

THE POLITICS OF SODOMY LAW:
A COMPARATIVE STUDY ON THE IMPACTS OF LEGAL
ENVIRONMENTS ON NATIONAL HIV RESPONSE FOR MEN WHO
HAVE SEX WITH MEN IN MALAYSIA AND INDONESIA

Mr. Safir Soeparna

A Thesis Submitted in Partial Fulfillment of the Requirements
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การศึกษาเปรียบเทียบผลกระทบของสภาพแวดล้อมทางกฎหมายที่มีต่อการจัดการเกี่ยวกับ
HIV สำหรับกลุ่มชายรักร่วมเพศในมาเลเซียและอินโดนีเซีย

นายซาฟรี ไชปาร์นา

วิทยานิพนธ์นี้เป็นส่วนหนึ่งของการศึกษาตามหลักสูตรปริญญา ศิลปศาสตรมหาบัณฑิต
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By Mr. Safir Soeparna

Field of Study Southeast Asian Studies

Thesis Advisor Associate Professor Withaya. Sucharithawarugse, Ph.D.

Accepted by the Graduate School, Chulalongkorn University in Partial
Fulfillment of the Requirements for the Master's Degree

..... Dean of the Graduate School
(Associate Professor Amoon Petsom, Ph.D.)

THESIS COMMITTEE

..... Chairman
(Assistant Professor Theera Nuchplam, Ph.D.)

..... Thesis Advisor
(Associate Professor Withaya. Sucharithawarugse, Ph.D.)

..... External Examiner
(Professor Emeritus Praphan Phanuphak, M.D., Ph.D.)

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(THE POLITICS OF SODOMY LAW: A COMPARATIVE STUDY ON THE IMPACTS OF LEGAL ENVIRONMENTS ON NATIONAL HIV RESPONSE FOR MEN WHO HAVE SEX WITH MEN IN MALAYSIA AND INDONESIA)

อ. ที่ปรึกษาวิทยานิพนธ์หลัก : รศ.ดร.วิทยา สุจริตธนารักษ์, 103 หน้า

เป็นหนึ่งในปัญหาด้านอนามัยปัญหาใหญ่ที่รัฐบาลแต่ละประเทศต้องเผชิญยิ่งไปกว่านั้น ภาวะติดเชื้อ HIV ยังก่อให้เกิดวิกฤตการณ์ทางด้านสิทธิมนุษยชนและประเด็นปัญหาความเป็นธรรมในสังคมเนื่องด้วยผู้ป่วยที่ติดเชื้อ HIV มักถูกสังคมมองด้วยทัศนคติเชิงลบยิ่งไปกว่านั้นกฎหมายที่มีบทลงโทษซึ่งก่อให้เกิดการทัศนคติทางลบดังกล่าวจากสังคมยังเป็นกฎหมายที่ภาครัฐยังคงใช้อยู่ด้วย ตัวอย่างหนึ่งของกฎหมายเช่นที่กล่าวมาคือกฎหมายความผิดวิธิการทางเพศ กฎหมายความผิดวิธิการทางเพศนี้ ทำให้สังคมมีทัศนคติทางลบต่อผู้ที่มีเพศสัมพันธ์กับเพศเดียวกันด้วยเหตุนี้จุดประสงค์ในการศึกษาในครั้งนี้คือเพื่อวิเคราะห์ว่ากฎหมายความผิดวิธิการทางเพศนั้นมีผลมากเพียงใดต่อการละเว้นและเลือกปฏิบัติของเจ้าหน้าที่รัฐต่อกลุ่มรักร่วมเพศ (MSM) โดยการวิเคราะห์ได้แบ่งออกเป็นสองภาคภาคที่หนึ่งคือการหาข้อเท็จจริงเพื่อยืนยันว่ากฎหมายความผิดวิธิการทางเพศเมื่อใช้เป็นเครื่องมือในการปฏิรูปสังคมแล้วก่อให้เกิดทัศนคติทางลบต่อกลุ่มรักร่วมเพศด้านภาคที่สองนั้นจะนำเสนอกรณีศึกษาถึงการละเลยความรับผิดชอบของรัฐบาลมาเลเซียต่อกลุ่มผู้ป่วยรักร่วมเพศโดยชี้ให้เห็นช่องว่างในการปฏิบัติของรัฐบาลมาเลเซียเมื่อเทียบกับรัฐบาลอินโดนีเซียในการช่วยเหลือผู้ป่วยรักร่วมเพศที่ติดเชื้อ HIV

ผลจากการศึกษาในครั้งนี้พบว่า การเปลี่ยนแปลงทางกฎหมายเพื่อขจัดอุปสรรคทางด้านโครงสร้างทางสังคมซึ่งตกตะกอนโดยกฎหมายความผิดวิธิการทางเพศนั้นเป็นสิ่งจำเป็นอย่างยิ่ง กล่าวคือควรมีการยกเลิกกฎหมายความผิดวิธิการทางเพศเมื่อมีการยกเลิกกฎหมายซึ่งเป็นอุปสรรคต่อโครงสร้างนี้แล้วจะก่อให้เกิดสภาพแวดล้อมที่ส่งเสริมให้เกิดการช่วยเหลือและบริการผู้ป่วยรักร่วมเพศอย่างเต็มที่

สาขาวิชา เอเชียตะวันออกเฉียงใต้ศึกษา

ลายมือชื่อนิสิต.....

ปีการศึกษา 2556

ลายมือชื่อ อที่ปรึกษาวิทยานิพนธ์หลัก.....

5587534020 : MAJOR MAJOR SOUTHEAST ASIAN STUDIES

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SAFIR SOEPARNA : THE POLITICS OF SODOMY LAW: A
COMPARATIVE STUDY ON THE IMPACTS OF LEGAL
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The HIV epidemic is one of the greatest public health challenges societies and governments face today. The epidemic is also a crisis of human rights and social justice given the stigma and discrimination surrounding the key affected populations. Paradoxically, punitive laws that amplify such stigma and discrimination are employed by some governments. Sodomy law, which criminalizes homosexual behavior, is an example of such laws. The aim of this study was, therefore, to analyze the extent to which a sodomy law acts to influence the national AIDS authorities in derogating its responsibility to provide effective HIV response to MSM population. The analysis was conducted in two facets: firstly, the study corroborated Malaysian sodomy law as a social reform tool that aspired to impose an institutional homophobia; and secondly, the study demonstrated the lack of accountability on the part of the Malaysian government by highlighting the larger gap in MSM-oriented HIV response in the case of Malaysia when compared with that of Indonesia. The finding of this study suggests that the structural obstacles synthesized by sodomy law implied that legal intervention – namely, the repeal of sodomy law – is a essential to ensure a supportive environment in which HIV prevention, treatment and care can be successfully delivered to and accessed by MSM.

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Student's Signature.....

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LIST OF ABBREVIATIONS

| | |
|-------------|---|
| AIDS | Acquired immune deficiency syndrome |
| amfAR | The Foundation for AIDS Research |
| APCOM | Asia Pacific Coalition on Male Sexual Health |
| APF | Asia Pacific Forum |
| ART | antiretroviral treatment |
| ARV | antiretroviral drug |
| ASEAN | The Association of Southeast Asian Nations |
| CBO | community-based organization |
| CCM | Country Coordinating Mechanism |
| CDC | U.S. Centers for Disease Control and Prevention |
| CEDAW | Convention to Eliminate All Forms of Discrimination Against Women |
| CSW | United Nations Commission on the Status of Women |
| ESCAP | United Nations Economic and Social Commission of Asia and the Pacific |
| FSW | female sex worker |
| GA | General Assembly of United Nations |
| Global Fund | Global Fund to Fight AIDS, Tuberculosis and Malaria |
| GWL-INA | Indonesian Network of Gay, Lesbian and Transgender Organizations |
| HIV | human immunodeficiency virus |
| HRC | Human Rights Council of United Nations |
| IBBS | Integrated Bio-Behavioral Surveillance |
| ICCPR | International Covenant on Civil and Political Rights |
| IDLO | International Development Law Organizations |
| IDS | Institute of Development Studies |
| IDU | injecting drug user |
| ILGHRC | International Gay and Lesbian Human Rights Commission |

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|-------------|---|
| ILO | International Labour Organization |
| ISEAN | Insular Southeast Asia Network |
| ISEAN-HIVOS | Islands of Southeast Asia Network on Male and Transgender Sexual Health |
| KOMNASHAM | Indonesia's National Human Rights Commission |
| KPA | Indonesia's National AIDS Authority |
| LGBT | lesbian, gay, bisexual and transgender |
| LGBTI | lesbian, gay, bisexual, transgender and intersex |
| LGBTIQ | lesbian, gay, bisexual, transgender, intersex and queer |
| MAC | Malaysian AIDS Council |
| MARP | most-at-risk population |
| MDG | Millennium Development Goal |
| MoH | Ministry of Health |
| MSM | men who have sex with men |
| NCPI | National Commitments and Policies Instrument |
| NGO | non-governmental organization |
| OHCHR | Office of the High Commissioner for Human Rights |
| OIC | The Organization of Islamic Cooperation |
| OLS | Ordinary Least Square of regression analysis |
| PEPFAR | U.S. President's Emergency Plan for AIDS Relief |
| PLWHA | people living with HIV/AIDS |
| SOGI | sexual orientation and gender identity |
| STI | sexually transmitted infection |
| SUHAKAM | Malaysia's National Human Rights Commission |
| SW | sex workers |
| TG | transgender population |
| ToR | Term of Reference |
| TWG | thematic working group |
| UN | United Nations |
| UNAIDS | Joint United Nations Programme on HIV and AIDS |

| | |
|--------|---|
| UNDP | United Nations Development Programme |
| UNFPA | United Nations Population Fund |
| UNGASS | United Nations General Assembly Special Session on HIV/AIDS |
| UNHRC | United Nations Human Rights Council |
| UNSC | United Nations Security Council |
| USAID | U.S. Agency for International Development |
| USD | American U.S. Dollar |
| VCT | voluntary counseling and testing |
| VDTS | venue day test sampling |
| WHO | World Health Organization |

CHAPTER I

INTRODUCTION

This chapter provides the conceptual structure behind the study. It begins with the rationale of study that provides a background that motivates the author to conduct the research. Problem identification and the study's objective and hypothesis will follow subsequently to present a further essential framework in comprehending the study. Definition of terms is presented consequently to clarify terms that are repeatedly used in this study.

1.1 Rationale of the Study

At the end of 2011, there are four million people living with HIV in South and South-East Asia making the region the second most-affected population after Sub-Saharan Africa, in which 25 million people are infected¹. While the epidemic in Sub-Saharan Africa affects the general population, HIV transmission in South and South-East Asia is highly concentrated in sex workers, injected drug users and MSM— known as most-at-risk populations². Sex workers are vulnerable to HIV infection due to their frequent exposure with unprotected sexual activities. Injected drug users are prone to HIV infection as a result of their tendency to share needles and/or reuse unsterile needle while consuming the drugs in groups. HIV can be transmitted through blood exchange, and therefore, sharing a same needle or reusing worn needle is an effective way to spread HIV from one injector to another. MSM are exposed to HIV infection more than their heterosexual counterparts because of their engagements in anal sex practice. The receptive person in unprotected anal intercourse is at relatively greater risk of contracting HIV from an infected partner than the receptive partner in unprotected vaginal

¹ UNAIDS, *UNAIDS Report on Global AIDS Epidemic*, (Geneva: UNAIDS, 2012), 14.

² UNAIDS, "Regional Fact Sheet 2012 - Asia and the Pacific," UNAIDS, accessed June 1, 2013, http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/2012_FS_regional_asia_pacific_en.pdf.

intercourse because the lining of the anus is more prone to tears and injury than is the lining of a vagina, allowing the virus easier passage into the blood³.

Regardless of their HIV status, these groups are highly stigmatized. Negative beliefs, feelings and attitudes towards people from these subpopulations and people associated with them, manifests itself in societies with strong religious upbringing, such as in Muslim-dominated populations of Malaysia and Indonesia. The populist view of Islam sees extra-marital sex, drug abuse and homosexuality as immoral traits, and thus, sex workers, injected drug users and MSM are marginalized in these two countries.

Association of these most-at-risk populations with HIV amplifies the stigma within the Muslim societies in two countries. Misconception largely appears as the public oftentimes incorrectly assume that sex workers, injected drug users and MSM are infected with HIV and people who are infected with HIV are only sex workers, injected drug users and MSM. Accordingly, HIV is highly associated as a depiction of immorality. With limited or incorrect HIV knowledge such as believing that shaking hands may transmit the virus, HIV-related stigma becomes easily visible through shunning and avoiding everyday contact, verbal harassment and discrediting, physical violence and stigmatizing language and behavior, such as ostracization and abandonment. Stigma, consequently, causes discriminatory actions. The unfair and unjust treatment of an individual based on his or her attribution as sex worker, injected drug user or MSM and/or on his or her real or perceived HIV status, may occur in families, workplaces or within the entitlement of public services such as healthcare services, educational settings, places of worship, housing, insurance, social security, travel and migration.

A person may also discriminate against another without personally embracing stigmatizing beliefs, for instance, where discriminative action is endorsed by the existing laws. Discrimination may, deliberately or unintentionally, be institutionalized through laws and policies that negatively target sex workers, injecting drug users and MSM. Legal environments can exhibit an influential role in the prosperity of the society. Laws can construct a prominent impact to the well-being of people living with HIV and those

³ Robert Krasner, *The Microbial Challenge: Science, Disease and Public Health*, (Sudbury: Jones and Bartlett Publishers, 2010), 413.

vulnerable to HIV. Good laws, fully resourced and rigorously enforced, may expand the access to and quality of HIV response and protect human rights of and improve social support for people affected by the epidemic⁴. Conversely, repressive legal environment may hamper the efficacy of HIV measures⁵.

In the context of sex workers and injected drug users, punitive laws directed towards these populations exist in Indonesia and Malaysia, despite the difference between the jurisdicative traditions of Indonesia's civil law⁶ and Malaysia's common law⁷. Both countries criminalize commercialization of sex⁸ and substance abuse⁹. This criminalization creates an omission that amounts to a form of discrimination, such that the level of HIV response directed towards sex workers and injected drug users is not commensurate with the severity of the epidemic amongst these populations. The restriction and criminalization on sex work has resulted in hampering the promotion of health and HIV awareness among sex workers¹⁰. They can easily be distorted by law

⁴ Global Commission on the HIV and the Law, *Global Commission on the HIV and the Law: Risks, Rights and Health*, (New York: UNDP, 2012), 11.

⁵ Ibid.

⁶ Civil law legal systems are originated from continental Europe and rely on codified collections of legislation. Former European continent's colonies such as Indonesia, Lao PDR and Timor Lester are among countries whose jurisdiction are based on civil law.

⁷ Common law legal systems, which are derived traditionally from English law, laws made by or under the authority of parliament and laws defined by judges' decisions. Malaysia and other former British colonies, such as Brunei and Singapore, still use or are strongly influenced by common law traditions.

⁸ Although its national penal code does not specifically prohibit sex work, Indonesia is equipped with penal codes that prohibit facilitation of acts of obscenity by others as a livelihood (Article 296), trading in women (Article 297), vagrancy (Article 505) and living on the earnings of a female sex worker (Article 506). Political decentralization has allowed range of local laws, regulations and by-laws to be more detailed, and thus, some are applied specifically to sex workers and the sex industry. These range from strict prohibitions on sex work to regulation of officially tolerated brothel complexes. Meanwhile, Malaysia's national laws specifically regulate sex work as its penal code provides offences for soliciting sex work (Section 372B) and keeping a brothel (Section 373). In addition, the Federal Territories and some states (e.g., Kelantan, Kedah and Melaka) have enacted sharia laws that specifically criminalize prostitution.

⁹ Indonesia's laws on criminalization of substance abuse are contained in the Law on Narcotics 1997 and the Law on Psychotropic Substances 1997. Malaysia's counterpart drug controls are, but not limited to, the Dangerous Drugs Act 1952 and the Poisons Act 1952. These laws penalize possession and personal consumption without medical supervision of narcotic and psychotropic drugs. Possession in excess of statutorily specified amounts creates a presumption of trafficking, which carries stringent penalty including death. Under specific decrees derived from these statutes, the possession of syringes and/or needles becomes legitimate reason to suspect the drug consumption.

¹⁰ John Godwin, *Sex Work and the Law in Asia and the Pacific*, (Bangkok: UNDP, 2012), 1. See also: The World Bank, *Global HIV Epidemics among Sex Workers*, (Washington DC: The World Bank, 2013), xvii.

enforcers, healthcare providers and society in general as endorsement for violence and discrimination against sex workers. In Indonesia, for example, vagrancy laws are reportedly used by police to harass sex workers or extort money under threat of prosecution or detention¹¹. Refusals of healthcare service delivery on a basis of the unlawful status of their work are not uncommon in both countries. Possession of condoms, for example is used by law enforcer as evidence of sex work or arresting the sex workers for vagrancy¹². These misconducts endorse the sex workers not to carry condoms with them, and thus, lower their bargaining power to practice protected sex with the clients. All in all, many legal barriers affect the self esteem of sex workers and their ability to make and practice well-informed choices about their health. Community and peer outreach is deemed to be the most effective available HIV response to this group, yet unsupportive legal environments also create barriers to the delivery of this outreach. Outreach workers and managers of HIV services have reportedly been arrested as suspected sex workers for carrying condoms¹³. On this basis, the low coverage of HIV prevention services among sex workers is undeniable.

Both countries are not being realistic by supposing that the punitive laws will eventually get rid of prostitution. The truth is, while putting an end to prostitution is extremely divisive¹⁴, punitive laws, which prevent sex workers from attaining quality health, will only amplify the spread of HIV, amongst the population in general – given how some of the consumers are those who have spouses, and therefore, may transmit the virus to their spouses.

A comparable scenario can be found in the accessibility of HIV response for injected drug users. The narcotics laws in both Indonesia and Malaysia criminalize injected drug users and do not acknowledge harm reduction¹⁵ despite its proven success

¹¹ Ibid., 127.

