

Law, Gender and Mobilisation: The Case of the Mak Nyahs in Malaysia

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Introduction

This article describes the intersection of law, rights and gender identity in the case of the mak nyahs in Malaysia. Mak nyah is a Malay word which refers to the self-designated, social identity of pre-operative and post-operative male-to-female transsexuals in Malaysia.¹ Historical accounts show that the mak nyahs were traditionally and culturally accepted by Malay royalty and played various roles in early Malay society.² However, since the mid-1980s, which witnessed the start of “creeping” Islamisation and moral policing,³ the mak nyahs have been subjected to oppressive, harsh and dehumanising treatment, often meted out by religious authorities and legal enforcement agencies. The plight of the mak nyahs were kept in the “shadows”, as the mak nyahs were often branded as “deviants” of society. However, since the mid-2000s, local and international non-governmental organisations (“NGOs”), and activist lawyers had begun to highlight the severe human rights abuses and violations as well as the legal persecution of the mak nyahs for “crimes” such as ‘cross-dressing’ and ‘indecent behaviour’.⁴ The increasing involvement of legal experts and human rights organisations in handling the grave issues which impacted the mak nyahs had pushed the “mak nyah cause” from the margins into the legal domain, ie the courtroom. This article posits that the courts are actively being used as a site of contestation, where mak nyah gender identity and grievances are being framed, (re)interpreted, and reinforced by the courts, but also heavily contested by the mobilised mak nyahs and their “legal” mobilisers.



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A preliminary examination of the mak nyah cause since the 2000s shows that the “law” and “rights” have played a significant role in empowering and mobilising aggrieved mak nyahs. When it comes to analysing the “law” and “rights”, the legal complex, which consists of lawyers, judges, law academics and legal institutions, often adopts the conventional or “positive” definition of the law and rights. The conventional theory of ‘legal positivism’ or doctrinal study of the law examines the law as a normative rule, ie ‘black letter law’ constructed by the legislature and interpreted by the courts.⁵ The legal positivist approach is useful if the task requires a purely legal analysis, but it is inadequate in analysing a socio-legal phenomenon.

In analysing the law and rights which occur in a social phenomenon such as mobilisation, the legal positivist approach would confine the analysis to a ‘top-down’ definition of the law which would reveal the law as the coercive power of the state to control and maintain order. The way in which the law and rights are utilised would be confined to purely legal arguments, while the aggrieved mak nyahs would only be viewed as the litigants (or legal claimants), and the resulting analysis would offer a court-based perspective. The legal positive approach would disregard the utility of the law and rights in extra-legal spaces, ie outside the courtrooms, where the law is used as a political strategy.

This article takes a socio-legal or ‘law and society’ approach,⁶ which examines the role of the law and rights, the courts and lawyers, in the wider process of mobilisation. This article adopts a broader and

more inclusive meaning of the law, which incorporates the 'legal discourses, conventions and practices in constructive meaning',⁷ that includes both the 'top-down' or elite perspective and the 'bottom-up' or grassroots perspective. The elite perspective includes the court-centric interpretations of formal law, as well as the legal and human rights discourse of the mobilisers, while the grassroots perspective includes the aggrieved mak nyahs's discourse.

This article uses Michael W McCann's theory on law and social movements or 'legal mobilisation',⁸ which is a socio-legal approach to study mobilisation. McCann's theory reveals that legal mobilisation is not solely about using the courts to claim legal remedies for grievances, but also about using the law (and rights) as both legal and extra-legal strategies of wider mobilisation. The use of the law and rights as strategy includes the participants' actions, motivations, movement culture, elite involvement, as well as local and international networks. Using McCann's theory, this article shows that the law and rights played a significant role in constructing and (re)interpreting three elements of mak nyah mobilisation in Malaysia: (a) the trans-gender identity of the mak nyah; (b) the issues or grievances claimed; and (c) the strategies taken to highlight the grievances to the elites and public, and seek remedies.

