And so forth
ECHR	European Convention on Human Rights
FTM	female-to-male
ICCPR	International Covenant on Civil and Political Rights
IFLA	Islamic Family Law (Federal Territories Act) 1984
LRA	Law Reform (Marriage and Divorce) Act 1976
MTF	male-to-female
n.	footnote
r.a.	<i>radiyallahu 'anhu</i> , peace be upon him
SAW	<i>sallallahu 'alaihi wa sallam</i> , peace be upon him
SWT	<i>subhÉnahu wa ta'Éla</i> , glory be to Allah, the Most Exalted
UDHR	Universal Declaration of Human Rights 1948
v.	versus, against

TABLE OF TRANSLITERATION

b	=	ب	z	=	ز	f	=	ف
t	=	ت	s	=	س	q	=	ق
th	=	ث	sh	=	ش	k	=	ك
j	=	ج	Ĥ	=	ح	l	=	ل
Ĥ	=	ح	Ī	=	ط	m	=	م
kh	=	خ	Ĭ	=	ظ	n	=	ن
d	=	د	Ḍ	=	ع	h	=	ه
dh	=	ذ	‘	=	غ	w	=	و
r	=	ر	gh	=		y	=	ي

Short: a = ' i = ِ u = 'ُ

Long: Ê = ا Ê = ي Ë = و

Diphthong: ay = اِ ي aw = اِ و

CHAPTER 1

GENERAL INTRODUCTION

1.1 INTRODUCTION

In June 2008, amid cheers and tears, gay and lesbian couples began tying the knot as a historic court ruling legalizing same-sex marriage in United States' most populous state of California took effect.¹ The truth is, the battle for legal recognition of same-sex marriage is not a new phenomenon. In the Hawaiian case of *Baehr v. Lewin*² in 1993, the court ruled that denying marriage licences to same-sex couples would amount to a violation of State constitutional guarantee of equal protection on the basis of sex.

As the years rolled by, same-sex marriage has now become a global issue. Giving “green light” to the legal recognition of such marriage, the Netherlands made a move ahead by codifying in its Article 30(1) of the Civil Code of the Netherlands that a marriage now can be contracted by two persons of different sexes or of the same sex. In recent years, Norway, Sweden, Iceland and France recognized this type of marriage by another name. Embarking into the same legal voyage, Canada amended its Civil Marriage Act 2005; reformulating the legal definition of marriage as the lawful union of *two persons* to the exclusion of all others.

This gives rise to the question of what is actually meant by same-sex marriage? Why this type of marriage is sought to be given legal recognition around the globe? What is the justification relied by those jurisdiction which legalized it? Speaking in Malaysian context, how Malaysia should respond to this issue? This study

¹“Legacy-ly Married,” *The Sun*, 18 June, 2008, 10.

² 852 P.2d 44 (1993).

hence, undertakes to unravel these questions and provide a discussion on the topic of ‘‘The Socio-Legal Aspect of Same-sex Marriage in Malaysian Context.’’

Same-sex marriage emerges in the new millennium as a part of the evolution in the concept of marriage. Setting in the opposite direction, same-sex marriage seeks to redefine the meaning of marriage; from heterosexual in nature to marriage between two people of the same gender.³ While ‘‘same-sex marriage’’ and ‘‘gay marriage’’ are the most common terms used in media and politics, human rights has been invoked as the most popular defence for legalizing the same-sex marriage worldwide. The proponents of this kind of marriage assert that same-sex couples have the rights to be treated equally, without any discrimination due to their sexual orientation.⁴ They also argue that right to marry is a fundamental constitutional principle extendable to them.⁵

Besides such rights, they also demand for the same rights enjoyed by heterosexual spouses in matters such as housing, employment and public accommodation and other marital benefits like health care insurance and tax breaks. In New Zealand, the legislature in considering the possible options to respond to the demands for recognition of same-sex marriage, classified six categories of recognition; either do nothing; or extend a degree of recognition to cohabitants without any requirement that their association be marriage-like; or recognize same-sex couples for certain limited purposes; or recognize same-sex couples for most or all purposes; or recognize same-sex couples for most or all purposes, subject to a

³Encyclopædia Britannica Online, ‘‘same-sex marriage,’’ <<http://www.britannica.com/EBchecked/topic/753687/same-sex-marriage>> (accessed 16 July, 2009).