¹² Ibid., 128, 140, 455.

¹³ John Godwin, *Sex Work and the Law*, 21-2, 128, 137.

¹⁴ See: Elizabeth Pisani, *Wisdom of Whores* (London: Granta Publications, 2008), 214-16, 223-24.

¹⁵ Harm reduction generally refers to policies, courses and measures that aspire to diminish the adverse health and socio-economic effect of the use of both legal and illegal psychoactive drugs without necessarily reducing drug consumption. These kinds of drug fall into a category of drugs that are consumed through injection, and thus, harm reduction fits in the category of treatment for the injected drug users. Harm reduction commonly entails needle exchange program, opioid substitution program (or opioid

to decrease HIV transmission among injected drug users¹⁶. Both national laws also prohibit the possession of needles or syringes by anyone without a prescription, and therefore, law enforcers use possession of needles or syringes as evidence to arrest suspected injected drug users¹⁷. This discourages the injected drug users to seek for new clean needles when they run out of them. As a consequence, the injected drug users reuse the worn needle and, while consuming the drugs in a group, share that same needle to other injectors. This risky behavior could be avoided if the laws allowed for greater access to clean needles.

While specific state-run laws relating to sex work and injected drug use are employed in both Indonesia and Malaysia, the view towards homosexuality is stated differently in the legislations of both countries. Common law-based Malaysia and civil law-enacted Indonesia set divergence over the context of male-to-male sex despite their resemblance on Muslim-dominated cultures. Under Penal Code Section 377A and 377D, the legality of male-to-male sex is unlawful in Malaysia. Homosexual sex between two consenting adults is subject to whipping and imprisonment. Indonesia, on the other hand, does not carry out such an analogous law. Male-to-male sex is legal according to the national legislation¹⁸. While the resemblance between punitive laws in Malaysia and

replacement therapy) and drug consumption room (or safe injection site or supervised injection site). Needle exchange program is intended to prevent the needle sharing, which is main channel of HIV transmission. By exchanging the used needle with new and sterile needle, the injected drug users are always ensured to use HIV-free needles as well as prevented from infecting his/her fellow drug users. Opioid substitution program, on the other hand, is the medical procedure of substituting a euphoric opioid drug such as heroin with a longer acting but less addictive opioid, such as methadone or buprenorphine, which is consumed orally. This, therefore, prevents the drug users from injecting themselves. Drug consumption room, last but not least, is a legally sanctioned and medically supervised facilities intended to reduce annoyance from public drug use and provide a hygienic and stress-free environment for illicit drug users when injecting drug. This is intended to prevent needle sharing as the site will provide sterile equipment as well as to prevent the users from risky behavior that is normally resulted from the consumption of euphoric drug such as unprotected sex under the influence. In addition, the prevalence of such site also aims to gradually reduce the consumption of drugs by providing information about basic healthcare, treatment referrals and access to medical staff.

¹⁶ Harm Reduction International, *The Global State of Harm Reduction 2012: Towards an integrated response*, (London: Harm Reduction International, 2012), 14.

¹⁷ Open Society Institute, *Breaking Down the Barriers: Lessons on Providing HIV Treatment to Injected Drug Users*, (New York: International Harm Reduction Development, 2004).

¹⁸ Due to the decentralization of law-making powers to provinces and districts, some local regulations appear to conflict with the Constitution of the Republic of Indonesia and international conventions ratified by Indonesia. This situation is observed strongly in Aceh Province in which its autonomous power over the practice of Sharia law criminalizing homosexual sex between two consenting

Indonesia towards sex workers and injected drug users has resulted in congruent scenarios of rights violations of the respective two subpopulations of the two countries, the discrepancy on the existence of sodomy law sheds light on the need to assess HIV response for the respective MSM subpopulations in both countries.

The HIV epidemic projection by Asian Epidemic Model suggests that, without an intensification of effective prevention measures, around 46 per cent of new HIV infections in Asia will be among MSM, a significant increase from 13 per cent share in 2008¹⁹. The same model shows expansion in new infections among MSM in Indonesia and stabilized rate of MSM-transmission in Malaysia. In 2012, the total of MSM living with HIV in Indonesia was 16,700 people and the number is estimated to increase to 25,000 by 2015²⁰. On the other hand, homosexual HIV transmission rate in Malaysia is expected to stabilize at 4.5 per cent from 2011 to 2015 implying a steady rate of new HIV infections²¹. In contrary to the projection, however, sexual transmission, among MSM in particular, appears to be on the rise due to growing risk of HIV among MSM and increased testing and disclosure of personal sexual histories²².

Alternatively, the projections for the two countries should not be shaped in a future framework as a failure – in the case of Indonesia; or accomplishment – in the case of Malaysia. MSM populations in both countries are still struggling to fully exercise their human rights. Social acceptance of MSM lifestyle is diminutive in Muslim-dominated populations such as that of Indonesia and Malaysia. Homosexuality is considered sinful and taboo by the populist view of Islam. Social stigma and discrimination within predominantly Muslim society pressure MSM to hide their sexuality from the public.

adults. See: UNDP, *Legal Environments, Human Rights and HIV Response among MSM and Transgender People in Asia and the Pacific* (Bangkok: UNDP, 2010), 86.

¹⁹ Commission on AIDS in Asia, *Redefining AIDS in Asia: Crafting an effective response*, (New Delhi: Oxford University Press, 2008).

²⁰ Amala Reddy, "Re-strategizing the MSM Response," *Data for Action of Regional Programme Advisor Strategic Information of UNAIDS Regional Support Team Asia-Pacific* (Bangkok, January 21, 2013). See also: Indonesian National AIDS Commission, *Republic of Indonesia Country Report on the Follow Up to the Declaration of Commitment on HIV/AIDS Reporting Period 2010-2011*, (Jakarta: Indonesian National AIDS Commission, 2012).

²¹ *Ibid.*, See also: Ministry of Health Malaysia, *Malaysia 2012 Global AIDS Response Country Progress Report*, (Kuala Lumpur: Ministry of Health Malaysia, 2012) 21.

²² APCOM, "MSM Snapshot of Malaysia," APCOM, accessed July 13, 2013, http://www.apcom.org/tl_files/2012_resources/12_12_Resources/MSMSnapshots-Malaysia.pdf.

Laws pertaining to protection against discrimination for MSM are absent in both countries²³. Islamic upbringing, combined with social stigma, fabricates their inability to negotiate between their religion, gender and sexuality, and thus, leads them to unsupportive social system that drives them away from HIV response²⁴. Given how marriage is strongly advocated as a prophetic example of Islamic culture, many of these MSM end up being in relationship with or marrying women. Consequently, an extra-marital homosexual relationship through sexual fling or short-lived relationship with fellow homosexuals and/or frequenting male sex work is common. This then constructs a mean of risk of HIV transmission from MSM to their spouses – the women. If these female spouses are indeed infected with HIV, there will be chance that the infection will also be inherited by their baby, had they gotten pregnant. In light of this malevolence chain, the concentrated epidemic may therefore evolve into a generalized epidemic. On this basis, delivering robust, effective and quality HIV response for MSM, as well as creating a supportive environment towards LGBT people, is highly important. Among all the factors that need to be assessed to craft such a scheme, the laws relating to MSM are inevitably crucial aspects to evaluate.

1.2 Problem Identification

The reports produced by civil societies have shed light on legal barriers faced in the forefront of Indonesian and Malaysian MSM community. Arbitrary harassment, arrest and detention of gay men assembling in public areas such as public halls, parks and roadsides are not unheard of²⁵. Detainment of men in public venues under the charge of

²³ See: Forum LGBTIQ Indonesia, *Laporan Situasi HAM LGBTI di Indonesia Tahun 2012*, (Surabaya: GAYa NUSANTARA, 2013), 20.

²⁴ APCOM, *Islam, Sexual Diversity and Access to Health Services*, (Brighton: IDS, 2013), 7,8; TREAT ASIA, *MSM and HIV/AIDS in Asia: What is Fueling the Epidemic among MSM and How Can It be Stopped?* (Bangkok: TREAT ASIA, 2006), 2; Jenkins Carol, *Male Sexuality and HIV: The Case of Male-to-Male Sex*, (India: Male Sexual Health and HIV in Asia and the Pacific International Consultation, 2006), 4.

²⁵ Forum LBTIQ Indonesia, *Laporan*, 47; ILGHRC. *Human Rights Abuses Against Sexual Minorities in Indonesia* (Geneva: ILGHRC, 2007).

gross indecency based on the possession of condom and lubricants are not uncommon²⁶. Possession of large stock of condoms and lubricants often leads to accusation of prostitution, public disturbance and gross indecency²⁷. HIV community outreach for MSM is obstructed by unsupportive legal environment in both countries. In sum, laws that represent state-sponsored homophobia and the absence of protective laws are plausibly counterproductive to what the States should aim for in ensuring the well-being of their societies.

While traditional literatures relating to the relationship between HIV and law elaborate the intentionalist assumption in establishing poorly-resourced law as obstacles to HIV response, contemporary reports attempt to provide the empirical study²⁸. The empirical study enacted by contemporary scholars, however, are limited to the examination of the misconduct of law enforcers as well as to the act of pinpointing the insufficiency of legal environment in ensuring a sustainable frontline response. They overlook the examination of the gap between legal system and upstream entities, such as the national administrative and legislative bodies. National administrative entity refers to the national AIDS authority, which is judicially responsible for the delivery of HIV response to the whole nation, or a so-called national AIDS strategy. Legislative entity refers to the law and policy makers that are responsible for further creation of laws and policies that may affect the mechanism of national AIDS strategy. Sodomy law has been blamed for the HIV response's inefficacy, yet little empirical work has been incorporated to examine the actual impact of sodomy law on the mechanisms of national entities. Much of the current advocacy and scholarships is underway to comprehend law's association in the pattern and control of social norms and the negative impacts on individual behavior, namely law enforcers that directly interact with the community.

²⁶ See: New Straits Times, "Over 30 men caught with pants down in illegal spas," *New Straits Times*, 2010. See also: TIME, "Homosexuality is a Crime Worse Than Murder," accessed June 2, 2013, <http://edition.cnn.com/ASIANOW/time/features/interviews/2000/09/26/int.malay.gay2.html>.

²⁷ See: ILGHRC, "Sodomy Laws", 2. See also: Elizabeth Pisani, "Wisdom", 90-91.

²⁸ This will be elaborated in the next subchapter: Literature Reviews.

1.3 Objective of the Study

By evaluating the HIV response gaps from each country, this study is, therefore, conducted to examine the paradigm of punitive law within the framework of sodomy law's constitutive impact towards the national HIV response for MSM-oriented mechanism. In retrospect, this study intends to accomplish the objectives as follow:

- (1) to examine the implication of sodomy law on MSM-oriented HIV response in Malaysia;
- (2) to examine the gaps of MSM-oriented HIV response within the mechanism of national administrative and legislative bodies in Malaysia;
- (3) to examine the gaps of MSM-oriented HIV response within the mechanism of national administrative and legislative bodies in Indonesia;
- (4) to compare the MSM-oriented HIV response gaps of Indonesia and Malaysia;
- (5) to observe if the difference on the subsistence of sodomy law results in different progresses of national HIV response between Indonesia and Malaysia

1.4 Hypothesis and Major Arguments

The discrepancy on the sodomy laws' subsistence is hypothesized by this study to create diverse implications between the progresses of MSM-oriented national HIV response mechanism in Indonesia and Malaysia. As a country that implements sodomy law in its penal code, Malaysia is faced with a situation where the national mechanisms in combating HIV within its MSM population will be lagging behind that of its neighboring country, Indonesia, where sodomy law is not employed in its penal code.

This thesis employs the theory of "law as instrument of social change"²⁹ as the point of departure. Utilizing theory of "law as instrument of social change" within the study is deemed to rationalize the upshot of sodomy law on the produced national mechanisms through a form of moral value reformation that induces discriminative

²⁹ As an instrument of social change, laws postulate two interconnected processes: the institutionalization and internalization of patterns of social behavior. Institutionalization of a pattern of behavior signifies the founding of a norm with provisions of its enforcement; and internalization of a pattern of behaviour refers to the exercise of the value or values implicit in a law. See: Steven Vago, *Law and Society*, (New Jersey: Prentice-Hall, 1991), 219-24.

behavior within the society. It is, therefore prominent to comprehend that while social change oftentimes entails a general connotation that signifies social improvement, the emphasis of the “change” within this particular theoretical elaboration refers to the induction of homophobic behaviour – which does not necessarily account for a positive direction. In other words, the “social change” employed in the context indicates the emergence of state-sponsored homophobia that justifies discriminatory acts towards MSM population. Though the Malaysian population is predominantly Muslim and homosexuality is already deemed as an anathema to the populist view of Islam, the author firstly argues that the existence of sodomy law fosters a far more stringent punitive attitude towards homosexual-related matters. Islam does not explicitly dictate its believers to bear rights to discriminate and punish MSM³⁰. However, as a law with binding force and sanction to those who contravene it, sodomy law encourages institutionalization and internalization of a discriminative and punitive behaviour towards MSM. Such amplification of abhorrence is therefore equivalent with the context of social change utilized in this thesis. In sum, this thesis proposes that the subsistence of sodomy law enlarges the HIV response gap since the statute encumbers the capacity of national mechanisms in mitigating the HIV epidemic within MSM populations due to the institutionalized and internalized homophobic behaviour. As much of the current effort is underway to understand law’s involvement in the configuration, preservation and control of social norms and the subsequent impacts on individual behavior, the finding of this thesis is therefore distinct from previous advocacy discourses as this thesis analyzes a larger institution’s conduct.

1.5 Definition of Terms

To comprehend this study, please refer to the list below to understand the conceptual and operational terms employed in study.

³⁰ The Quran does not detail legal punishment or instruct the mankind to punish someone who is homosexual or committing consenting homosexual act. In addition, there is no authentic Hadith contending that the Prophet Muhammad has given or prescribed punishment for the homosexuals. See APCOM, “Islam,” 9.

Capacity building – which is equivalent to capacity development, is a conceptual approach to development that emphasizes on understanding the impediments that hinder people, governments, international organizations and non-governmental organizations from realizing their developmental goals while improving the capabilities that will allow them to accomplish measurable and sustainable outcomes. For the context of this thesis, the term is specifically referred to developmental goals that provide effective HIV response.

Frontline HIV response – signifies the on-field HIV programmes. However, such programmes do not always account as the national AIDS authority's mechanism since there are other forms of responsive community-led grassroots efforts that may not be affiliated with the national AIDS authority.

HIV response – refers to the act of HIV treatment, prevention, care and support.

HIV response gap – is the gap between the national HIV response's actual performance with potential performance that may scale up the HIV response into a more comprehensive and effective scheme. If a national HIV response does not employ the best use of available resources and opportunities, the result may therefore be below its potential. The notion can be translated in situations where less people are being covered, less medication being distributed or less investment being resourced.

Human rights-based approach – is a conceptual framework for the process of human development that is normatively based on international human rights standards, set in Universal Declaration of Human Rights and other UN-adopted human rights treaties, and operationally directed to promoting and protecting human rights. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.

MSM – is a grouping that categories men by behavior of committing same sex sexual act, rather than sexual orientation. That said, MSM includes those who classified themselves as male heterosexuals yet engage in homosexual venereal activity.

National AIDS authorities – refers to national administrative entity that is judicially responsible for the delivery of HIV response to the whole nation. In Indonesia, this entity is known as Komisi Penanggulangan AIDS (KPA); while in Malaysia, this entity is embodied in the HIV/STI Section of Malaysian Ministry of Health.

National AIDS strategy – refers to comprehensive coordinated HIV/AIDS roadmap with clear and measurable targets to be achieved by the national AIDS authorities of the UN member states in adhering to the HIV political declaration agreed within the UN General Assembly.

National HIV response – refers to the scaled-up HIV response that consist the national AIDS strategy and the support of other national stakeholders outside the national AIDS authority.

Serological studies – refers to surveys that are conducted by epidemiologists to determine the prevalence of a disease in a population (i.e., MSM population). Such studies are sometimes performed by random, anonymous sampling from samples taken for other sexual tests.

Sodomy laws – refers to the statutes that limit, prohibit and prosecute sodomy and other homosexual sex activity. Other literatures may use the term anti-sodomy law, and thus, both terms are interchangeable.

Thematic working group – or TWG refers to a working group occupied by an expert of particular key affected population that has a function to provide a platform for the represented key affected population to influence policymaking and program planning, to inform the development of an overall strategy and operational plan that aim to increase access to services, reduce stigma and discrimination, and decrease HIV prevalence among this vulnerable population. That said, each of key affected population has their own TWG (e.g., TWG for IDU, TWG for sex workers and TWG for MSM).

1.6 Scope and Limitations

Supposedly, there is a range of contextual factors that could be defined to properly assess the mechanism of national AIDS authority. However, the approach

employed by this study only incorporated upstream attributes in the guise of national law and policies in the context of HIV response, in which the data relating to them were publicly accessible and not problematic for making cross-country comparison. The study did not assess the downstream response, and thus, the result of the study does not hypothesize for epidemiological conclusion. That said, as the purpose of this study is to postulate which country that has a more committed MSM-targeted national response, deriving epidemiological comparison from the study is incongruous. A country with smaller HIV response gap does not necessarily signify that its MSM population faces a less severe epidemic. Although it is strongly suggestive, a better system does not always guarantee a better epidemiological performance, such as lower HIV prevalence. Hence, although this study provides specific measurement on countries' HIV response gap, the result should be viewed as preliminary.

CHAPTER II

LITERATURE REVIEW

The literature review conducted for this thesis is divided into four sections. The first section will entail the context of sodomy laws while the rest of the chapter assert the spectrum of the relationships between laws and MSM-oriented HIV response through the impact of law on social behavior and on HIV response and the implication of sodomy law on MSM-oriented response.