Mak Nyah Mobilisation: A Case of Rage, Rights and Remedy⁹

Since the 2000s, the campaign to highlight the plight of aggrieved mak nyahs in Malaysia was fueled by persistent, rampant and serious abuses faced by the mak nyahs. These abuses were frequently meted out by religious authorities (targeting Muslim mak nyahs) and the police. In 2014, the Human Rights Watch, an international human rights NGO, reported on the issues faced by the transgender persons in Malaysia. The report states:

"Police regularly arrest transgender persons, especially Muslims who are considered to be violating Sharia law provisions against cross-dressing, ridicule and humiliate them, and jail them in lock-ups where they are subject to physical and sexual abuse by police staff and male inmates."¹⁰

The religious authorities used Syariah law provisions which criminalise 'cross-dressing' for Muslim men who dress as women, while the police used civil law provisions which prohibit 'indecent behaviour', ie Section 21 of the Minor Offences Act 1955 (which is applicable to both Muslim and non-Muslim mak nyahs). The laws which are punitive in nature, legitimise the harsh treatment accorded to the mak nyahs by the official authorities. Hence, the law constructs the grievances of the mak nyahs.

The 'black letter law', ie Malaysian legislation and case-law has attempted to restrict legal definitions of gender identity vis-à-vis legal documentation. The following legal cases suggest that the issue of gender identity of post-operative transsexuals in Malaysia is a contestation between the formal or legal gender identity in legal documentation, such as the birth certificate and the identity card ("IC"), and the "self-ascribed" gender identity. The gender identity of post-operative transsexuals does not fall squarely into officially recognised gender status under the National Registration Act 1959.

In the case of *Fau En Ji v Ketua Pengarah Jabatan Pendaftaran Negara*,¹¹ the High Court of Kuala Lumpur rejected the plaintiff's application for judicial review, seeking to change the gender status and name on the IC to Kelvin Fau. The plaintiff was a post-operative female-to-male transsexual, who had undergone a medical surgery in Thailand. The court stated that "gender is a multifaceted question ...[i]t does not involve the desire of the applicant alone, but involves consideration of chromosomal, gonadal, genital and psychological factors."¹² The court not only failed to recognise Kelvin Fau's self-ascribed gender identity, but reinforced the gender status as recorded in the birth certificate.

The court seemed to take a more liberal approach in *Tan Pooi Yee v Ketua Pengarah Jabatan Pendaftaran Negara*,¹³ where the High Court of Kuala Lumpur held that the plaintiff, a post-operative female-to-male transsexual was "physically, anatomically and psychologically a male", and hence the law should declare the plaintiff as being male.¹⁴ It should be noted that both these cases involved post-operative female-to-male transsexuals or transmen.

In a 2005 High Court decision, regarding a post-operative male-to-female transsexual, the court took a liberal approach and stated that "[t]he plaintiff felt like a woman, lived as a woman, behaved liked (sic) a woman, had a physical body of a woman and most importantly, had the psychological thinking of a woman.

. When determination of a person's sex is based on medical evidence, the courts should play their part and grant relief according to justice."¹⁵ However, in a later case, *Kristie Chan v Ketua Pengarah Jabatan Pendaftaran Negara*,¹⁶ which involved a post-operative male-to-female seeking a declaration to change gender status in the IC, the Court of Appeal dismissed the appeal and stated that "[t]here was no evidence, medical, and psychiatric, from experts in Malaysia as to what was gender, what made a person a male or female or whether sex reassignment surgery changes a person's gender to warrant a change of the gender description in that person's identity card."¹⁷

The legal cases show that the courts tend to follow a 'hetero-normative' or 'hetero-patriarchal ideology' that enforces a 'male/female binary system'.¹⁸ The restrictive approach taken by the courts which amounts to a refusal to recognise the self-ascribed gender identity of the transsexuals and the syariah criminalisation of 'cross dressing' for Muslim mak nyahs, effectively legitimises the forceful "rehabilitation" by the religious authorities and the rampant indignations meted out by the police. Hence, the law becomes an oppressive tool of the state in order to "witch-hunt" and dehumanise the mak nyahs. Furthermore, the rampant discrimination and stigma faced by the mak nyahs has impeded them from finding employment, as many had resorted to work as sex workers.¹⁹