⁴They often rely on the non-discrimination guarantee enshrined in Article 2 of the Universal Declaration of Human Rights 1948, Article 26 of the International Covenant on Civil and Political Rights, as well as Article 14 of the European Convention on Human Rights in substantiating their claim.

⁵As provided in Article 16 of the Universal Declaration of Human Rights 1948.

requirement of registration; or alter the definition of marriage to include same-sex couples.⁶

This study is undertaken due to the fact that there were already a few cases involving same-sex marriage occurred in Malaysia, but up to this date, there is no specific research done in response to this issue. The 2007 case of *Mohd Sufian Mohamad @ Mazinah Mohamad* who married a woman definitely caused the public stir. Contracted a marriage by having a forged identity card bearing a name of a male, her same-sex marriage with Zaiton Aziz was ordered to be separated, being an offence under Section 11 of the Islamic Family Law Enactment of Malacca 2002.⁷ Notably, two years prior to that case, *Jessie Chung*, a Malaysian Christian businesswoman who has previously underwent a sex change operation; married Joshua Beh in a wedding ceremony held in Sarawak, despite their failure to obtain marriage certificate from the authorities.⁸

Being a fast developing issue, same-sex marriage causes immense changes in the spheres of laws around the world. Appreciating its significance in relation to the law and society in Malaysian context, this study comes out with the aim of offering an insight how Malaysian law should react to this issue. The demand for legal recognition also brought forward by post-operative transsexuals in Malaysia, to have their acquired sex being reflected in the identification documents. However, judicial

⁶The Law Commission of New Zealand, *Study Paper 4: Recognising Same-sex Relationships*, The Law Commission, December 1999 at 4.

⁷“Marriage void rules court,” *The Star Online*, 4 September 2007, <<http://thestar.com.my/news/story.asp?file=/2007/9/4/courts/18775314&sec=courts>>, see also “Husband a woman court told,” *Malaysian Bar*, 17 July 2007, <http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=9884> (accessed 1 February 2010).

⁸ “Government and Church reject couple’s marriage deemed as unlawful and unholy,” *The National Evangelical Christian Fellowship (NECF) Malaysia*, 15 November 2005, <<http://www.necf.org.my/newsmaster.cfm?&menuid=43&action=view&retrieveid=642>>. See also “Malaysia declares same-sex marriages illegal,” 14 November 2005, <<http://www.freerepublic.com/focus/f-news/1522240/posts>> (accessed 9 March 2010).

decisions' inconsistency in granting such recognition put their status in limbo. This study in probing into same-sex relationships under the Malaysian law will also look at the current status of transsexuals and transvestites.

1.2 STATEMENT OF PROBLEM

Same-sex marriage begins to be openly practiced and legally recognized worldwide with the increased support, founded on the guaranteed fundamental human rights. It is undeniably accepted by most of the Western cultures and norms which acknowledge that such marriage should be conferred the same rights and benefits as enjoyed by the heterosexual spouses. The history of legalization of same-sex marriage in most countries such as Netherlands pointed to the fact that it started with the decriminalization of sodomy, as early as 1811 while Belgium did the same in 1792.

While more and more jurisdictions heading towards granting legal recognition to same-sex couples, it is realistic at this point of time to probe into the question of whether the same-sex marriage is viable in the Malaysian context; appreciating the fact that Malaysian legal and social cultures are of blended nature. Any attempt to remove laws criminalizing sodomy is not without hurdles and obstacles due to strong moral values and religious adherence in Malaysia; a country whose majority of the population are Muslims.

1.3 HYPOTHESES

Revolving around the social and legal areas of same-sex marriage, it is practical to learn from the experience of those jurisdictions that already legalized same-sex marriage in an attempt to fit Malaysian context into the same legal landscape. N

oticing that same-sex marriage is not without flaws and problems, same-sex marriage from the socio-legal aspect is favourably given no place in Malaysia. To the extent of existing laws regulating criminalization of same-sex relationships and family matters are concerned, they are prepared to respond to the issue of same-sex marriage.

1.4 SIGNIFICANCE OF THIS STUDY

1. To identify the relevant issues in same-sex marriage which addresses three types of relationships i.e. between homosexuals, lesbians and transsexuals especially on matters that relate to human rights;
2. To examine the legal and social issues surrounding the same-sex marriage particularly in the jurisdictions which already legalized it;
3. To study relevant statutory provisions in Malaysia and selected countries with regard to same-sex marriage;
4. To provide suggestions and recommendations in relation to this issue.