2.1 The History, Application and Context of Sodomy Laws

The account of sodomy law in Malaysia is substantially presented in the work of Human Rights Watch¹, Kirby² and Sanders³. These literatures trace back the history of Malaysia's penal code article 377 on criminalization of sodomy act to its origin, article 377 of the Indian Penal Code Act XLV of 1860: Chapter XVI of Offences affecting Human Body. The article states:

“377. Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offense described in this section.”

The definition of carnal intercourse against the order of nature is not clearly specified in the article nor is sodomy, an act of sexual intercourse involving anal copulation, plainly categorized as unnatural. The article also does not solely target

¹ Human Rights Watch, *This Alien Legacy: The Origins of "Sodomy" Laws in British Colonialism* (New York: Human Rights Watch, 2008).

² Michael Kirby, "The Sodomy Offence: England's Least Lovely Criminal Law Export?" *Journal of Commonwealth Criminal Law* (2011): 22-45.

³ Douglas Sanders, "377 and the Unnatural Afterlife of British Colonialism," *5th Asian Law Institute Conference* (National University of Singapore. Singapore, May 22 and 28, 2008).

homosexual as the law is addressing "whosoever" and "man, woman or animal". Kidwai & Vanita⁴, however, asserts that article 377 emerged as a protective measure against what British ruler described as the oriental diseases. In the unflattering description of Indian society during the colonization era, English social reformers made direct and indirect references to Indian men's penchant for seeking out the company of fellow man and deplored the corrupting effects of such proclivity. In light of this assertion, it is rational to consider that section 377 was implicitly designed for sodomy act. In addition, given how the many of the cases prosecuted under the article is male-to-male anal sex, Human Rights Watch, Kirby, Misra⁵, Ramasubban⁶ and Sanders suggest that the weight of article 377 has fallen on homosexual sex, and thus, evolves as a strong platform to interpret homosexual act as unnatural offence and serves to criminalize homosexual conduct. Ergo, sodomy law terminology becomes widely adapted.

Although the section 377's wording was never part of the criminal law in Britain, section 377 was not an entirely new law condemning homosexual act. Human Rights Watch, Kirby and Sanders acknowledge this by narrating the Buggery Act, British criminal laws covering homosexual sex that began in 1534 under the reign of King Henry VIII. The act, adopted firstly as ecclesiastical criminal law, specifically forbade "the detestable and abominable vice of buggery committed with mankind of beast". Sanders further narrates that the term buggery is derived from the French "bougre" which in the thirteenth century, had become associated with anal intercourse⁷. The 1533 statute⁸, which was the revised legislation system subsequent to the kingdom's decision to break with the Catholic Church to become secular, took over the offence of buggery from. The penalty for the offence was death punishment. The statute, however, was repealed in the

⁴ Vanita Ruth and Saleem Kidwai, *Same-Sex Love in India: Readings from Literature and History* (New Delhi: Macmillan, 2000).

⁵ Geetanjali Misra, "Decriminalising Homosexuality in India," *Reproductive Health Matters* 17, no. 34 (2009): 20-28.

⁶ Radhika Ramasubban, "Culture, Politics, and Discourses on Sexuality: A History of Resistance to the Anti-Sodomy Law in India," in *SexPolitics: Reports from the Front Lines*, by Sexuality Policy Watch, 92-125 (Rio de Janeiro: Sexuality Policy Watch, 2004).

⁷ See also: H. Montgomery Hyde, *The Love That Dared Not Speak Its Name: A Candid History of Homosexuality in Britain*, (Boston: Little Brown, 1970).

⁸ While Human Right Watch and Kirby asserted that the new non-ecclesiastical statute was founded in 1533, Sanders claimed that the statute was founded in 1544.

reign of Queen Mary I as her jurisdiction returned to ecclesiastical law. During the reign of Queen Elizabeth I in 1563, the kingdom became secular again and the statute was reenacted again, known as 1563 statute. The last recorded execution for “buggery” in England took place in 1836 and the law was repealed twenty five years after that. In other words, domestic British law penalizing sodomy, in one form or another, persisted until 1861.

Ironically, Indian Penal Code, the penal code that contained article 377, was enforced in 1862⁹ by British Raj, British rule in the Indian subcontinent within the period of 1858 – 1947¹⁰, to act as the main criminal code of India. This incongruity can be explained by acknowledging that the drafting of the Indian Penal Code, as what Sanders suggested in his paper, had began long before 1837, the year when the drafting was finished. In that sense, the drafting of the Penal Code took place when the form of Buggery Act still existed, and therefore, sodomy law emerged in the Penal Code. However, due to Indian resistance and English hesitation, it took more than twenty years to enforce the Penal Code.

Another explanation for such paradox comes from Stephen¹¹ and Singha¹². Stephen suggests that the colonial environment was the perfect field for experiments in rationalizing and systematizing law, given how, unlike at home, the British government could carry out autocracy in the midst of a weak populist power. Singha goes further by narrating that such autocratic imposition of a unified code took advantage of the deficiency of a developed and litigious Indian public opinion around questions of criminal law. The contentions from both Stephen and Singha, accordingly, suggest that, while the populist view in the homeland repealed the sodomy law, sodomy law was never questioned in India, and thus, continued to be ratified in the penal code.

The penal code was then adopted wholesale by the non-Indian subcontinent British colonial authorities in Asia. While section 377 was repealed in India in 2009, the

⁹ Dissimilar with what Kirby and Sanders stated, Human Rights Watch suggested that Indian Penal Code came into force in 1860.

¹⁰ Lionel Knight, *Britan in India* (New York: Anthem Press, 2012).

¹¹ James Stephen, *A History of the Criminal Law of England* (London: Macmillan, 1883), 304.

¹² Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (London: Oxford University Press, 1998).

provision of the penal code is still presently in force in nearly all former British colonies in Asia, including Malaysia. Adopted in the national Penal Code Act 574, which was firstly enacted in 1936, Malaysia's sodomy law was found in article 377 and 377A and came into force on December 21, 1938, with the following content:

“377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for a term which may extend to 20 years and shall also be liable to fine or whipping.

377A. Outrages on decency. Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to two years."

Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”¹³

During the 1989 amendment (Act A727), “buggery with animal” was separated into different article (article 377), while the sodomy stature was entailed into newly structured articles: 377A, 377B, 377C and 377D, with contents as the following:

377A. Carnal intercourse against the order of nature: Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature. Explanation: Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section.

377B. Punishment for committing carnal intercourse against the order of nature: Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

377C. Committing carnal intercourse against the order of nature without consent, etc: Whoever voluntarily commits carnal intercourse against the order of nature

¹³ The Law Reform Commission of Hong Kong, *Laws Governing Homosexual Conduct* (Hong Kong: HKLRC, 1983), 63.

on another person without the consent, or against the will, of the other person, or by putting other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.

377D. Outrages on decency: Any person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years.”

In *Politics in Malaysia: The Malay Dimension*, Marzuki Mohammad scrutinizes the dynamics of Malaysia’s legal coercion and suggests that sodomy law is used by the regime as an instrument of tool of political control, just like how all other criminal and civil laws are used by the regime against political opponents in an effort to diminish apparent factional battles to formal legal conflicts and to conveniently brand opponents as common criminals rather than dissidents¹⁴. Mohamad’s assertion can be observed from the prosecutions of Anwar Ibrahim – who was rumored to plot the incumbent prime minister's removal¹⁵ – under the charge of section 377, along with corruption allegation. The prosecution also marked a defining moment for the subsistence of the law as, despite its longevity, the contravention of sodomy law in the country was unheard until this political drama put a spotlight on it.

The rumors of Anwar's homosexual act developed from a letter written by Azizan Abubakar, his wife's former chauffeur, to Mahathir accusing Anwar of committing

¹⁴ Marzuki Mohamad, "Legal Coercion, Meanings and UMNO's Legitimacy," in *Politics in Malaysia: The Malay Dimension*, ed. Edmund Gomez, (Abingdon: Routledge, 2007), 35-40.

¹⁵ The rift between Anwar and the frontman of the ruling party, represented by the then Prime Minister Mahathir Muhammad, is well-explained with the situation inflicted by political business-generated UMNO factionalism. UMNO was the largest Malaysian political party and a founding member of National Front coalition which had dominated the country's parliament since the independence. Within the UMNO, party factionalism and money politics had its roots in the way government concessions were generated and circulated to a number of capitalist in the country. By the early 1990s, Anwar was closely linked to a new group of mainly Malay businessmen who were frustrated with the dominance of corporate Malaysia by the allies of Mahathir. Binary division on the country's capitalism direction evidently emerged within UMNO. Following the 1997 financial crisis, Anwar was opposed to the government's desire to bail out some firms that were associated with Mahathir's cronies. Anwar's stance was deemed to validate rumours that he was plotting the removal of Mahathir. See Mazuki Mohamad, “Politics”, 35.

sodomy rape to Azizan. The letter became documented in a book titled “50 Reasons Why Anwar Cannot Become Prime Minister”. The book, that also alleged Anwar of committing corruption, got circulated within the country’s general assembly and resulted in Anwar’s eviction from the cabinet amid the police investigation on his alleged crimes mentioned in the book. Following his eviction, two sodomy charges were declared against Munawar Anees, his former speechwriter, and Sukma Atmadja, his adoptive brother. The trials from both charges contend that both Anees and Atmadja were voluntarily sodomized by Anwar and sentenced the two to six-month jail terms. Anwar, accordingly, was brought into court for corruption and sodomy charges. The court convicted Anwar on all the charges brought against him and sentenced him to imprisonment of six-year term for corruption charge and nine-year term for sodomy charge, with the later run consecutively after the former. The sodomy conviction however was later overturned once Anwar had finished his six-year jail term in 2004 but with a five-year ban on contesting political office after his discharge from prison.

In 2008, subsequent to the expiration of his politic disqualification, Anwar returned to run in the Parliament by-election. A month before the by-election, the opposition leader was once again arrested on sodomy charge – with different plaintiff. The trial proceeded until 2012 with final verdict claiming that Anwar Ibrahim was not guilty. The possibility of an imprisonment as a result of the allegations could be seen as political tactic to remove him from the leadership of the opposition, or essentially, to remove the political threat. Human Rights Watch and Amnesty International corroborate the idea¹⁶. Both institutions accused the sodomy charge in both allegations as a political frame up since the state’s handling of the evidence fed suspicions. In an Islamic environment, where extra-marital assembly of opposite sexes is considered taboo, a man whose reputation of moral and religious standing will rarely be found congregating with a

¹⁶ See: Human Rights Watch, *Human Rights Watch World Report 2013: Events of 2012* (New York: Seven Stories Press, 2013), 335. See also: Amnesty International, “Malaysia: Anwar Case Shows Why Sodomy Law must be Scrapped,” accessed July 4, 2013, <http://www.amnesty.org/en/news/malaysia-anwar-case-shows-why-sodomy-law-must-be-scrapped-2012-01-09>.

woman who is not his wife or part of his families, and therefore, sodomy law is considered to be a potent political slander¹⁷.

Sodomy charge has never appeared in Indonesian court since Indonesia's penal code does not rule sodomy. As a former colony of the Netherlands, Indonesian legal system is majorly inherited from Dutch legislation¹⁸. Historically, sodomy law was contained in the Dutch Penal Code known as Roman Dutch Law, a version of codified Roman law that was interpreted by Renaissance classicists in the Low Countries¹⁹. The penal code was repealed in 1809 when Napoleon annexed Holland to France during the French invasion²⁰. The Dutch Penal Code was replaced by French Penal Code, known as Napoleonic Code, in which the sodomy law was not employed. After the Dutch gained independence back from the French in 1813, the sodomy law remained absent until today. Although the Dutch arrived in Indonesia in the 17th century, only until 1918 the unified criminal code was enforced in the archipelago under the set of laws that is known today as Indonesian Penal Code²¹. As in 19th century the sodomy act was long gone already, it is comprehensible why the penal code of 1918 did not employ sodomy statute, and therefore, it is evident why the criminalization of sodomy remain absent in Indonesian Penal Code.

2.2 The Impact of Law on Society

The reciprocity between law and social change has been one of the key subjects developed by both law and sociology scholarships. The discourses on whether social changes calls upon legal changes or legal changes are the one that inflicts social alteration

¹⁷ This notion is synthesized from the interview with Latheefa Koya, a member of legal defence team of Anwar's second sodomy charge. See: The Nut Graph, "Rethinking Malaysia Sodomy Law", Claire Brownel, last modified July 24, 2009, accessed June 18, 2013, <http://www.thenutgraph.com/rethinking-malaysia-sodomy-laws>.

¹⁸ Steven Drakeley, *The History of Indonesia* (Westport: Greenwood Press, 2005), 47.

¹⁹ Scott Long, "Before the Law: Criminalizing Sexual Conduct in Colonial and Post-Colonial Southern African Societies," in *More than a Name: State-Sponsored Homophobia and its Consequences in Southern Africa*, by Human Rights Watch and International Gay and Lesbian Human Rights Commission, 256-299. (New York: Human Rights Watch, 2003), 257.

²⁰ *Ibid.*, 258.

²¹ Robert Cribb and Audrey Kahin, *Historical Dictionary of Indonesia* (Lanham: Scarecrow Press, 2004), 238 – 240.

remain debatable. Both paradigms are likely to be correct under different circumstances, but for the context of this thesis, however, the literature review will only employ the paradigm of law implication on social dynamicity.

Historical illustration has a fair share of narrations of the enactment and implementation of laws as instrument to induce social change in the society. Vago does a great work on compiling the account of Roman, Soviet Union, Nazi Germany and the Communist China in enacting law to create enormous changes in their respective societies²². As an instance of such enormous changes, a society may no longer see prostitution and gambling as vices once the law legalizes business that source its profit from such activities²³. The theory of “law as an instrument of social change” becomes more profound in contemporary society. A legal scholar, Friedmann, argues that “the law – trough legislative or administrative responses to new social conditions and ideas, as well as through judicial re-interpretation of constitutions, statutes or precedents – increasingly not only articulates but sets the course for major social changes”²⁴. Harcourt upholds such notion by contending that law “may, in fact, reconfigure – for better or for worse – the way that we perceive, think desire or interrelate with others and judge others”²⁵.

Vago substantiates the foregoing views by setting the improvement of social and political position of black American trough the inception of law criminalizing racial discrimination as an example²⁶. Prior to Friedmann’s idea, the role of law in social change has been developed by Dror. He asserts that indirect aspects of law in social change emerge through the formulation of various social institutions, which sequentially

²² Vago, “Society,” 219-20.

²³ The precedence of this notion is illustrated when the Communist party came into power in China in 1949. See: Brady, James. "A Season of Startling Alliance: Chinese Law and Justice in the New Order." *International Journal of the Sociology of Law* 9 (1981): 41-67.

²⁴ Wolfgang Friedmann, *Law in a Changing Societ* (New York: Columbia University Press, 1972), 513.

²⁵ Bernard Harcourt, *After the “Social Meaning Turn”: Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 204-5, quoted in Goodman, "Beyond the Enforcement Principle: Sodomy Laws, Social Norms and Social Panoptics," *California Law Review* 89, no. 3 (2001): 643-740, 645.

²⁶ Vago, “Society,” 220.

created direct effect on society²⁷. As the law interacts in many conditions involving primary social institutions, the direct association between the law and social change is inevitable. Take a laws forbidding racial discrimination in education as example. Such statute has a direct impact on social change by allowing previously excluded group to attend educational institution of their choice. Dror, nevertheless, notifies that, the emphasis on the direct and indirect impact may not always be in balance; one may exert more weight over another.

The appropriate response to the foregoing scholarships is to examine under what specific circumstances, at what level and to what extent the law can produce social change. In light of this, numerous literatures have emphasized the efficacy of law as an instrument of social change. William Evan invented a discourse that describes seven conditions to follow in order to make law effectively promote a change²⁸. The more conditions being fulfilled, the more effective the change induced. The seven conditions are: (1) the law must emanate from an authoritative and prestigious source; (2) the law must introduce its rationale in terms that are understandable and compatible with existing values; (3) the advocates of the change should make reference to other communities or countries with which the population identifies and where the law is already in effect; (4) a relevant use of time is made to overcome potential resistance; (5) those enforcing the law must themselves be very much committed to the change intended by the law; (6) the implementation of the law should include positive as well as negative sanctions; and lastly, (7) the enforcement of the law should be reasonable, not only in terms of the sanctions used, but also in the protection of the rights of those who stand to lose by violation of the law. While these conditions seem to be cohesive to each other, condition (7) is not as objective as the preceding conditions. The rationality of law is a very subjective matter, especially on the law intersecting with crimes without victim – such as drug consumption and gambling. In pluralistic society, a law's level of reasonableness can face various judgments. While the law might be deemed as reasonable by the

²⁷ Yehezkel Dror, *Law and Social Change* (San Fransisco: Chandlre Publishing Company, 1970), 674, quoted in Vago, "Society", 221.

²⁸ William Evan, *Law as an Instrument of Social Change* (New York: Free Press, 1965), 288-91, quoted in Vago, "Society", 223.

lawmakers, the group who is prone to violate such law may think otherwise. That said, change through law is typically preferred by some and opposed by some other. To solve this contention, the “role of public opinion leader” theory should be incorporated. Rose and Rose contend that if the majority of opinion leaders are behind the change, the opposition remains powerless and most of the people will eventually adapt themselves to the change²⁹. Thus, assimilating Evan’s conditions and Rose and Rose’s notion, the reasonableness of the law unwarrantedly lies on the verdict of the public opinion leaders. Vago further adds the necessary criteria for law to be an agent of change by accentuating the amount of information available about the law itself. The law will not generate a social change had the transmission of information relating to the law been insufficient³⁰. Says Vago: “Ignorance of the law is not considered as an excuse for disobedience, but ignorance obviously limits the law’s effectiveness.” In the same vein, the responsiveness of enforcement, as Zimring and Hawkins argue, also has an influence on the law’s efficacy. In “Legal Threat as an Instrument of Social Change”, the two claim that “the more high status individuals are arrested and punished, the greater will be the likelihood that a particular law will achieve its intended objective”³¹. This notion becomes valid because, similar to Evan’s fifth condition, Zimring and Hawkins assert that selective enforcement would only signify the unwillingness of law enforcers to enact the law, which will then hinder the law’s intended object. The prosecution of high status individuals, alternatively, will add the volume of the transmission of information relating to the law, given how the media would publicize such matter to the public. The media coverage of the prosecution of such a high status person plays a role that educates the public on the substances relating to the law. Vago’s “information transmission” criteria, therefore, is more likely to be fulfilled when Zimring and Hawkins’ “high status arrestment” prevails.