In this climate of legal oppression and discrimination faced by the mak nyahs, 'rights' was beginning to emerge as a retaliatory tool of the oppressed. Since the mid-2000s, the mak nyahs were beginning to mobilise, and organisations such as Justice for Sisters were beginning to utilise "rights rhetoric" and "rights talk" in their discourses in order to seek remedies for their grievances. As a mak nyah lamented in a newspaper report (emphasis added):

"When transgenders keep pleading guilty, you have criminal records, being repeat offenders, and you're vulnerable ... There's a complete breakdown in terms of access to justice, in terms of self-recognition, in terms of living in dignity, violation of so many rights, we felt that we have to tell people to not plead guilty ... Just because the judges are overseeing Shariah laws, doesn't mean they don't have to follow principles of human rights, don't have to be objective, don't have to be neutral. They still need to abide by these principles. They cannot be exempted, they can't work in isolation."²⁰

Rights-based claims, which include 'legal' rights, ie constitutional rights and human rights, were beginning to be used in both legal and extra-legal spaces. A key factor for the shift is the role played by the mobilisers, who consisted largely of activist lawyers that represented the aggrieved mak nyahs. The Bar Council Malaysia and the lawyers became a key alliance in the mak nyahs' mobilisation, as they possess specialised legal knowledge and serve two significant roles in the mobilisation of the mak nyah: first, they comprise a cost-effective "legal resource" as they provide legal counsel and pro bono services to aggrieved mak nyahs; second, the lawyers are also part of the wider mak nyah mobilisation, and as "mobilisers" their involvement extended to extra-legal strategies including lobbying and advocacy campaigns. For instance, Loyarburok which is a law-based organisation, helped to highlight and publicise the social, political and legal issues faced by transsexuals in Malaysia.²¹

A key social movement strategy devised by the legal elites is the Strategic Litigation Campaign that is run by the Bar Council Human Rights Committee and the Malaysian Centre for Constitutionalism and Human Rights. The strategic litigation campaign embraced not only legal strategies in winning legal cases, but also incorporated political mobilisation strategies. As iterated by Edmund Bon, a key figure in the campaign (emphasis added):

"Strategic litigation cannot operate purely within the legal realm, because its causes and outcomes are a distillation of the dynamic conversation that society is having with itself. Among this constellation of players, lawyers are central. No lawyer, no case."²²

The Strategic Litigation Campaign was instrumental in devising a politico-legal strategy for aggrieved mak nyahs in their court-based fight for constitutional rights and freedoms. This was evident in a "test case" initiated by four mak nyahs to challenge a Syariah provision that criminalises 'cross-dressing' for Muslim men in the state of Negeri Sembilan.

The Negeri Sembilan Mak Nyah Case: Rights and Gender Identity (Disorder?)

In 2011, the mak nyahs with the alliance of activist lawyers brought a “test case” to the High Court of Negeri Sembilan in order to challenge the constitutionality of Section 66 of the Syariah Criminal Enactment 1992. The provision expressly states that:

“any male person, who in any public place wears a woman (sic) attire and 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.”

Four Muslim male constituents of Negeri Sembilan, who were mak nyahs, made an application for judicial review and sought a declaration from the High Court of Seremban, in Negeri Sembilan. The mak nyahs argued that Section 66 was inconsistent with several provisions in the 1957 Federal Constitution that granted fundamental constitutional rights and liberties. These rights and civil liberties included: Article 5(1) which grants the right to life and personal liberty, Article 8(1) which grants the right to equality before the law and equal protection of the law, Article 8(2) which grants the right to non-discrimination on the basis of gender, Article 9(2) which secures the freedom of movement, and Article 10(1)(a) which grants the freedom of speech and expression.

The Seremban High Court decided to dismiss the mak nyahs’ application,²³ but the mobilisers viewed the dismissal as part of a wider strategy of the mak nyahs, which was to secure an appeal to the higher courts, ie the Court of Appeal. In the Court of Appeal,²⁴ the mak nyahs utilised two main arguments: a rights-based argument, and a gender identity-based argument. The rights-based argument was on the basis that Section 66 was contradicting the constitutional rights and freedoms in the Federal Constitution, as listed above.