1.5 LITERATURE REVIEW

In Malaysia, the issues touching on the relationships between persons of same gender; specifically between homosexuals, transsexuals and transvestites are rarely discussed in public. As a result, local publications touching on this matter are scarce. Having said so, reference to the sources concentrating on the socio-legal issues of same-sex marriage from the Western jurisdictions (mainly from the United States, United Kingdom, Australia, Canada and etc), is inevitable. Apart from that, the Islamic texts are also referred in this study.

From social aspect, Sloan⁹ found that Plato came out with the earliest arguments for outlawing same-sex relationship. In his book ‘*Laws*,’ Plato condemned same-sex relationship between men, considering such acts are unnatural on two grounds; firstly it is a degradation for men to allow themselves share lives with a man, whereas it is the proper role of a woman. Secondly, due to its sterility same-sex relationship defeats the nature of marriage that promotes procreation. This social justification is in line with the requirement of marriage to be of heterosexual nature, as propounded by the well known English case of *Hyde v. Hyde*.¹⁰

More or less, the discussion of same-sex marriage centres upon the notion of sexuality as a basis of recognizing such relationship. Kirsch¹¹ noted that, with regard to sexuality, we have in practice distinguished between nature and nurture, the individual and society and culture as against biology. While law and morality often seen as intertwined, Verma¹² opined that any moral principle which can be enforced effectively by means of the legal machinery can take the form of a law; for instance the laws against crimes such as murder, robbery, cheating, adultery and rape are ultimately based on morality principles like non-killing, non-stealing, honesty and chastity. In this sense, it is important for law to regulate sexual conducts including in the issue of same-sex marriage.

In legal literature, same-sex marriage challenges the traditional definition of marriage. Blending the essence of human rights issues (in term of equality and non-discriminatory principle) with the family matters, supporters of same-sex marriage

⁹ Irving J. Sloan, *Homosexual Conduct and Law*, Oceana Publication, 1987 at 1.

¹⁰ (1866) LR 1 P&D 130.

¹¹ Max H. Kirsch, *Queer Theory and Social Change*, (London: Routledge, 2000), 49.

¹² Ved Prakash Verma, ‘Law and Morality: A Philosopher’s Viewpoint,’ vol. 4 No.1 &2 (1984) *Islamic & Comparative Law Quarterly* 92.

reject the heterosexual definition of traditional marriage. McGlynn¹³ opined that the legalization of same-sex marriage is justified based on the premise that the concept of “family” should be expanded beyond its current limited definition; to be in consonant with human rights norms. Stark¹⁴ also pointed out that Article 8 of the European Convention on Human Rights has been held by the European Court of Human Rights in Strasbourg to prohibit the criminalization of homosexual practices between consenting adults, upholding the same-sex couples’ right of privacy including the matter of married life. Notably, the jurisdictions which legalized same-sex marriage had been generously tolerant towards homosexuals; Netherlands pointed to the fact the decriminalization of sodomy had taken place in that country as early as 1811; Belgium did the same in 1792.¹⁵

While same-sex marriage is promoted as a “new concept” to be incorporated into the spheres of family law, it is doubted whether same- sex marriage would serve the best interest of children. Due to the couple’s inability to procreate, adoption is currently made legal to same-sex couples. However, Hansen¹⁶ in a series of writings emphasized that such placement fails to serve the best interest of children since decades of researches show that the ideal family structure for children is a two-parent, mother-father family as provided by traditional heterosexual marriage; children raised in mother-father families have better psychological, mental and physical development.

¹³ Clare McGlynn, *Families and the European Union : Law, Politics and Pluralism*, Cambridge University Press, 2006 at 19.

¹⁴ Barbara Stark, *International Family Law : An Introduction*, Ashgate, 2005 at 37.

¹⁵ Anjuli Willis McReynolds, “What International Experience can Tell US Courts About Same-sex Marriage,” *53 UCLA L. Rev.* 1073, (April, 2006): 8, at www.lexisnexis.com. (accessed 9 November 2009).

¹⁶ Trayce Hansen, “Same-Sex Marriage: Not in the Best Interest of Children,” California Association of Marriage and Family Therapists, May / June 2009, <http://www.drtraycehansen.com/Pages/writings_notinthebest.html>, (accessed 9 November 2009).

In line with her findings, Baldwin¹⁷ and Wardle¹⁸ highlighted the fatal consequence of permitting children to be raised by homosexuals; the lifestyle of homosexuals exposes the children to premature sexualisation, molestation and sexual abuse.