²⁹ Arnold Rose and Caroline Rose, *Sociology: The Study of Human Relations* (New York: Knopf), 1969.

³⁰ Vago, “Society”, 223-4.

³¹ Franklin Zimring and Gordon Hawkins, *The Legal Threat as an Instrument of Social Change* (Englewood Cliffs: Prentice-Hal, 1975), 337-8, quoted in Vago, “Society”, 224.

The law, nonetheless, has a limitation as well in creating social change. The apparent limitation of the law in social changes comes forward, as Vago notes, when it tries to manage private morality³². His point of argument is based on how law dealing with adultery, prostitution and homosexuality being ignored by the society, and thus, failing to induce social change. This elaboration, however, is limited to secular western societies – where the shared value and morality that shape and treat the law are more diverse and not excessively trapped in a certain dogma such as that of religion. That said, in eastern societies or in population where strong religious upbringing becomes highly assimilated with the legislative power (i.e., Islamic countries with sharia law), a comparable scenario will not hold.

Consolidating the abovementioned scholarships, it is evident that, first, it takes time for a law to become an agent of change, and second, shared moral and value can become either support or limitation. Indication of law affecting society's behavior may surface when one or more criteria are being fulfilled. Such indication, however, is more likely to be observed in external behavior. Changes in external behavior, nonetheless, are subsequent to the changes in values, morals and attitudes, ergo the social changes.

2.3 The Impact of Law on HIV Response

While the preceding section focuses on society in general, this section emphasizes on the more specific part of society that is affected by HIV epidemic. As the duty bearer to ensure the well being of its society, a State is attached with accountability to provide health measures to its people, including those who are affected by HIV. Legal environment simultaneously postulates influences on HIV response and numerous literatures have accounted for the portrayal of such influences.

In *Legal Protections against HIV-related Human Rights Violations*³³, UNDP highlights the role of omnibus national HIV laws to synchronize all governmental entities in affecting the legal environment for HIV response. The study was conducted in the

³² Ibid., 234.

³³ UNDP, *Legal Protections against HIV-related Human Rights Violations* (Bangkok: UNDP), 2013.

latter semester of 2012 by documenting omnibus national HIV laws in Asia and the Pacific countries. Omnibus national HIV laws are defined to be the laws that comprehensively address all the legal aspects of HIV in one piece of legislation. By 2012, six Asian countries (Cambodia, China, Lao PDR, Mongolia, the Philippines and Viet Nam) had enacted comprehensive national HIV laws. A further three countries (India, Nepal and Pakistan) had prepared the bill's draft. A well-drafted national HIV law that reflects human rights-based approach can produce an enabling legislative framework for the national HIV response through a single law that defines consistent human rights based approach supported by an explicit statement of principles. Awaiting the bill's draft to be passed, India has been advancing its HIV-related legal environment by establishing prominent legal principles, including the right of people living with HIV to non-discrimination in employment, the right of prisoners to HIV healthcare, decriminalization of consenting homosexual adult sex and recognition of sex workers' human right. In contrary, a poorly drafted or misconceived national HIV law can entrench punitive or discriminatory approaches that weaken public health. The national HIV laws of Viet Nam still permit compulsory HIV testing of military personnel. Mandatory testing is also still permitted in certain industries by the national HIV laws of China. The existence of national HIV laws does not guarantee scaled-up national HIV response in all aspects. The study, therefore, suggests that the subsistence of national HIV laws alone is not sufficient to measure and compare the progresses of national HIV response.

The Global Commission on HIV and the Law³⁴, a commission consisting of distinguished individuals who advocate on issue of HIV, public health, law and development, have been advocating for evidence and human rights-based legal environment for effective and efficient HIV response since the commission's creation in 2010. In *Risk, Rights & Health*, the commission concludes that HIV is also a crisis of law, human rights and social justice³⁵. In the midst of scientific advance on HIV prevention and treatment and the growing epidemic of inequality hampering health and development across the globe, addressing the legal and human rights barriers to effective

³⁴ The commission is chaired by former president of Brazil, Fernando Cardoso.

³⁵ Global Commission on the HIV and the Law. *Global Commission on the HIV and the Law: Risks, Rights and Health*. New York: UNDP, 2012.

HIV response is as crucial as ever. It is increasingly acknowledged that securing the human rights of people living with HIV and most-at-risk populations is fundamental to guaranteeing access to HIV prevention, treatment, care and support for all. Good laws, fully-resourced and rigorously enforced, can accomplish such aspiration. To put it into perspective, in *Cost & Choice: Financing the Long-Term Fight against AIDS* publication³⁶, Result for Development Institute produces a graphic that illustrates why the law matters to the epidemic.

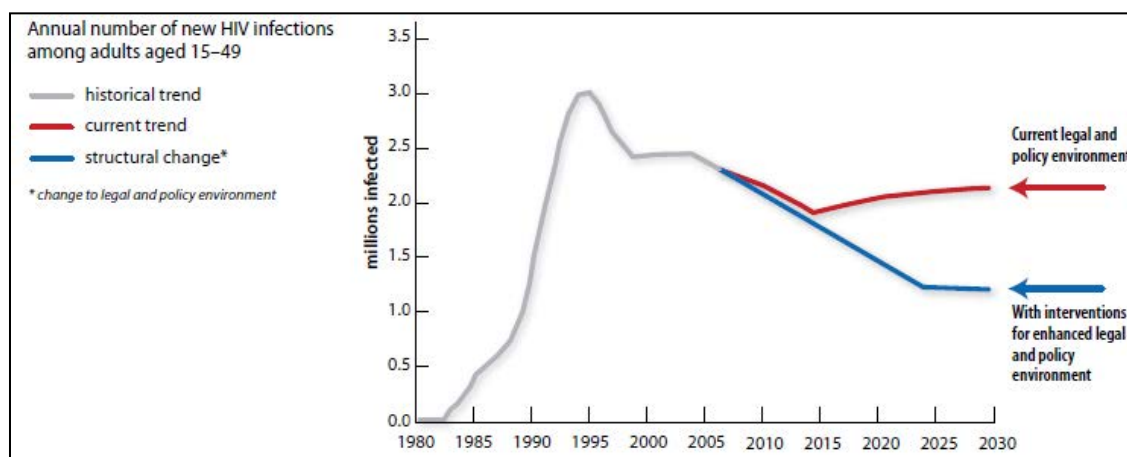


Figure 1 New Infections among Adults aged 15-49

Source: *Cost & Choice: Financing the Long-Term Fight against AIDS*

Based on the epidemic estimation model for 139 countries run by the working group behind the study, the graphic in the Figure 13.1 above shows that, with current legal and policy environment, the epidemic will never diminish and, instead, gets escalated. The interventions for enhanced legal and policy instrument are needed to plot the declining trend of the epidemic.

2.4 The Implication of Sodomy Laws on MSM Communities and Their Access to HIV Response

There are two schools of thought examining the relationship between sodomy laws and MSM-oriented HIV response. One is to look at the former as part of the latter;

³⁶ Result for Development Institute, *Cost and Choices: Financing the Long-Term Fights against AIDS* (Washington, DC: Result for Development Institute, 2010), 37.

while another views the former as obstacle for the latter. The first model emphasizes the justification of the statute while another advocates for its repeal.

In *Homosexuality and the Law*, Stewart enlists a number of arguments used for the continued support of sodomy laws³⁷. Among them is a belief that the control of sodomy reduces HIV infection and other sexual transmitted disease³⁸. Criminalizing sodomy means limiting the means for sexual transmission of HIV among MSM. Stewart, however, also argues that given how infrequently the sodomy laws are enforced, it is evident that controlling disease is not the purpose of such homophobic statute. Klarman corroborates Stewart's finding by as well documenting the United States-based trials to overturn sodomy law prior to its termination³⁹. Klarman stresses that defenders of sodomy laws used AIDS to justify such statutes on public health grounds. Some judicial verdicts declining constitutional challenges to sodomy laws overtly invoked AIDS as justification. When the U.S. Supreme Court in 1986 granted review in a buggery case, an amicus brief insisted that the law should be kept for the sake of eliminating HIV.

On the other hand, quantities of literatures essentially produce findings that declaim the consequences of obstructive legal environments towards the effort in mitigating the HIV epidemic. Prior to the materialization of these literatures, scholars focus on whether or not sodomy laws constitute an effect on shaping and reforming social norms relating to homosexuality, not necessarily to HIV measures in specific. Scholars believing the sodomy laws not constituting any consequences rely on the notion that the enforcement of sodomy law is deficient⁴⁰. This is, however, only valid in a circumstance in which the rights to privacy is strongly upheld. Sodomy is an act that cannot be justified through preference. An individual who shows a preference of homosexual does not imply that he engages in homosexual act. As law cannot act on preference and homosexual sexual

³⁷ Chuck Stewart, *Homosexuality and the Law*, (Santa Barbara: ABC-CLIO, 2001).

³⁸ *Ibid.*, 269.

³⁹ Michael Klarman, *From the Closet to Altar: Court, Backlash and the Struggle for Same-Sex Marriage*, (New York: Oxford University Press, 2013), 36.

⁴⁰ See: Richard Posner, *Sex and Reason* (Cambridge: Harvard University Press, 1994), 309. The study was mainly based on American prosecution cases, which were indeed rare. The author asserted that because sodomy laws are not actually enforced, there is no real damage inhibited and, therefore, no urgency in repealing such statute.

activity – like that of heterosexual – is a private matter, it is apparent that the respondent of sodomy law is the one whose privacy is being wrongfully exposed.

Other scholars argue that, regardless whether or not the law is being enforced, homosexuals are harmfully affected. While claiming that nation imposing sodomy law illustrates how certain religious doctrines concerning the depravity of gay sexuality is being favored over another by such nation – and thus, the law is unjustifiable, especially in a secular country – Reining also declares that sodomy laws play a role as an expression of insult by homophobic member of the society⁴¹. Such point is borrowed directly *Gays/Justice* piece, authored by Richard Mohr. Mohr argues that the dignity of homosexual is being diminished by the existence of the sodomy law⁴². Halley extends the foregoing findings by concluding that the maintenance of sodomy law and discussion about its preservation, amendment and termination shape the social understanding of sexual identity⁴³. Study commissioned by UNAIDS corroborates the comparable idea⁴⁴. The study concludes that even though in many cases sodomy laws are rarely enforced due to the impenetrability of discovering private behavior, the laws are often translated as validation for other human rights infringements, such as restrictions on the rights of association, opinion and assembly. Unless the laws have been abolished, LGBT individuals may be incapable to seek for police protection for other crimes such as homophobic violence for fear of being themselves.

These scholarships consolidate the idea that sodomy laws is such a retroactive criminal prosecution and its existence is prima facie evidence of human rights restrictions regardless the frequency of their application. Furthermore, while sodomy law is an expression of a fraction of society's sentiment towards homosexuals, the law also ends up creating and amplifying such sentiment within the society. This notion remains true even in the case of a country that inherits penal code from its former colonizer. The fact that

⁴¹ Timothy Reining, "Sin, Stigma & Society: A Critique of Morality and Values in Democratic Law and Policy," *Buffalo Law Review*, 1990: 859, 866.

⁴² Richard Mohr, *Gays/Justice: A Study of Ethics, Society and Law* (New York: Columbia University Press, 1988).

⁴³ Janet Halley, "Reasoning about Sodomy: Act and Identity in and after *Bowers v. Hardwick*," *Virginia Law Review*, no. 79 (1993): 1721.

⁴⁴ Cáceres et al., *Review of Legal Frameworks and the Situation of Human Rights related to Sexual Diversity in Low and Middle Income Countries* (Geneva: UNAIDS, 2008), 14.

the law is still adopted in their current legislation, while some other countries have abolished it, implies that the ongoing sodomy law does represent the subsistence of the native's sentiment.

In the same vein with Halley's conclusion, the result of Goodman's study is one of the pioneering conclusions in establishing empirical verification on negative consequences of sodomy law towards individual identity, social relations and conceptions of public space, while its preceding studies are highly based on intentionalist assumption⁴⁵. Taking place in South Africa, both before and after the country's sodomy law becomes invalidated in 1998, Goodman's study investigates, as an empirical matter – through interviews and questionnaires, how the sodomy law functioned to, whether enforced or not, affect South African's social norms in both micro and macro level. At micro-level, while the law is still enacted, the country's homosexual individuals are faced with constant insecurity, physically and mentally, when they are in public. Goodman illustrates such paradigm by utilizing Foucault's "social panopticism"⁴⁶. Says Goodman: "Private individuals perform roles of policing and controlling lesbian and gay lives in a mimetic relation to the modes of justice itself ... States apparatus does not exclusively exercise the function of surveillance and control [of the law]; instead, this power and its processes are channeled through individuals actors throughout the social body". This "function of surveillance and control" is, unfortunately, frequently translated into justification or endorsement for social harassment and discrimination, as the author notes. Succeeding the law's abolishment, however, Goodman suggests that there are attitudinal and behavioral shifts indicated by homosexual individuals to feel and experience a more secured social contact within a heteronormative environment. On macro level, Goodman proposes that sodomy law affect the views of religion, medical and other public domains. As religious texts are subject to interpretations that reflect the sociocultural norms, he

⁴⁵ Goodman, "Sodomy Laws", 660-727.

⁴⁶ Foucault believes that society acts like panopticon. The state becomes the central point that surround public and society-centered institutions such as schools, hospitals, corporations, police stations and an economic and political system. Adding to that, moral systems, culture, behavioral norms, and socially accepted ways of thinking also control us, ergo another central point. No matter where we go or what we do, these cultural patterns follow us. Social norms our society chooses to adopt, in other words, are inescapable. See: Michel Foucault, *Discipline & Punish: The Birth of the Prison* (NY: Vintage Books, 1995), 195-228.

concludes that sodomy law plays a constitutive role in justifying a homophobic social norm as a religious act. This notion eventually becomes the staple for other public domains as well, such as police, which in turn creates, but not always, a homophobic misconduct within the service. Goodman also declares that sodomy law is a major cause of former pathological model that holds that homosexuality is a mental illness. Goodman adds that, prior to the deletion of homosexuality from the list of mental disorders listed by American Psychiatric Association⁴⁷, the criminalization of sexual behavior has largely affected the medical profession's uneasiness of same-sex desire, and thus, summons significant historical medical mistreatment of gays and lesbians.

Subsequent to the study, in the realm of strengthening global cooperation in mitigating HIV epidemic, humanitarian situation reports come forward to shed light on the experiences and lessons learned from the management of HIV response in the existence of punitive or non-supportive legal environment. Numerous of them attempt to specify the law's constitutive impacts towards the measures, including the ones directed for MSM community.

More resemblance with the preceding conclusions is found in the findings of Fried and Kowalski-Morton's article⁴⁸. The article concludes that in regions and countries where homosexuality are criminalized and homosexual people are stigmatized, organizations that are organized by or work with LGBT people or groups experiences difficulties in participating in Global Fund processes and reaching the funding because of the intrinsic conflicts and risks involved in doing so. In the same vein, one staggering example of the difference in Global Fund's MSM-oriented funding before and after decriminalization of sodomy law, as pointed by amFar, can be observed in India⁴⁹. In 2009, the country generated 160-fold greater share of funding for MSM-oriented HIV response as that year's 32 per cent of funds targeted to MSM were inflated from just 0.2

⁴⁷ Major mental health organization such as World Health Organization, however, declassified homosexuality as mental disorder in 1990.

⁴⁸ Susana Fried and Shannon Kowalski-Morton, "Sex and the Global Fund: How Sex Workers, Lesbians, Gays, Bisexuals, Transgender People, and Men who Have Sex with Men are Benefiting from the Global Fund, or Not," *Health and Human Rights in Practice* 10, no. 2 (2008): 127-136.

⁴⁹ amfAR, *Achieving an AIDS-Free Generation for Gay Men and Other MSM: Financing and implementation of HIV programs targeting MSM*, (New York: amFar, 2012), 31-2.

per cent in the year before. Although such a change is only in part a reflection of the legal framework in India, particularly because it happened soon after the Delhi High Court decriminalization verdict, the change is sufficient to depict a sensible changing climate for MSM work in the country. Based on analysis of MSM-oriented program’s funding in eight countries, amfAR further argues that “in countries where same-sex sexual practices are not criminalized, MSM tend to receive a larger share of the budget [for HIV response]”⁵⁰.

UNDP’s *Legal Environments, Human Rights and HIV Response among MSM and Transgender People in Asia and the Pacific* research⁵¹, correspondingly, documents how both punitive and protective laws, policies and practices impact comprehensive HIV response in the observed 48 countries in Asia and the Pacific, and therefore urges the governments to scale-up HIV response among MSM and transgender people by addressing legal barriers to HIV response, including repealing laws that criminalize sex between consenting adults. The key findings that support such recommendation exemplify a range of adverse corollaries of repressive legal environments for HIV response, such as impeding MSM-oriented prevention activities, driving MSM away from HIV services, legitimizing discriminatory and inhuman health services and reducing MSM’s self-esteem and increasing their risk-taking behaviors. These corollaries, however, are not sufficient to illustrate the crisis on the legislature level and the associated national AIDS authority. They are only adequate to illustrate the crisis within the provision of HIV response on the front line, which may not necessarily account for the programmes of national AIDS strategy⁵². The documented rights violation cases in this study are, analogously, the result of the knowledge gap between justice and the downstream health sectors that invokes discrimination, harassment, violence and

⁵⁰ amfAR, “AIDS-Free Generation”, 32.

⁵¹ UNDP, “Legal Environments.”