The gender identity-based argument was on the basis that the mak nyah were men with a medical or psychological condition known as Gender Identity Disorder (“GID”). The mak nyahs’ lawyers argued that as men with the GID medical condition, they should be legally excluded from the definition of ‘any male person’ in Section 66. A clinical psychologist explained in court that GID was an untreatable ‘medical condition’ recognised under the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM IV-TR).²⁵ The Court of Appeal agreed with the gender identity-based argument and iterated 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 court further stated that Section 66 was unconstitutional as it had impeded the constitutional rights (eg right to life including the right to livelihood, freedom of expression including the freedom to dress as women, and the freedom of movement) of ‘male Muslim sufferers of GID’.²⁶

The utility of GID or gender identity disorder as an exemption was clearly a successful legal strategy, as it linked the mak nyahs’ identity to their grievances, and the claim for their constitutional rights as an aggrieved group. The argument not only gained the sympathy of the Court of Appeal judges, but also effectively linked gender identity and grievance to a wider claim for legal rights and legal protection under the Federal Constitution.

This article points out that although GID was successful as a legal strategy inside the courtroom, the use of a medical model in order to frame the mak nyahs identity and grievances can lead to the pathologisation of transsexuals in Malaysia. In the Negeri Sembilan mak nyah case, the judges accorded their sympathy for the aggrieved mak nyahs as ‘sufferers of GID’ and identified the mak nyahs as victims of an untreatable health or medical condition. The GID argument intrinsically connects the mak nyah’s identity to a ‘disorder’ which can create a backlash that discriminates the mak nyahs as medically abnormal.

Previous studies on the legal mobilisation of the Disability Movement in Canada and the United Kingdom has shown that mobilisers were only successful when they shifted away from a medical based identity to a rights-based identity.²⁷ The medical-based identity had pegged the disabled person as “helpless, defined by their impairment and objects of charity or pity”, as they were perceived as being “sufferers” of a medical condition rather than as citizens with constitutional rights.²⁸

However, the writer concedes that the past studies done on the success of the rights-based model over the medical model in strategic litigation had been conducted in a Western liberal democratic state where the judiciary is receptive to rights-based arguments.

In the case of Malaysia, an illiberal democratic state with a restricted judiciary, the Court of Appeal in the mak nyah case seemed to be open to a rights-based argument that was linked to a medical model. However, the arguments were not well received in the Federal Court which overturned the Court of Appeal decision. The Federal Court found that the mak nyahs had procedurally erred in seeking a High Court declaration to challenge the constitutionality of Section 66, a syariah provision.²⁹ The Federal Court stated (emphasis added):

"The issue here was not whether the appellants were prejudiced by the mode of action undertaken by the respondents. The case raised a larger issue. It was about the jurisdiction of the courts. The fundamental question was whether the validity or constitutionality of section 66 could be challenged in the High Court by way of a collateral attack in a judicial review proceeding."³⁰

The Federal Court decision shows that the court was unwilling to decide on the legal substance of the case vis-à-vis the gender identity-based grievances and constitutional rights claimed by the mak nyahs. A procedural argument was used to overturn the Court of Appeal decision. Nevertheless, the Court of Appeal decision may have an impact on future cases regarding the mak nyahs. The 2016 Tan Pooi Yee case,³¹ which took an unprecedented liberal approach to define gender identity as including the physical, anatomical and psychological elements, indicates that strategic litigation may yet have a wider impact in the long-run.

Concluding Remarks

The legal mobilisation of the mak nyahs in Malaysia indicates that there is a link between gender identity, grievances and the strategies undertaken by the mobilisers. While the law is instrumental in constructing, interpreting and reinforcing a 'hetero-normative' ideology of gender identity, mobilisers have successfully raised awareness of mak nyahs identity and grievances among the lawyers and judges, as well as the public.

¹Yik Koon Teh, *The Mak Nyahs: Malaysian Male to Female Transsexuals* (Eastern Universities Press, 2002).

²Farish A Noor, *What Your Teacher Didn't Tell You: The Annexe Lectures* (Matahari Books, 4th ed. ed, 2010).

³Julian Lee, *Policing Sexuality: Sex, Society, and the State* (Zed Books, 2011).