Other writers in voicing their view of disfavouring same-sex parenting, argue that same-sex marriage deprives the child the right to be raised by his or her father and mother. Wardle¹⁹ stressed that while unwed birth and divorce impair that right for some children of conjugal unions, same-sex marriage guarantees that all children who are born during or raised in such unions will be deprived totally of this fundamental moral right. Musselman²⁰ supported the contention, clarifying that all children in same-sex marriage necessarily have a broken link to at least one of their parents, whether because of a previous marriage by one of the partners, artificial insemination or adoption. In a wrap, they contend that same-sex marriage does not serve the best interest of children; a reason why same-sex parenting and childrearing should not be recognized by law.

As a matter of fact, the ability of same-sex marriage in safeguarding the morality and creating a stable relationship is also put to question. Wardle²¹ argued that inserting same-sex marriage into the realm of marriage will cause transformation to the long-defended concept of marriage. With the high rates of promiscuity, infidelity

¹⁷Steve Baldwin, "Child Molestation and the Homosexual Movement," *Regent University Law Review*, <www.mega.nu:8080/ampp/baldwin_pedophilia_homosexuality.pdf>, (accessed 9 November 2009).

¹⁸Lynn D. Wardle, "The "Inner Lives" of Children in Lesbian Adoption: Narratives and Other Concerns," *18 St. Thomas L. Rev.* 511, (Winter 2005): 7-8, at www.lexisnexis.com, (accessed 9 November 2009).

¹⁹Lynn D. Wardle, "The Attack on Marriage as the Union of a Man and a Woman," *83 N. Dak. L. Rev.* 1365. (2007): 5-7, at www.lexisnexis.com, (accessed 5 January 2009).

²⁰James L. Musselman, "What's Love Got to Do With It? A Proposal for Elevating the Status of Marriage by Narrowing Its Definition, While Universally Extending the Rights and Benefits Enjoyed by Married Couples," *16 Duke J. Gender L. & Pol'y* 37, (January 2009): 18, at www.lexisnexis.com, (accessed 9 November 2009).

²¹Lynn D. Wardle, "A Response to the "Conservative Case" for Same-Sex Marriage: Same-Sex Marriage and the Tragedy of the Commons," *22 BYU J. Pub. L.* 441, (2008): 11, at www.lexisnexis.com (accessed 5 January 2009).

and reckless sexual behaviours among the homosexuals as shown by many studies; such insertion will turn such marriage into an institution which is less responsible, less stable, less monogamous, less faithful, and less committed to responsible child-rearing.

The promiscuity of same-sex partners in a larger scale threatens the safety of the society since same-sex relationship is the source of transmission of life-threatening sexual disease particularly AIDS, syphilis, gonorrhoea etc. The HIV/AIDS epidemic has remained a predominantly gay issue in the U.S primarily because of the greater degree of promiscuity among gays. A study (based upon statistics from 1986 until 1990) estimated that 20-year old gay men had a 50% chance of becoming HIV positive by age 55.²² In addition, multiple studies identified high rates of psychiatric illness including depression, drug abuse and suicide attempts among homosexuals; claimed by human rights activists as induced by homophobia.²³ Nevertheless, a study published in *Archives of General Psychiatry* led to contrary conclusion; the high rates of psychiatric diseases are associated with same-sex sexual acts, and not homophobia.²⁴

The inability to procreate and the existence of long-list life-threatening diseases among same-sex couples trigger the fear that legalizing same-sex marriage would place the survival of human race in peril. In response to this contention, some authors called for the need of safeguarding the interest of traditional heterosexual marriage which promotes procreation. Wardle and Oliphant²⁵ stressed that due to the

²²John R. Diggs, Jr., "The Health Risks of Gay Sex," Corporate Resource Council, 2002, www.corporateresourcecouncil.org/white_papers/Health_Risks.pdf (accessed 6 November 2009), 2.

²³ Homophobia is the fear, dread, and hatred of lesbians and gay men. See Monique Cohen, *Counselling Addicted Women: A Practical Guide*, (USA: Sage Publications, 2000), 171.

²⁴ Diggs, Jr., 6-7.

²⁵ Lynn D. Wardle & Lincoln C. Oliphant, "In Praise of Loving: Reflections on the "Loving Analogy" for Same-Sex Marriage," *51 How. L.J.* 117. (Fall, 2007): 25, at www.lexisnexis.com, (accessed 5 January, 2009).