⁵² See: amfAR, *Lesson Learned from the Front Lines: Effective Community-Led Response to HIV and AIDS among MSM and Transgender Populations* (New York: amfAR, 2011). The publication reports the profiles of effective and creative MSM community-based organizations, which are too often sidelined in the development of national AIDS strategies and in the top-down, public health discourses regarding the global AIDS response. These outreach projects depict a more responsive role of community-led grassroots efforts than that of the national AIDS strategy itself. The coverage and the intensity of condom distribution, HIV prevention workshop and post-exposure psychological counseling by community-led programmes funded by international fund in some cities are often greater.

criminalization towards community-based response provider and the outreached MSM. In other words, the study may succeed in showcasing the misconduct of law enforcers as well as pinpointing the insufficiency of the existing mechanism of national HIV response in utilizing the nation's capacity to mitigate the epidemic within MSM population, yet fail to examine the knowledge gap between legal system and the upstream health sectors. The linkage between the laws, which are produced by legislative entities, with decision of national HIV authority, which represents an entirely different entity (e.g., national health department), is overlooked in the study. Little empirical work has been incorporated to examine the actual effect, and therefore, the forthcoming studies should shed light on such subject matter.

CHAPTER III

RESEARCH METHODOLOGY

Prior to assessment of the national mechanisms, the thesis examines the efficacy of sodomy law as an instrument of unconstructive social alteration that affects HIV-related national mechanism. This chapter will, therefore, be systematized into two corresponding subchapters detailing the approach for, first, examination of the implication of sodomy law, and second, the assessment of the national mechanisms. Each approach contains theoretical foundations and data collection methods by which the study produces relevant findings to the topic.

3.1 The Approach for the Corroboration of Sodomy Law as Institutional Homophobia's Instrument

The derivative scholarships from “law as instrument of social change” theory were exercised to show the extent to which sodomy law can provide an effective impetus for inducing discriminative behavior within the society, including the stakeholders behind the national mechanisms. It is, therefore, prominent to comprehend that while social change oftentimes entails a general connotation that signifies social improvement, the emphasis of the “change” within this particular theoretical elaboration refers to the induction of homophobic behaviour. In other words, the “social change” employed in the context indicates the emergence of state-sponsored homophobia that justifies discriminatory act towards MSM population.

William Evan's “Seven Theoretical Prerequisites” scholarship¹ was employed to examine if Malaysian sodomy law fulfill enough criteria to succeed in inducing change in Malaysian society. However, given how sodomy act charged by The Penal Code is a victimless crime, the seventh prerequisite, which cites the rationale of victim's protection, is not applicable for the corroboration analysis. Evan argues that the enforcement of the law that acts as social change instrument should be reasonable, not only in terms of the

¹ The scholarship is previously discussed in Literature Review (see page 22).

sanctions used, but also in the protection of the rights of those who stand to lose by violation of the law. The voluntary manner between consenting adults that conduct sodomy act, however, does not constitute a party who stand to lose by the infringement of the law. It is a victimless offence, and thus, there is no need to analyze a victim's protection.

In further utilizing Evan's scholarship, Zimring and Hawkins' "High Status Prosecution" and Vago's "transmission of information precondition" conjectures were as well employed to further substantiate the connotation of sodomy law.

The corroboration framework adopted by this study is that, as there is a time needed for a law to become social instrument, the author argues that the sodomy law's defining point on becoming „the instrument“ is reflected from the fulfillment of Vago's "transmission of information precondition" conjecture. The fulfillment of such conjecture is substantially supported by the realization of Zimring and Hawkins' "high status prosecution" theory. To strengthen the corroboration, William Evan's "Seven Theoretical Prerequisites" scholarships are employed subsequently.

3.2 The Approach for the Assessment of the National HIV Responses

In delivering the progress comparison, this thesis adopted and adapted the methodology of National AIDS Spending Assessment and National Composite Policy Index developed by UNAIDS as well as the AIDS Accountability Scorecard on LGBT assembled by AIDS Accountability International. By utilizing the indicators selected from these methodologies, the thesis' qualitative approach became competent to compare the response progresses of the two nations through the HIV response-related mechanisms conducted by the national AIDS authorities and the associated legislative entities. Due to time and financial constraints, however, this thesis only employed some particular indicators in which the data relating to them were accessible within the public documents and not problematic for making cross-country comparisons.

The indicators used to measure the national HIV response gap from each country were:

- (1) national commitments and policies instrument;
- (2) deployment of Global Fund's HIV grant;
- (3) adoption of resolutions.

Although these indicators did not essentially represent the full range of relevant HIV response for MSM, each was a critical measure of a comprehensive mechanism for mitigating HIV epidemic within MSM population. The indicators were not merged into single quantification because this would demand for a subjective evaluation of the relative importance of each. Furthermore, these indicators were sufficiently divergent that if a country performs better than another in more indicators, there would be sufficient grounds to make the stakeholders of the less advanced country to improve its mechanism. Consequently, subsequent to the examination of the aforesaid indicators, the study produces a conclusion on the constitutive impact of sodomy law in the level of national authorities. The following subsections detail further explanation of each indicator and the method of analysis behind it.

3.2.1 National Commitments and Policies Instrument

National commitments and policies instrument on MSM-oriented response within the government is reviewed to examine the authorities' efficacy in making tangible progress towards their MSM-oriented target. In doing so, this study compared the advancements of the authorities' functional and organizational capacities. Such a comparison will be assessed by evaluating the NCPI reports of Indonesia and Malaysia. NCPI reports are submitted by UN member countries to UNAIDS to report the countries' compliance in providing active leadership, coordinating the involvement of different partners and sectors, and ensuring accountability for an effective national HIV response. The format of NCPI report is clustered into five clusters explaining distinctive features of national HIV response: strategic plan, political leadership, human rights, prevention and scheme of treatment, care and support. Each cluster consist evaluative instrument that needs to be answered by both government and non-governmental actor. This study therefore examined the completion of MSM-related instruments that were assembled by

governmental party. The exclusion of non-governmental actor's answers within the analysis was due to the objective of this thesis in measuring governmental-based HIV response gap only. Including non-governmental response into the analysis would postulate an imbalance within the dimension of other indicators employed by this study. That being said, the gap was measured by extrapolating the accomplishment of the MSM-targeted national commitment and policies instruments. A country with fewer accomplishments is therefore a nation that has a higher gap.

3.2.2 Deployment of Global Fund's HIV Grant

The government's operation of international assistance for MSM-focused HIV response is appraised to assess further modalities enhanced in the national HIV response. The assistance can be in a form of foreign aid and provision of technical working group, dialogue and consultation. Aid in form of financial grant, however, is chosen to represent the appraisal of international assistance to ease the technicality of the comparative study. This study therefore evaluated the deployment of mutual MSM-oriented international grant assistance acquired by Indonesia and Malaysia, Global Fund's HIV grant, in addressing MSM population. The Global Fund is an innovative financing institution that disburses funding to countries to support programs that prevent, treat and care for people with HIV and AIDS along with their counterpart programs on treating and preventing tuberculosis and malaria. The Global Fund does not manage or implement programs on the ground. Instead, the institution relies on local experts. Every country that seeks for a grant should found Country Coordinating Mechanisms that develops and submits grant proposals to the Global Fund, supervises the implementation of funded programs, assesses grant recipient reports and guarantees cross-sector coordination. Each year, Global Fund opens the submission of grant proposal that implement multiyear HIV response programme. If the proposal is accepted, the grant will be progressively dispersed once a year within the program conduct. The latest Global Fund grant acquired by Indonesia is Round 9 grant, with implementation period of 2010 to 2012. Malaysia's latest Global Fund grant is Round 10 grant, with implementation period of 2011 to 2013. Thus, Indonesia's Round 9 grant and Malaysia's Round 10 grant are the object of the

evaluation of this international aid indicator. That being said, the HIV response gap was measured to an extent whether the grant deployment addressed MSM population or not. The country whose grant deployment did include MSM population had a slighter gap than the country whose aid utilization did not.

3.2.3 Adoption of MSM and HIV-related Resolutions

International resolutions that urge the member states to either protect LGBT rights, scale up the provision of generic and MSM-focused HIV response, or enact both initiatives are reviewed to evaluate the government's commitment to ensure comprehensive HIV response for MSM population on both formulation and delivery aspect. Signatory status and participatory attitude of Indonesia and Malaysia in such resolutions that applicable to both countries are therefore assessed to measure another facet of HIV response gap. More ratification status within MSM/HIV-related resolutions signifies a reduction of HIV resource gap.

As each of multilateral institutions produce HIV-related resolutions sequentially, the technique for this indicator only employed the latest resolution produced by each institution unless there was a remark that the institution produce distinct decrees.

3.1 DATA COLLECTION

This study employed a qualitative approach and the information was significantly gained through documentary research and interviews. This study researched a total of 66 documents and conducted interviews with 9 key informants. The following subsections details each of the methods.

3.3.1 Documentary Research

Sixty six literatures and documents were reviewed for this study. These documents include researches, reports and news produced by academicians, governments, journalists and civil societies. For the first part of the research finding, Corroboration of Sodomy Law as Social Instrument, a total of 18 of literatures pointing at the enactment of Malaysian sodomy law were studied to conduct the analysis. For the second part of the

research finding, Assessment of the National HIV Response, a total of 48 documents that shed light on the three indicators were examined. For Indicator 1 (National Commitment and Policies Instruments), 8 documents were reviewed with two being the key documents: 2012 NCPI reports. These NCPI reports were the latest reports submitted by Indonesia and Malaysia as of the writing of this study. Within the cross-report comparison, supplementary documentaries were reviewed to assess both discrepancy and resemblance in detail. For Indicator 2 (The Grant Deployment of Global Fund), a total of 11 Global Fund-related documents, such as proposals and grant performance reports, were reviewed. For Indicator 3 (Adoption of MSM and HIV-related Resolutions), the desk review was conducted on two stages. First stage was to review all international resolutions relating to HIV response and/or LGBT rights and to decide which resolutions that is applicable for MSM population and to select the finale resolution within a sequence of resolutions covering a same topic within the same institution. In so doing, the analysis of the documentation keywords were used to search the documentation. The keywords included: gay, homosexual, homosexuality, LGBT, men having sex with men, MSM and sexual minority; and it resulted in 29 resolutions. After assessment, 10 resolutions were retained due to its MSM-related content, and therefore, used for the more detailed analysis: to assess the signatory status of Indonesia and Malaysia. See Appendix A to see the list of documents reviewed in each chapter.

3.3.2 Interviews

Much of the data for the second part of research finding, Assessment of the National HIV Response, were tabulated from interviews. The three indicators were re-examined through discussion with persons of expertise in area of HIV-related advocacy and response on both regional and national levels. A total of 9 key informants were interviewed. The interviews were conducted in open-ended and one-on-one method with an aim to scrutinize an expert's view and firsthand experience on the MSM-targeted HIV responses. See Appendix B to see the list of key informants interviewed in this study.

CHAPTER IV

RESEARCH FINDING

Presenting the key findings of the research, this chapter is divided into two major parts: the corroboration of sodomy law as instrument of social change in Malaysia and the assessment of the HIV response gap of Indonesia and Malaysia.

4.1 The Corroboration of Sodomy Law as Instrument of Institutional Homophobia in Malaysia

This section uses the theories of “law as an instrument of social change” to assess the extent to which sodomy law has exerted social impact on Malaysian society. To begin the verification process, it is essential to comprehend the corroboration framework adopted by this thesis – as previously mentioned in the research methodology. As it takes time for a law to develop into a social instrument, the framework starts with the exercise of Vago’s “transmission of information precondition” conjecture to identify sodomy law’s defining point on functioning as a social reforming tool. In exercising Vago’s scholarship, Zimring and Hawkins’ “high status prosecution as enhancement” theory is employed as well. To add volume to the corroboration, William Evan’s “Seven Theoretical Prerequisites” scholarships are employed consequently.

4.1.1 Analysis Employing Vago’s “Transmission of Information Precondition” and Zimring and Hawkins’ “High Status Prosecution” Conjecture

There are numerous schools of thought to attest the rationale behind a creation of law. The conception of sodomy law may fall perfectly to the functionalist lawmaking model in which the model admits that laws are a form of institutionalized customs – norms or rules about the ways in which people must behave if social institutions are to execute their purposes and society is to tolerate. These customs, however, are heavily defined by the lawmakers. Value judgments and preferences enter into the process of

definition yet it is unfeasible to conclude that sodomy law accurately reflects Malaysian customs. At this point, the author can only argue that the Islamic upbringing behind the continuation of sodomy law in Malaysian Penal Code, despite the repeal of such statute in its origin and the nation's independence from British power, is analogous with the biblical motive behind the creation of the foremost sodomy law.

Acknowledging that a bias might surround the validity of the custom that is chosen to be institutionalized into law, it is sensible to argue that many functional model-made laws may possibly appear to be arcane and operate in some kind of legal vacuum, separate from the actual accepted norms and rules of the wider society. This is a point where the information gap between the law and society is being observed. In this manner, Vago's theory basically argues that without sufficient transmission of information, the law will fail to achieve its intended objective. Publicity of sodomy law, in sum, is prominent to corroborate sodomy law as an instrument of social change. . This form of information transfer evidently develops into another prerequisite to renovate law as a social change instrument given how the exposure also functions to validate the accepted customs of lawmakers; or in other words, to instill the lawmakers-initiated norms and values into a wider society.

Average people have little knowledge of the laws, unless they happen to experience some form of conflict that requires the law be applied to them. This scenario is a staple of crime laws' publicity. To garner a law's larger publicity, the public should get exposed to this law more often. Such exposure can be attained, predominantly with the help of mass media, when the intensity of the law's contravention and its prosecution is high or when a high status individual is proven to infringe the law. This represents the importance of the responsiveness of enforcement agencies to a law. When the rules are taken seriously, the punishment for their contravention is likely. However, for a law to be easily enforceable, the infringing behavior should be easily observable too. Sodomy, or any kind of sexual activity, is not discernible and it becomes more difficult to observe when it highly intersects with the rights of privacy (i.e., law enforcers are not entitled to monitor one's sex life within private space). The scenario of publicity's magnification relying on high intensity of contravention and prosecution is highly impractical. The

latter scenario – high status prosecution – is manifestly a more effective way to publicize sodomy law. This resonates with Zimring and Hawkins’ “high status prosecution as enhancement” theory. The more individuals in hierarchical positions who are arrested and put on trial, the greater will be the chance that a particular law will accomplish its intended purpose.

The trial of Anwar Ibrahim in 1998 on the basis of sodomy law’s infringement precisely represents such high status prosecution scenario. Accordingly, the trial constitutes two things: the magnification of the information available about the sodomy law and the establishment that the law is enforced across class and group lines. However, the views condemning the prosecution as merely a political tool questions the credibility of the latter. If the people do agree that the charges against Anwar were politically motivated, rather than an act of moral value enforcement, the law will not be seen as binding as Zimring and Hawkins assert. People can derive a conclusion that the law will not be highly applicable to general society. Looking at this point only, the capacity of the sodomy law to nominate social reform thinking is still questionable.

Alternatively, regardless of whether or not the charge was a political frame-up, the propagation of the charge, trials, verdicts and sentencing made up a substantial information transmission to the public. The charge and trials made headlines on both local and international press. Along with the news feed on television, print, radio and online, the verdict was also distributed publicly by the government through pamphlet form installed in public venues such as sidewalks and bookstores throughout the whole country¹. Sodomy statute, in one form or another, made headlines and dominated the news fabricating its comprehension to wider society. The law became less arcane than it was before. The influx from public media’s feed educated the public beyond the statute’s existence. It “edified” the public in regards to the content of the statute: how homosexual acts should be responded to in a punitive manner. This context of edification was strengthened by the mainstream Malaysian media’s projection of monologic views that,

¹ Michael Peletz, *Islamic Modern: Religious Courts and Cultural Politics in Malaysia* (New Jersey: Princeton University Press, 2002), 263.

more often than not, took a cue solely from the regime². Possession of the mainstream media was, and still is, concentrated on a select few whose political persuasion was closely aligned to the ruling party. The New Straits Times Press and the Utusan Melayu group, the country's biggest news producers were owned and managed by the people who had major stakes with the Barisan Nasional coalition – the then incumbent regime³. Interpolating this observation with a discourse of Anwar's sodomy charge being a political frame-up, the neutrality manner portrayed in the coverage of Anwar's sodomy prosecution is concluded to be questionable. Given the nature of biased news in incorporating the language that is representative of favoritism of certain perspectives, some points of assertion become center-staged at the expense of other points. In the same vein, when a legal coercion is undeniably a regime's political frame-up, the subsequent effort done by the regime is to disseminate the disgrace through a propagation that is likely to be delivered in the form of news. In exposing Ibrahim's downfall in the country's political sphere to the public, the propagation acts to ruin the public trust on him. This includes, but is not limited to, convincing the public that the charge against Anwar is a genuine treatment for his "misconduct". Accordingly, the mainstream news covering Anwar's prosecution manipulatively represents and portrays a full agreement of the populace with the State with regard to Anwar's villainy⁴. The choice of diction, the use of language and all other aspects of writings were encoded to facilitate the placement of the characters into a moral duality: the sodomy law implementer as the "right" and Anwar, the sodomy doer, as the "wrong".

Anwar's villainy, on the other hand, was highly parallel to a view that justified homosexual act as misconduct and punishable act. They encoded such a view as a dominant view to the extent to which it helped to reinforce homophobic discourses.

² S. Manan, "Re-reading the media: A stylistic analysis of Malaysian media coverage of Anwar and the Reformasi movement," *Asia Pacific Media Educator*, 1, no. 11 (2001): 39-54.

³ Zaharom Nain and Mustafa K. Anuar, "Ownership and Control of the Malaysian Media," *Media Development* 4 (1998): 14, quoted in S. Manan, "Re-reading", 40.

⁴ See S. Manan, "Re-reading", 50. The study involved three-month stylistic analysis of the Anwar-vs.-Mahathir episode started in September 1998, the time when news of Anwar's supposedly "criminal acts" were first reported by the press. Language used by New Strait Times to portray these subjects of discourse was scrutinized, in particular the consistent lexical, phrasal and clausal selections examined to support or authorize the dominant discourses.