⁴See, Joseph N Goh and Thaatchayini Kananatu, 'Mak Nyahs and The Dismantling of Dehumanisation: Framing Empowerment Strategies of Malaysian Male-to-Female Transsexuals in the 2000s' (2017) *Sexualities: Studies in Culture and Society* (Sage) forthcoming.

⁵H L A Hart, 'Positivism and the Separation of Law and Morals' (1957) 71 *Harvard Law Review* 593,601–602.

⁶Austin Sarat, *The Blackwell Companion to Law and Society* (Blackwell Pub, 2004); Alan Hunt, *Explorations in Law and Society: Towards a Constitutive Theory of Law* (Routledge, 1993).

⁷Michael W McCann, *Law and Social Movements* (Ashgate, 2006). See also, Marc Galanter, "'Presidential Address": The Legal Malaise; Or, Justice Observed' (1985) 19(4) *Law and Society Review* 537.

⁸Michael W McCann, *Law and Social Movements* (Ashgate, 2006); Michael W McCann, *Rights At Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994).

⁹Taken from the phrase 'right, rage and remedy'. See, John Brigham, 'Right, Rage, and Remedy: Forms of Law in Political Discourse' (1987) *Studies in American Political Development* 303.

¹⁰Human Rights Watch, *World Report 2014: Malaysia (Events of 2013)*, <<https://www.hrw.org/world-report/2014/country-chapters/malaysia>>.

¹¹[2015] 1 CLJ 803.

¹²[2015] 1 CLJ 803, 804.

¹³[2016] 8 CLJ 427.

¹⁴[2016] 8 CLJ 427, 451.

¹⁵J-6 v Pengarah Jabatan Pendaftaran Negara [2005] 4 CLJ 710, 711.

¹⁶[2013] 4 CLJ 627.

¹⁷[2013] 4 CLJ 627, 628.

¹⁸Britton A Gibson, et al, 'Gender Identity, Healthcare Access, and Risk Reduction among Malaysia's Mak Nyah Community' (2016) 11(7-8) *Global Public Health* 1010-1025, 1011. See also, Francisco Valdes, 'Intersections: Sexuality, Cultural Tradition, and the Law: Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins' (1996) 8 *Yale Journal of Law & the Humanities*, 161-559.

¹⁹Teh, above n 1.

²⁰Zurairi Ar, '10 Things About: Justice for Sisters, Defenders of Transgenders', *Malay Mail (online)*, 23 November 2014 <<http://www.themalaymailonline.com/malaysia/article/10-things-about-justice-for-sisters-defenders-of-transgenders>>. See also, Julia Yeow, "'Women in Men's Bodies" Struggle for Basic Rights', *Malaysiakini (online)*, 9 September 2001 <<http://www.malaysiakini.com/news/4611>>.

²¹Loyarburok, 'Human Rights: Let's Talk About Sex', *Loyarburok (online)*, <<http://www.loyarburok.com/category/human-rights/lets-talk-about-sex/>>.

²²Edmund Bon, 'The BON con: A Call to Action', *Loyarburok (online)*, 7 October 2015, <<http://www.loyarburok.com/2015/10/07/bon-con-call-action/>>.

²³High Court of Malaya, Seremban, *Judicial Review No.13-1-2011*.

²⁴Muhamad Juzaili Mohd Khamis & Ors v State Government of Negeri Sembilan & Ors [2015] 1 CLJ 954.

²⁵Under the DSM 5 (American Psychiatric Association, 2013), GID is known as 'Gender Dysphoria'.

²⁶[2015] 1 CLJ 954, 964.

²⁷Lisa Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization* (Cambridge University Press, 2011); Lisa Vanhala, 'Disability Rights Activists in the Supreme Court of Canada: Legal Mobilization Theory and Accommodating Social Movements' (2009) 42(4) *Canadian Journal of Political Science* 981.

²⁸Vanhala (2009), above n 27.

²⁹State of Negeri Sembilan & Ors v Muhammad Juzaili Mohd Khamis & Ors [2015] 8 CLJ 975.

³⁰[2015] 8 CLJ 975, 976.

³¹[2016] 8 CLJ 427.