Concretizing this assertion, an anti-homosexual social movement called the People's Anti-Homosexual Volunteer Movement (PASRAH) was launched on October 21, 1998 – roughly two months after the first public airing of sodomy charge against Anwar. Scholars and media subsequently investigated the group to figure out the movement's subsistence and significance to the society⁵. The group's vision was to eliminate homosexuality in Malaysia. The group referred to gay drug abuse in 1960s, which was not considered dangerous until it finally became a big peril to society, ergo the need to curb the rise of homosexuality. Its short-term goal included closing down bars, recreational centers, stores and other establishments patronized by people who were suspected of being homosexuals. PASRAH claimed that homosexuality was a Western product that was imported to substantially disrespect Malaysian's race and nation since it ruins the Islamic and Malaysian moral values. The long-term goal, accordingly, strived to press for legislation and measures that will eradicate homosexuality in its entirety including calling for severe legal penalties against individuals who engage in same-sex sexual activity. The current statute with its punishment of whipping and imprisonment for twenty years is considered too moderate by the group. The group's inclination on supporting executions for homosexuals was increasingly apparent. Although few years later PASRAH was deemed to no longer formally function, many still thought that the group, or its shadow organization, still existed and operated, though underground. All in all, PASRAH is an example of a moral construction that is inflicted by a law that accomplishes a certain level of publicity. The prejudice against homosexuals was transformed into a more severe discredit resulting in the deterioration of the security of human rights of Malaysian gays and lesbians.

4.1.2 Analysis Employing William Evan's "Theoretical Prerequisites"

The time-span of Malaysian sodomy law starts with its adoption in the country's penal code before the country gained its independence. The disciplines of "law as social change instrument" allow for different frameworks in scrutinizing the validity of sodomy

⁵ See Peletz, "Islamic Modern", 268-9; Choong Sieu and Santha Oorjitham, "A Subject Too Hot to Handle: An anti-gay movement quickly loses steam," *ASIAWEEK*, November 13, 1998: 33.

law as "an instrument" as well as judging the time frame of such a validation. The exercise of Vago's theory above therefore synthesizes that Anwar's sodomy prosecution is a justifiable point in determining the timeline when the sodomy law starts acting as a social instrument. Furthermore, the exercise also synthesizes two discourses in applying sodomy law's implication to the construction of social value. The first one claims that the press coverage wielded a sufficient platform to publicize the sodomy statute in order to begin the social change construction. On the other hand, taking the judiciary crisis into account of political negative branding campaigned by the ruling party, another discourse asserts that, not only did it exert adequate information transmission, the biased exposure given by the mainstream press were also the catalyst for the exaggeration of homophobic sentiment purported by the sodomy law. These aforesaid discourses provide a backdrop against which such a framework that the exercise of William Evan's "Theoretical Prerequisites" can be pursued, and at the same time, further corroborated the implication of sodomy law as social instrument. The analysis of each of the prerequisites is explained below.

4.1.2.1 The Authority and Prestige of the Legislator

The first observation of the analysis falls to the authority and the prestige of the source of Malaysian sodomy law due to the first theoretical prerequisite, "law must emanate from an authoritative and prestigious source". As mentioned in the literature review, the original source of Malaysian sodomy law is the article 377 of 1860 Indian Penal and was instigated by the 1532 British traditional law – containing article prohibiting buggery act – during British colonization in India. The Indian Penal Code was then introduced to Malaysia during British colonization era in Southeast Asia and first enacted in 1936. The fact that the British penal code itself did no longer entail sodomy law during the enactment of the 1860 Indian Penal Code and, later on in 2009, the sodomy law was repealed from the penal code of India, however, may hinder the authority and the prestige of the authentic article 377 as a source. Yet, it is imperative to comprehend that the Malaysian legislators fabricated legal changes upon the adaption of article 377. These legal changes include the changes on the wording of the article and the

inclusion of different punishment for the contravention of the article. The legal changes wrought by the local legislator can therefore be said to become the factual source of Malaysian sodomy law and occupy a position that is both authoritative and prestigious.

4.1.2.2 Compatibility with Existing Laws and Societal Norms

The values of Malaysian society also plays a role in corroborating the implication of sodomy law since the second theoretical prerequisite says “the law must introduce its rationale in terms that are understandable and compatible with existing values”. Religion adopted by the majority of a society, particularly in the Eastern culture, is an eminent factor in shaping the values of a society. Taking a cue from such notion, Islam, the religion adopted by the majority of Malaysian inhabitants, has been a key factor in embedding the moral ideas of Malaysians⁶. The historical background of Islam's arrival in Malaysia is a suitable backdrop to further enhance the analysis of this precondition and a Muslim scholar Hussin Mutalib comprehensively synthesizes such a link between Islamic civilization and Malaysian value codification in his study, "Islamic Malay Polity in Southeast Asia"⁷. In late 13th century, a group resembling Muslim rulers was said to govern Melaka, the southern tip of Malaysian peninsula. With its well fortified position that granted the land to become vibrant economic hotspot that attracted traders and ships from Arab, Persia, India and China, Melaka eventually became the center of Islamic propagation, and therefore, postulates the Islamic proselytization in the subcontinent. With such a backdrop, Islamization of the Malays reached its peak in 16th century, creating the homogenous Muslim populace in the peninsula and vicinity around it. With such a time frame, the contemporary society of Malaysian seemed to have completely identified their life with Islam. Islam modification results in prominent configuration of Malay society and culture such as marriage, family and kinship system, territorial and spatial perception, fundamental economic exchanges and traditional political organization. Islamic teaching is a mandatory subject given to students starting

⁶ Hussin Mutalib, *Islam in Malaysia: From Revivalism to Islamic State?* (Singapore: Singapore University Press, 1993).

⁷ Hussin Mutalib, "Islamic Malay Polity in Southeast Asia," in *Islamic Civilization in the Malay World*, ed. Mohd. Osman (Selangor: Dewan Bahasa dan Pustaka, 1997), 14-17.

in primary school until college and most of the youth spend another extra hours, outside their formal school time, learning in Quranic school. Islamic dakwah⁸ are part of regular show in almost all of TV and radio channels. In sum, Malaysians make sense of their lives within an enveloping culture of Islamic texts, teachings, images and narratives⁹. Within the country's constitutional aspect, such an enveloping culture can be observed since the amendment of Federal Constitution in 1988 to employ Sharia law¹⁰ to matters concerning marriage, family, inheritance and religious-related offences within the Muslim inhabitants in a form of State law. The addition of article 121 (1A) in the constitution acts to ensure that the Federal Constitution provide more jurisdictional leverage to the Sharia courts so that the decisions made by Sharia court could not be overturned by the civil courts.

The populist view of Islamic teaching, on the other hand, is well-known for implanting negative views towards homosexuality and homosexual act. There are Quranic texts and hadiths¹¹ that are interpreted by majority of the Muslim clerics to validate homosexuality and homosexual act as a sin, although the reality is much less clear-cut¹². Such an interpretation formulates fatwa¹³ issued by the country's National

⁸ Dakwah refers to a preaching of Islam with intention to invite people, both Muslims and non-Muslims, to understand the worship of Allah and the practice of Islam as expressed in the Qur'an, the teaching of the Prophet Muhammad and the hadiths.

⁹ Andrew Weintraub, *Islam and Popular Culture in Indonesia and Malaysia* (Abingdon: Routledge, 2011).

¹⁰ The jurisdiction of the law is however limited to imposing fines for an amount not more than RM 5000, and imprisonment to not more than 3 years. Therefore, the Sharia law in the context of Malaysian constitution is not a perfect mirror of Sharia court in Middle Eastern country where the prosecution applies to all perdana and pidana matters.

¹¹ Hadith refers to a collection of traditions containing sayings of the prophet Muhammad that are not necessarily recorded in Quran.

¹² See: Scott Kugle, *Homosexuality in Islam: Critical Reflection on Gay, Lesbian, and Transgender Muslims* (London: Oneworld Publication, 2010); APCOM, "Islam", 5. Quran is written in a poetry style, and thus, a universal interpretation of it is not plausible. Muslim scholars contend that Quranic verses cannot be cited independently without taking into account contexts and motives for revelation. The story of Sodom and Gomorrah (the people of Propeth Loth), which is the direct reference to homosexuality mentioned in Quran, are found in seventy six verses located in nine different chapters (surah). Similar to the casual quranic interpretation (tafsir) technique, one must study these verses together and juxtapose it with scientific and historic facts and figures. Unfortunately, many orthodox Muslim scholars (ulama) abandon these contexts and jump to direct conclusion that homosexuality is ultimately condemned by the God. This synthesis is, regrettably, adapted by the populist view. Unlike the contemporary or the so-called "liberal" Muslim scholars, these "old view" does not, or is unable to, differentiate sexual orientation and identity from the sexual atrocities performed by the inmates of Sodom and Gomorrah. As a result, an informed judgment on homosexuality is lacking within general Muslim populace.

Fatwa Council, to equalize homosexuality and any resemblance of it as immorality and corruption of Islam. Fatwa will not have authority to be legally binding within a jurisdiction of non-sharia law, yet in the secular countries with predominant Muslim populace, such as Indonesia and Malaysia, and even in Muslim communities in predominantly non-Muslim countries, fatwa exerts, more often than not, substantial role in classifying the moral values of the Muslims even though it does not bear legal coercion¹⁴. This type of condemnatory interpretation, accordingly, has become a staple of Malaysian's view on homosexuality. Homosexuality, in retrospect, is an anathema to majority of Islam believers in Malaysia.

In light of this abomination, the criminalization of sodomy tends to resonate well with the public opinion. It is therefore sufficient to conclude that, within a lens of Islamic populist view, sodomy law is understandable and compatible with the existing values of Malaysian society.

4.1.2.3 Pragmatic Models of Compliance

Based on the third prerequisites – “the advocates of the change should make reference to other communities or countries with which the population identifies and where the law is already in effect” – sodomy law's pragmatic model of compliance is the another key aspect to examine. Tracing back the history of article 377 of Malaysian Penal Code, the exemplar setting during the early period of penal code's enactment would only be reflected from India and other former British colonies. Subsequent to the country's independence and the rise of non-Western nationalization in other countries, however, Malaysian sodomy law is highly referenced to other countries that also upholds similar punitive law, regardless its origin. Among them are the Middle Eastern countries, such as Saudi Arabia, United Emirate Arab and Qatar, which enact sharia law in their constitutions' criminal codes. In these countries, the code is deemed as the government's

¹³ Fatwa means a legal opinion or decree postulated by a mufti, Islamic cleric that are seen to be resourceful enough to declare a solution to matter that is not explicitly and comprehensively covered in Quran and hadiths.

¹⁴ See: Mohamad Abdalla, "Do Australian Muslims Need a Mufti? Analysing the institution of ifta in the Australian context," in *Law and Religion in Public Life: The Contemporary Debate*, edited by Nadirsyah Hosen and Richard Mohr (New York: Routledge, 2011).

attempt to translate Muslim's obligations to the God. Under their respective interpretation of sharia conduct, homosexual act is classified into *hudud*, religious offences that deserve punishment from the fellow Muslims, ergo the inclusion of sodomy law within their respective penal codes¹⁵.

To comprehend the aforesaid reference of Malaysian sodomy law's model of compliance, one may scrutinize the direction of Malaysia in becoming Islamic country – without fully performing sharia law – ever since the rise of Islam's influence within international world in 1970s. Such a rise was also remarkably shown by the creation of international organization consisting predominantly Muslim countries, Organization of the Islamic Conference (OIC)¹⁶, in 1969, in which Malaysia became the member, along with other 24 nations, immediately after the founding of the organization. A scholar Terence Chong corroborates such notion in his piece, "The Emerging Politics of Islam Hadhari", a study that examines the progressive Islam-based governance within Malaysian political landscape¹⁷. The ideological impact of the Arab-Israeli war, the rise of Arabic nations as economic powerhouses, Muslim dissatisfaction with secular nationalism and Iranian revolution of 1979 are asserted by Chong to trigger the alteration of Malaysia's political climate to become more Islamic. Islamic revivalism movement, or popularly known as *dakwah* movement of 1970s, initiated by the student-based establishment titled Malaysian Muslim Youth Organization (ABIM), demanded for a creation of Islamic state, or at least, more inclusion of Islamic principles in the country's

¹⁵ The offences that fall into hudud are not universally agreed though they generally are adultery, theft, slanderous accusation, robbery, consuming alcohol and apostasy. Some teachings define adultery in a broader manner, referring it as unlawful sex and including homosexual act in it. The Sharia law that punish homosexuality practiced by most of Middle Eastern Islamic countries evidently employs such an interpretation.

¹⁶ Today, OIC's official name is The Organisation of Islamic Cooperation. OIC was founded upon a decision of the historical summit which was conducted in Rabat, Morocco, on September 25, 1969 as a response to criminal arson of Al-Aqsa Mosque in occupied Jerusalem a month before (August 21). OIC is currently the second largest international governmental organization after the United Nations with a total member of 57 states. The Organization aims to consolidate the collective voice of the Muslim world and to ensure the safeguard on and protection of the interests of the Muslim world in the spirit of securing international peace and harmony among various people of the world. This statement, however, is contested by the non-member countries or UN given how their definition of human rights might not be congruent with what is agreed by the general assembly of UN (i.e., LGBT rights)

¹⁷ Terence Chong, "The Emerging Politics of Islam Hadhari," in *Malaysia: Recent Trends and Challenges*, edited by Saw Swee-Hock and K. Kesavapany (Singapore: ISEAS, 2006).

governance. The movement presented a crucial challenge to the incumbent regime. True to form, the regime's opposition, known as Pan-Malaysia Islamic Party (PAS), experienced the rising share of popularity once they legitimized a political pursuit of a more doctrinaire and fundamentally-defined Islam. Acting as the ruling government, UMNO's co-option of Anwar in 1982, subsequent to a year anniversary of Mahathir's prime minister election, indicated the growing Islamization of UMNO's contour to respond to ABIM's censure as well as to counter the opponent's increasing power. The institutionalization of Islam conducted by UMNO started with an amalgamation of Islamic ethics with the governance's policy guideline. The agenda was followed by the series of establishment of Islamic infrastructures, which resembled the Middle Eastern countries' Islamism advancement, such as Islamic-based university, development institute, insurance company, banking facility, and above all, a government-sponsored dakwah center. The exploitation of Islamic jargon and salutations, accelerated building of mosques and Islamic institutions, and religious courses for public become the staple of the "new" government. The Islamic influence within the governance grew stronger and the utilization of Islamic sharia law, although partially, eventually show up in the constitution in 1998. Subjects relating to marriage, family, inheritance and religious-related offences within the Muslim populace were governed according to Islamic law and courts under the states' legislations. Islamism, as Chong concluded, was more or less a strategy to embody social, moral and political order signified by the Islamic states without being like one – the term Islam Hadhari or "civilizational Islam" is used to signify such a moderate, yet progressive, Islamism movement. It is, therefore, suffice to argue that the deployment of British-inherited sodomy law is another form of vehicle to bring about such an embodiment. The country's pragmatic model of Islamic ethics and values that is referenced to the Islamic nations signifies the sodomy law's model of compliance that makes reference to countries with which the population identifies and where the law is already seen coherent.

4.1.2.4 The Element of Time

Resistance to change is a generic problem within a society. A newly introduced law may face a societal opposition with various reasons, be it cultural, political or combination of multiple social factors. While a fulfillment of previous preconditions may demonstrate a constructive environment for a law to become social change instrument, Evan believes that potential resistance should always be anticipated. Thus, his next asserted precondition claims that relevant use of time should be made to overcome such a potential confrontation. This might be done by implementing the law in a sequential manner or preceding it with another statute that provides a similar, if not the same, rational. This can be observed in the laws banning corporal punishment from parents to their kids. In New Zealand, such a law was preceded by the ban on corporal punishment in the schools and other institutions. In Sweden, the statute changed sequentially from a partial to a total ban.

Malaysian sodomy law, on the other hand, was not preceded by any other laws governing homosexuality; nor was it delivered in a sequential manner, although the law actually experienced a modification. Before the 1989 amendment, the gross decency-article solely targeted homosexual persons. The amendment replaced the wording “any male person” with “any person”, indicating a less homophobic measure in the amended statute. Such a change, however, did not constitute a progressivity the way the context of element of time works.

The element of time might not be observable, yet in the context of Malaysian society, this precondition exerts a very minimal influence. Although the international actors in human rights field strongly condemn the execution of sodomy law in the country, societal resistance of Malaysian people towards such a discriminative law is not discernible. If any, the societal discontent was more directed to criticize the unfair prosecution of Anwar, not the sanctity of sodomy charge. Even Anwar’s party itself, did not have a true intention to censure the sodomy law¹⁸. Condemning the law or attempting to repeal it will be considered as promoting homosexuality, and thus, be seen “un-

¹⁸ Latheefa Koya, *Information Chief of Parti Keadilan Rakyat*, interview by Claire Brownell (2009).

Islamic”. Challenging the law, in other words, ruins the reputation of the party in the eyes of its followers.

4.1.2.5 Commitment of Law Enforcers

The commitment of enforcement agencies is another key factor that Evan considers in his synthesis. As the fifth precondition, he asserts that those enforcing the law must themselves be very much committed to the change intended by the law. Observing from the handling of the court case against Anwar Ibrahim, Munawar Anees and Sukma Atmadja – who were convicted on sodomy charges against them in 1998, the court has exhibited a desire to pursue the spirit of the legislation banning sodomy. Analysis of Anwar Ibrahim’s case demonstrates that even in scenario where the indictee was a high status person, the court was keen to advocate the law. The court’s verdict was to punish Anwar’s sodomy act with a sentence of a nine-year jail running consecutively after the termination of his six-year conviction for corruption practice. Although the sodomy sentence was overturned once Anwar finished his corruption conviction sentence of six years imprisonment, the court nevertheless demonstrated that the act of sodomy is not tolerated. Another sodomy charge against Anwar from different plaintiff in 2008 brought him back to the sphere of court. The trial took place until 2012 and the verdict ruled that Anwar is not guilty. Yet again, since the only sodomy allegations in such a time frame were related in Anwar’s prosecution case, the court’s affirmation in handling the accusation demonstrated a further form of commitment to the country’s sodomy law. Another form of pledge to the sodomy law can also be observed outside the court as well. A rising chorus of commitment to sodomy law may be ignited from the condemnation on homosexuality demonstrated by government officials. In 2000, Abdul Kadir Che Kob, a high rank official at Malaysia’s Islamic Affairs Department, in an interview with *TIME*, concluded that homosexuality was a crime worse than killing¹⁹. Later he added that homosexuals did not have rights to commit homosexual act since it was forbidden by God, and therefore, sodomy law and other punitive sharia codes pertaining to

¹⁹ *TIME*, “Homosexuality is a Crime Worse Than Murderer: Interview with Malaysia’s Morality Police,” *TIME*, September 26, 2000, <http://www.time.com/time/world/article/0,8599,2040451,00.html> (accessed June 2, 2013).

homosexuality should be enforced. Abdul's condemning statements resonate well with the action of the police in curbing the "immoral acts". The police are blatant and intrusive in interrogating individuals who are suspected of being homosexual or raiding activities that are deemed to be patronized by homosexuals²⁰. The "gross indecency article" (section 577D) are often exploited by the police to justify the charges if evidence to prove the act of sodomy is not sufficient. Men found to be carrying condoms while being in a public space frequented by males, such as gyms, male health centers and nightclubs, were often interrogated. The HIV outreach workers who focused on the MSM group were also found to bring condoms, and often got captured and brought to the station to be investigated. Scenarios where police harass and prosecute two men who are suspected to be dating were not unheard. Social gatherings that were believed to be attended by homosexuals were reported to be raided with accusation of conducting sodomy sex party. Furthermore, although Islamic value had been a mere justification for employing such homophobic agenda, these raids were reported to account for both Muslim and non-Muslim Malaysian²¹. Between 1997 and 1999, 442 men were arrested based on public tip-offs that they had attempted to engage in homosexual acts²². None of these raids led to a trial of sodomy allegation since the police could not consolidate enough evidence. However, it suffices to contend that the law enforcers' dedication on sodomy law prevails within Malaysian society.

4.1.2.6 Positive and Negative Sanction

As a facet of social interaction, sanction is another key factor that embodies another theoretical precondition in succeeding law as social change instrument. Defined as a response by an individual or group to behavior that could either encourage or discourage that behavior, sanction can surface as negative or positive rewards. The

²⁰ UNDP, "Legal Environment," 70-1; Walter Williams, "Islam and the Politics of Homophobia: The Persecution of Homosexuals in Islamic Malaysia Compared to Secular China," Vol. 1, in *Islam and Homosexuality*, ed. Samar Habib (Santa Barbara: ABC-CLIO, 2010), 16-19.

²¹ In 2006, a gay Chinese Malay was granted asylum in United States of America on a basis of fearing of being jailed subsequent to his experience of being harassed by police when he was found to be inside a car with another man in a public parking lot during evening time. See Walter Williams, "Strategies," 16.

²² See *TIME*, "Murder."

emergence of both negative and positive rewards, as Evan asserts, is necessary. Positive sanction would include rewards from institutions such as government and public sectors while negative sanction may come as legal sentence ruled by the court.

While it has been evident that the sodomy statute may penalize the guilty party with imprisonment for a term which may extend to twenty years and whipping, other form of negative sanction, namely the informal one, has also been acknowledged in the previous discussions within this thesis. The law is an advocate of homosexual oppression, indicating that sexual relationship between a man and a woman is compulsory for equality before the law. Being considered as an outlier, Malaysian homosexuals are not granted with rights-based jurisdiction, and instead, are faced with law enforcer's discrimination-fueled harassment. They live in fear of arbitrary detainment and prosecution. That said, while there is no specific governmental reward given to the Malaysian for not engaging in homosexual sex act, it suffices to say that the fact that the heterosexuals are not oppressed by the law enforcers symbolizes a positive sanction. Unlike their homosexual counterpart, the heterosexuals are free to congregate without having fear of arbitrary arrest. In light of this disparity, however, it can be concluded that such a positive sanction is very disproportionate since it only applies to people who are considered heterosexual. The homosexuals who do not commit homosexual sex act are not granted with such a positive sanction. Disproportionate positive sanction like this, if any, begins to unravel a preliminary conclusion that turns institutional homophobia into cultural hatred – a social change that this thesis argues as the outcome of sodomy law.

4.2 The Assessment of the National HIV Responses

This section is delivered to evaluate the national HIV responses observed in Malaysia from 2010 to 2012. Divided into four subsections, this section separately evaluates three indicators used to measure the national HIV response gap: national funding for prevention programmes for MSM, acceptance of international MSM-oriented assistance, capacity building on MSM-oriented response, and MSM and HIV-related law reformation.

4.2.1 National Commitments and Policies Instrument

The analysis on this indicator is based on the comparative study of the 2012 NCPI reports of Indonesia and Malaysia. NCPI reports are clustered in five groupings: strategic plan, political support and leadership, human rights, prevention, and treatment, care and support. Table 1 below enlists all the MSM-related instruments featured in the NCPI reports as well as shows Indonesia's and Malaysia's stances on each instrument.

Table 1 MSM-related NCPI Instruments of Indonesia and Malaysia

| NCPI INSTRUMENTS | INDONESIA | MALAYSIA |
|--|--|---------------------|
| STRATEGIC PLAN | | |
| Strategic Programmes for MSM | Yes | Yes |
| MSM as Identified Key Population | Yes | Yes |
| Coverage on Addressing Stigma and Discrimination | Yes | Yes |
| TWG on MSM | Yes | No |
| Monitoring on MSM-specific Programme Coverage | Yes | No |
| POLITICAL SUPPORT AND LEADERSHIP | | |
| Mechanism to promote interaction within the cabinet/parliament | Yes: HIV-themed Coordination Meeting of The Cabinet led by Coordinating Minister of People's Welfare | No |
| Mechanism to promote interaction between government and MSM-oriented civil societies | Yes: GWL-INA | Yes: MAC |
| National Law Inconsistency | No | Yes: Penal Code 377 |

Table 1 MSM-related NCPI Instruments of Indonesia and Malaysia (Cont'd)

| HUMAN RIGHTS | | |
|---|--------------------------------------|--------------------------|
| Law Protecting the Rights MSM | Yes: Law no. 39/1999 on Human Rights | No |
| Law on Non-Discrimination | Yes | No |
| National Human Rights Commission | Yes: KOMNASHAM | Yes: SUHAKAM |
| PREVENTION | | |
| Delivery of Key Message on Risk Reduction | Yes | Yes |
| Delivery of Key Message on Condom Promotion | Yes | Yes |
| Delivery of Key Message on HIV Testing and Counseling | Yes | Yes |
| Delivery of Key Message on Reproductive Health | Yes | Yes |
| Delivery of Key Message on Vulnerability Reduction | Yes | Yes |
| Delivery of Key Message on Drug Substitution Therapy | Yes | Yes |
| Delivery of Key Message on Needle & Syringe Exchange | No | No |
| HIV Coverage in the School Curriculum | No | Yes, at Secondary school |
| TREATMENT CARE AND SUPPORT | | |
| Social and Economic Support for HIV-infected MSM and His Family | No | No |

In the first cluster, Strategic Plan, both national strategic plans claimed to identify MSM as key affected population of HIV epidemic and to accommodate them with a strategic programme. Reduction of stigma and discrimination was part of the HIV-related areas included in both national developmental plans, yet interviews with representative

from MAC suggested that none of the stigma reduction programme in Malaysia specifically aimed to lessen the misunderstanding or hatred toward MSM. The stigma reduction programmes were rather generic, covering PLWHA in general only. On the other hand, Indonesia had more completion in the MSM-oriented stigma reduction area as shown with the existence of TWG²³ on MSM – within its national strategic plan – that included stigma and discrimination diminution within its agenda. Such a thematic working group was established under Indonesia's National AIDS Commission in 2008. TWG on MSM, however, was not found in Malaysia, though TWG on IDU has established in the country since 2006. Interviews with a representative from PT Foundation²⁴ and with a former MAC's project manager revealed that the formation of TWG on MSM had been pushed by Malaysian civil societies towards the government in the past ten years, yet the government had not responded with eminent retort. Given the function of a thematic working group, the discrepancy on the existence of TWG on MSM is an early signifier of a difference on level of commitment given by the government towards the MSM. That said, it was comprehensible that a discrepancy on the existence of MSM-specific programme monitoring also came into sight. Malaysia had no evaluation system that was supposed to measure the impact and effectiveness of MSM-targeted interventions conducted by the national plan. An anecdotal insight suggested that this was largely due to the fact that the government put more emphasis, both structural and financial, on IDU and SW – populations that had a higher prevalence than that of MSM. This notion, however, is argued by UNDP to be disingenuous since the government should inclusively handle the epidemic on each key affected population. Indonesia, in contrast, included MSM in HIV programme monitoring along with other population groups such as IDU, SW, clients of SW, prisoners and PLWHA. The monitoring was based on geographical areas in three different levels: national, provincial

²³ As previously mentioned in Definition of Terms, the function of working group is to present a platform for MSM/TG to influence policymaking and program planning. The working group's guidance serves to inform the development of an overall MSM/TG strategy and operational plan that aim to increase access to services, reduce stigma and discrimination, and decrease HIV prevalence among this vulnerable population.

²⁴ PT Foundation (previously known as Pink Triangle) is a community-based, voluntary non-profit making that mainly provide HIV care and support for Malaysian key affected populations. The foundation has been part of national and global networking, including MAC, APCOM and IPPF.

and district. The data was then used for program planning and resources mobilization, which was highly critical in a country with archipelago topography like Indonesia. Such a comprehensive strategic coverage, by and large, corresponds to the verdict that Indonesia's national strategic plan was more MSM-inclusive than that of Malaysia.

The next cluster sheds light on political support and leadership. Delivering the commitments to reverse HIV epidemic requires the parliamentarians to exercise their legislative, representative, resource mobilization and oversight roles respectively. In the NCPI report, this notion was fairly exercised by evaluating the mechanisms of HIV management interaction among the stakeholders behind the response. This included relationships between the national AIDS authority with civil societies and between the national AIDS authority with the cabinet as well as the consistency between law and the national AIDS authority's strategy. Indonesia's National AIDS Commission has been establishing the interaction with MSM-oriented civil societies through a network called GWL-INA since it was founded in 2007. The network is now consisted of 37 MSM-oriented organizations from 19 provinces and has been actively engaged with the programming of the national commission. The national commission has also established a network with governmental actors in the cabinet through coordinating meeting of The Cabinet led by Coordinating Minister of People's Welfare. These two information networks indicate that the information chain of HIV response in Indonesia appeared to be structured well. Malaysia's mechanism, regrettably, is not identical with Indonesia. The mechanism of relations between national AIDS authority – Malaysian MoH – and MSM-oriented civil societies is embodied in the establishment of MAC. Founded in 1992, MAC has been serving as an umbrella organization that supports and coordinates the efforts of non-governmental and other organisations working on HIV/AIDS issues in Malaysia with the MoH. Unlike GWL-INA that specifically coordinates MSM-based organizations, MAC directs a broader management as it collides the MSM-based organization with other stakeholders aiming different key affected populations. Such a discrepancy, however, was not a crucial issue given how both methods certify inclusion of MSM participation regardless. A bigger concern was observed on the fact that while the relations between MoH and MSM-oriented civil societies was instrumented in MAC,

there was no HIV-themed parliamentary meeting agenda recorded in their governmental system. Unlike Indonesia's National AIDS Commission that extends HIV response accountability to The Cabinet, HIV response within Malaysian parliament appears to be a sole responsibility of the MoH. In light of this, it was graspable that Malaysia was lacking of parliamentary focal point for legislative work in the field of HIV/AIDS.

Parliamentary-based instrument is critically needed to recover a tenuous facet of HIV management. The inconsistency of the law with prevention measures, for example, surely hampers the continuity of HIV response. Malaysia's deficiency in its HIV-related legislative effort implies an enduring contradiction of penal code's section 377 that would incessantly obstruct HIV response for MSM. Indonesia, conversely, has not recorded any law contradictions towards its MSM-targeted response. That and the existence of HIV advisory system within its cabinet denote Indonesia's stronger political support and leadership than that of Malaysia.

Human rights protection in the form of law is another instrument assessed in NCPI report. The report aims to detect the laws that secure the human rights of MSM and the laws that oppositely create obstruction to MSM-targeted HIV response. Indonesia claimed to adopt the former and be free of the latter, while Malaysia had an exact opposite trend: adopting law that discriminated MSM in the midst of the absence of law that protected the human rights of its citizen – let alone MSM in particular. Indonesia asserted that the rights of MSM were secured under the Law no. 39/1999 on Human Rights. However, the study found that the law did not explicitly mention MSM in it. The law defines discrimination as follow:

“Discrimination is any restriction, harassment, or direct or indirect isolation based on differences on the basis of religion, ethnicity, racial, ethnic, group, class, social status, economic status, gender, language, political beliefs, that results in a reduction, or elimination of recognition, enforcement or application of human rights and fundamental freedoms in individual and/or collective aspect of politics, economics, legal, social and cultural and other aspects of life.”

An implicit indication that the rights of MSM were protected by the law was found through interpolating two points: first, a declaration that discriminatory act was

prohibited by law; and second, an impression that MSM may fall into a category of “group” mentioned in the definition above. Such an unspoken suggestion, however, was not a compelling attribute for MSM’s rights protection instrument. It did not provide a solid gesture that Indonesia performed better than Malaysia in terms of MSM inclusion in a legislative context. The trend of the ratification on UN’s human rights-themed resolutions or conventions, on the other hand, could be deemed as a promising start to intersect Indonesia’s constitution with LGBT rights in a more profound manner. Indonesia had ratified ICCPR, an international bill that commits its parties to respect the civil and political rights of individuals – including the right to life, freedom of religion and freedom of speech; and CEDAW, a multilateral treaty of rights for women that defines what constitute discrimination against women and sets up an agenda for national action to end such discrimination. Malaysia, in contrast, had not ratified any of the bills due to the government’s objection towards the provision of some articles²⁵. That being said, Malaysia was left behind in adapting to right-based development principle, an enabling principle that was designed to eliminate discriminatory practices and unjust distributions of power that impede development progress. Indonesia had shown more inclination to adapt with UN proficiency to secure the human rights. In other words, there would be longer a more intricate process for Malaysia than it is for Indonesia to advance the rights of MSM given how some of the basic rights of Malaysian citizens are not expansively protected by the government in the first place.

Table 1 also shows that both countries have a national commission of human rights. As the name suggest, the function of the commission is to protect and promote of human rights defined or set up by the national constitution, and therefore, different countries may have different commission with different practice. In a country ruled by a regime national human rights commission may be just a gimmick – in which its authority may be controlled and limited by the regime, resulting in ineffective human rights protection mechanism. That said, it was necessary for this study to examine the human rights commission from each country in a more exhaustive perspective in terms of

²⁵ Government of Malaysia does not consider itself bound by the provisions of articles 5 (a), 7 (b), 16 (a), (f) and (g) of CEDAW.

MSM's right protection mechanism. APF, IDLO and UNDP had cooperated to set up an initiative that documents the capacity of each national human right commission in South and Southeast Asian countries to promote the rights of people of diverse sexual orientation and gender identity and to respond to human rights violation of LGBT people. The initiative was also designed to engage civil societies in the participating countries to hear the perspectives of LGBT people and to contribute in dialogue with the commission. While KOMNASHAM, Indonesia's commission, along with the commissions from Bangladesh, India, Nepal, the Philippines, Sri Lanka and Timor Leste, was willing and indeed participated in the project, SUHAKAM, Malaysia's commission, refused to get involved in the project. SUHAKAM took the stand that the commission was not familiar with the LGBT issues and acknowledged LGBT rights as the fundamental rights under the national constitution as the non-LGBT, and thus, an exclusive record of LGBT rights violation was not considered rational in the eye of federal constitution. A similar attitude had been showed by SUHAKAM within their response towards Yogyakarta Principle²⁶. While KOMNASHAM had been an active supporter of the principle by conducting workshops to evaluate the impact of Yogyakarta Principle since its adoption, SUHAKAM had been remaining passive. Such an attitude, all in all, put the credibility of SUHAKAM to recognize, let alone protect, LGBT rights in question. In a larger picture, it also made public associate SUHAKAM's stance on LGBT rights with the negative attitude of Malaysian government towards LGBT people, despite the requisite of national human rights commission to be fully independent from government's position. To posit that both KOMNASHAM and SUHAKAM are equally embracing LGBT rights was, therefore, absurd. The existence of national human rights commission did not always guarantee a security for the LGBT rights. Conclusively, KOMNASHAM's more lauded support towards LGBT movement amplified a supposition that Indonesia had played a more leading effort in promoting and protecting the rights of MSM.

²⁶ Set up and written by international human rights expert in Yogyakarta, Indonesia, in 2006, Yogyakarta Principles is a universal recommendation of human rights which affirm binding international legal standards of the protection of LGBT people in attaining their basic rights, with which all States must comply.

The NCPI report also evaluates the key messages adopted in the national HIV prevention campaign. It is palpable that a better mechanism is a campaign that engages all key messages in it, yet national AIDS authority often tends to be rather selective in choosing its deliverables, resulting in countries that enacts more wide-ranging prevention strategy than the other governments do. The table above shows that Indonesia and Malaysia has a discrepancy in the HIV coverage within school curriculum. There has been a persistent debate whether HIV education necessarily needs to be given formally at school. While the opponents argue that such an education will influence the adolescent to commit premarital sex, the supporters – including UN and its entities – believe that adolescents have a right to learn about the sexuality-related issues, including HIV education, and such an education will not promote premarital sex, but instead will protect their health and wellbeing as well as enable them to help protect others. In this standpoint, Indonesian government is the opponent and Malaysian government is the supporter of HIV education campaign. It was unfortunate that, despite all of the aforementioned leading efforts in combating HIV, Indonesia was still lagging behind Malaysia in terms of HIV education provision. However, the existence of HIV education in Malaysia did not ensure the inclusion of MSM-related issues within its syllabus, despite MSM being known as one of the key affected populations. If any, this study found out that LGBT was considered by the Ministry of Education as an unhealthy lifestyle that needed to be prevented. In late 2012, Malaysian's Ministry of Education began campaigning guidelines for teachers and parents in several states to identify the symptoms of homosexuality. The guidelines were designed to give an early warning to the teachers so that they can provide a remedy for students who were deemed gay and lesbians. This significantly signified government's concerted efforts to curb homosexuality through formal education, and therefore, suggested that the government was undertaking measures to prevent and correct gender non-conformity and gender variance at a young age. That said, it was adequate to conclude that HIV education in Malaysian curriculum would not give fair objectivity and respect to MSM issues, and in turn, might demoralize gay students and hinder the efficacy of HIV prevention for young

MSM. To hypothesize that Malaysian HIV education signifies advancement of MSM-targeted prevention is incongruous.

Extrapolating the accomplishments of national authorities' functional and organizational capacities shown by Table 1, it was palpable that Indonesia had excelled in more instruments. Though the two countries exercised identical yet disappointing mechanism for prevention and support programmes, Indonesian government had a more comprehensive strategic plan, stronger political support and leadership and more forceful human rights protection in delivering MSM-targeted HIV response than Malaysian government did. This resulted in a conclusion that, in term of national commitment and policies instrument for MSM-targeted response, the gap was found higher in Malaysia.

4.2.2 Deployment of Global Fund's HIV Grant

Both governments of Indonesia and Malaysia were recipients of HIV aid given by Global Fund in the past five years. Table 2, Figure 2 and Figure 3 below detail the latest approved grants given by Global Fund to both countries in the last five years.

Table 2 HIV Grant Portfolio Summary of Indonesia and Malaysia in 2010-2011

| Country | Round* | Grant (US\$) | Grant Number | Grant Period | Most Recent Disbursement** |
|--|--------|--------------|---------------|-----------------------|----------------------------|
| Indonesia | 9 | 8,407,733 | IND-910-G15-H | 01-Jul-10 – 31-Dec-12 | 07-Nov-2012 |
| Malaysia | 10 | 5,605,067 | MYS-H-MAC | 01-Jul-11 – 31-Dec-13 | 24-May-2013 |
| <p>*) Round refers to the year of grant proposal submission deadline that has to be met by the grant seekers. Round 9 is of 2009, while Round 10 is of 2010. Due to processing and evaluation mechanism, it normally takes a year after the proposal submission to sign the grant and start the programme.</p> | | | | | |
| <p>***) The grant is progressively disbursed per year.</p> | | | | | |

While Table 2 above represents the whole overview of grant portfolio for Indonesia and Malaysia, the desk research found that Malaysia's round 10 did not include MSM as the target of their HIV grant service delivery area. The excerpt from Malaysia's HIV grant proposal of Round 10 in regards to the exclusion of MSM within the grant deployment is as follows:

“There is an epidemic among men who have sex with men due to unprotected insertive and receptive sex. This key population was not included in the Integrated Bio-Behavioral Survey but a venue based study using a convenience sample was conducted in 2009 in Kuala Lumpur. Men were recruited in clubs, male massage parlours, saunas, and parks. The HIV positivity rate among these men who have sex with men was 3.9%. No serological studies have ever been conducted among male sex workers in Malaysia though one is currently being conducted in Penang. The population of men who have sex with men is not addressed in this proposal due to the absence of serological studies. Malaysia is also participating in a separate regional Global Fund Round 10 proposal for men who have sex with men and transgender which will be submitted by the Insular Southeast Asia Network of Men who have Sex with Men and Transgender Community Based Organizations (ISEAN).”

From the excerpt above, the justification of exclusion of MSM population lies on two reasons: the absence of serological studies within Malaysian MSM population and the coverage of Malaysian MSM in ISEAN's program, or so-called ISEAN-HIVOS. The carried out qualitative review, however, suggests that Malaysian government's institutional homophobia plays an intrinsic role in leaving out the MSM population. A strong homophobic propaganda carried out by the government suffices to signify an influential power that affected CCM's decision to neglect population. In addition, the two aforementioned justifications are deemed weak, if not invalid.

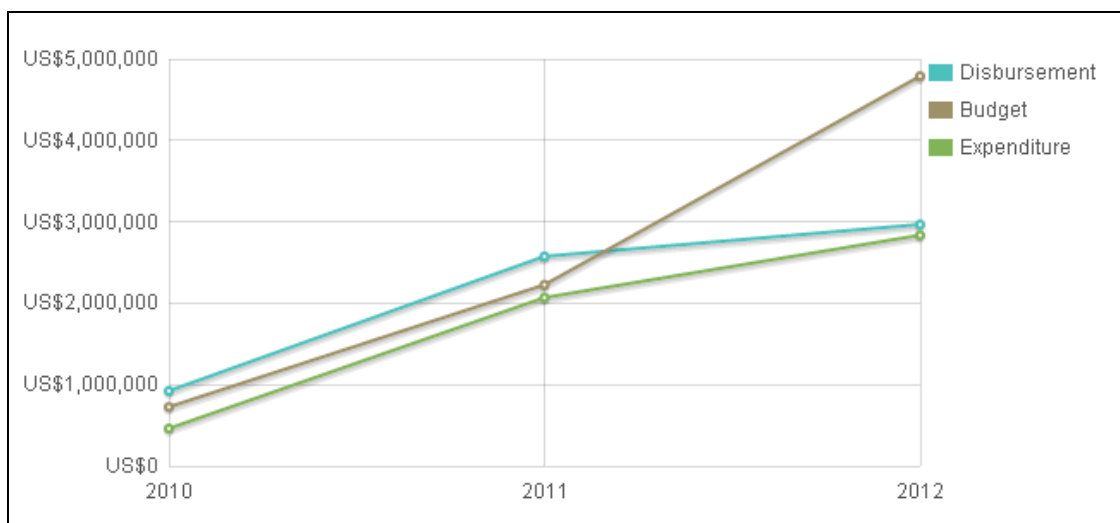


Figure 2 Indonesia's Round 9 Grant Overview
Source: Global Fund Grant Portfolio of Indonesia

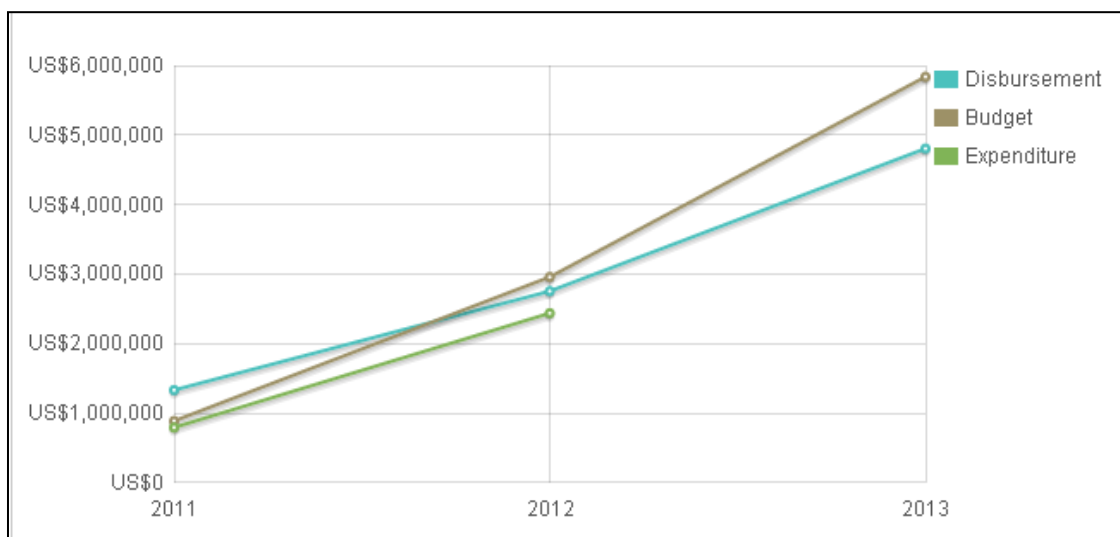


Figure 3 Malaysia's Round 10 Grant Overview
Source: Global Fund Grant Portfolio of Malaysia

Firstly, the statement citing the absence of serological surveys within Malaysian MSM is erroneous. While IBBS of MSM had indeed never been conducted, site-based surveys had been implemented quite extensively – note the MSM's HIV positivity rate of 3.9% mentioned in the excerpt, prior to the statement of the absence of serological studies. This rate was resulted from a 2009 VDTS study conducted by PT Foundation, a Malaysian LGBT non-governmental organization, with cooperation with The Centre of Excellence for Research in AIDS (CERIA); yet this study was not substantiated in

addressing the MSM population within the grant proposal. Site-based serological surveys and VDTS, however, are generally enough modality to showcase the urgency of grant funding towards MSM as what some other grant seekers had done in their proposal application. Furthermore, the nonexistence of national-scale serological study on MSM population within the country indicated that, despite the apparent and growing epidemic within the MSM population since the infection was firstly found in the country in 1986, the government put little effort in managing the epidemic within MSM. This notion, therefore, can be linked back to aforesaid notion that corroborates the government's institutional homophobia that may influence the exclusion of MSM population.

Secondly, an exclusion of MSM population due to participation in ISEAN-HIVOS programme did not come across as a compelling rationalization. ISEAN-HIVOS programme could not function as a solitary MSM-targeted programme for its member country because the programme only covered capacity building aspect, and thus, did not employ direct care provision aspect such as HIV testing provision and condom distribution (see the programme summary in Table 3 below). Relying solely on ISEAN-HIVOS programme did not portray a comprehensive response towards MSM.

Table 3 Summary of ISEAN-HIVOS Programme

| | |
|---------------------|---|
| Grant Title | Strengthening Community Systems to Reduce Vulnerability to and Impact of HIV Infection on MSM and TG in Insular Southeast Asia |
| Applicant | HIVOS Regional Office Southeast Asia |
| Grant Number | MEI-011-G01-H |
| Round | 10 |
| Grant Period | 01-Oct-11 – 31-Dec-13 |
| Grant (US\$) | 1,109,570 |
| Objectives: | |
| 1 | To strengthen the capacity of community-based organizations (CBOs) and healthcare providers to improve the delivery of HIV related services for MSM and |

Table 3 Summary of ISEAN-HIVOS Programme (Cont'd)

| | |
|---|--|
| | TG in Insular Southeast Asia |
| 2 | To improve enabling environment and strategic advocacy regarding MSM, TG, and HIV related issues in Insular Southeast Asia |
| 3 | To improve the development and utilization of strategic information on MSM, TG and HIV to strengthen the national responses in Insular Southeast Asia |
| 4 | To promote the strategic use of information communication technology (ICT) and media to effectively scale up the HIV response among MSM and TG in Insular Southeast Asia |

As a multicountry civil society focusing on insular Southeast Asian countries, ISEAN-HIVOS programme divides the grant deployment to four countries in archipelago part of Southeast Asia that has high HIV prevalence within their respective MSM populations: Indonesia, Malaysia, Philippines and Timor Leste. All of these four countries also submitted individual proposal, yet it was only Malaysia whose proposal did not address MSM population. For Indonesia, Philippines and Timor Leste, however, despite their participation in ISEAN-HIVOS programme, their respective MSM populations are still the key target for their individual grant's deployment. The CCM of these three nations were aware that ISEAN-HIVOS initiative could not be a lone MSM-targeted programme. Summarizing the individual grant programmes of the four countries and ISEAN-HIVOS, Table 4 in the following page showcases Malaysia's polarity in deploying grant towards MSM.

Table 4 Global Fund Grants of Insular Southeast Asian Grant Applicants (2010-2014)

| Country | Round* | Grant (US\$) | Grant Number | Grant Period | MSM Population Coverage | MSM-targeted Direct Care Provision |
|-------------|--------|--------------|---------------|-----------------------|-------------------------|---|
| Indonesia | 9 | 8,407,733 | IND-910-G15-H | 01-Jul-10 – 31-Dec-12 | Yes | Behavior change communication activities, condom distribution and establishment of MSM-friendly STI/HIV testing clinics |
| Malaysia | 10 | 5,605,067 | MYS-H-MAC | 01-Jul-11 – 31-Dec-13 | No | None |
| Philippines | 6 | 4,989,198 | PHL-607-G08-H | 01-Dec-12 – 30-Nov-14 | Yes | Behavior change promotion, condom distribution and provision of HIV testing and counseling for MSM |
| Timor Leste | 10 | 6,085,519 | TLS-H-MOH | 01-Jan-12 – 31-Dec-13 | Yes | Behavior change communication activities, condom distribution and provision of VCT and STI services on a routine basis |
| ISEAN-HIVOS | 10 | 1,109,570 | MEL-011-G01-H | 01-Oct-11 – 31-Dec-13 | Yes | None |

On the other hand, Indonesia's Round 9 grant deployment extensively addressed MSM population. The proposed goal was to reach 198,490 MSM by activities in twenty one provinces. Table 5 below summarizes the proposed MSM-targeted programmes that were planned to accomplish the goal within the relevant service delivery area.

Table 5 Indonesia's Round 9's Proposed MSM-Focused Programmes

| Service Delivery Area | MSM-Focused Programme |
|--|---|
| Prevention of Sexual Transmission of HIV | Training of trainers to involve MSM in condom use and distribution condom and to increase knowledge of condom social marketing towards MSM |
| | Expansion of MSM-targeted community outreach and peer education program in each district for supporting MSM |
| | Founding 300 condom outlets that are managed by MSM-focused NGO |
| Sexually Transmitted Infection Diagnosis and Treatment | Setting up of STI services in primary health centres and mobile clinics that is user-friendly to MSM |
| Institutional Strengthening | Continuing the initiative of partnership and expand resources with GWL-INA (a national network of MSM-focused NGOs) to ensure the availability of provincial level mechanisms to strengthen community networks and systems. |

Taking the explanation above into account, Indonesia and Malaysia deployed Global Fund's grant differently in terms of MSM-focused measure. Malaysia excluded MSM population in its grant deployment programme with invalid justifications given how there had been a study that could function as serological groundwork for Malaysian MSM's epidemic management and ISEAN-HIVOS program was not a wide-ranging measure for MSM population. In contrast, Indonesia recognized MSM population as key

priority within its grant employment activities. Therefore, it suffices to end this section with a conclusion that the gap of national HIV response in the context of international assistance deployment was higher in Malaysia than it is in Indonesia.

4.2.3 Adoption of MSM and HIV-related Resolutions

The evaluation of this indicator was resulted from a two-stage review of resolutions that contain either all-purpose HIV strategy, specific MSM-oriented HIV strategy, LGBT rights security or the combination of the aforementioned aspects²⁷. Table 7 summarizes such international resolutions that are applicable to either of or both Indonesia and Malaysia.

Based on the table above, almost all of the resolutions were mutually ratified or signed by both Indonesia and Malaysia. The only exception was on UNHRC Resolution 17/19 of 2011, the resolution that aims to pass declaration that associates sexual orientation and gender identity with universal human rights. The resolution was sponsored by South Africa, the first nation to take account of the standard of non-discrimination based on sexual orientation in its constitution when it was drafted in the 1990. Malaysia, along with other 18 nations who were serving as UNHRC member during the adoption²⁸, voted against the resolution; yet these countries' votes lost to votes from 23 other UNHRC members²⁹ that were in favor of the resolution. This made the resolution passed, and thus, signified a true stance of UN in regards to SOGI context. That said, this does not signify that Indonesia, who was not serving as UNHRC member during the adoption, was vehemently supporting the resolution. Had Indonesia been a member of the Council during the espousal, the country might have also voted against the resolution. This notion was derived from the fact that both Indonesia and Malaysia, along with other member countries of OIC, did not support the 2011 UNHRC Joint Statement

²⁷ See Appendix II to see all the complete list of documents reviewed for this indicator.

²⁸ The nations that were not in favor of UNHRC Resolution 17/19 were Angola, Bahrain, Bangladesh, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, Republic of Moldova, Russian Federation, Saudi Arabia, Senegal and Uganda.

²⁹ The nations that were in favor of UNHRC Resolution 17/19 were Argentina, Belgium, Brazil, Chile, Cuba, Ecuador, France, Guatemala, Hungary, Japan, Mauritius, Mexico, Norway, Poland, Republic of Korea, Slovakia, Spain, Switzerland, Thailand, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

on Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity that was produced two months before the meeting of Resolution 17/19³⁰.

The study also found out that when the reviewed resolution was accompanied by publicly-available meeting report³¹ or media coverage, there were further elements that may amplify the extent to which resolution may bring out country's attitude towards topics of HIV, MSM or both. For a resolution that is adopted with consensus, the mutually agreed resolution may be a product of the least comprehensive agreement where the common dominator is the most generic measure and controversial issues tend to be left out. The draft of a resolution may specifically address MSM population or LGBT rights, yet the final product of the consensus does no longer carry such specific points. In 2012 ASEAN Human Rights Declaration, for example, the draft was suggested to include coverage of sexual orientation and gender identity during the regional consultation with regional civil societies, yet The Declaration left out the topics of SOGI.

In light of this observation, the assessment on indicator of resolutions' adoption prompted two remarks: functional and structural. Functionally, the finding did not demonstrate a noteworthy discrepancy between the conjectural attitudes of Indonesia and Malaysia toward HIV and MSM-specific topics as both countries ratified the resolutions on the same wavelength. Structurally, the adoption on MSM/HIV-related resolutions may not provide compelling indicator in defining and comparing the gap of MSM-targeted HIV responses given the mechanism of consensus-based resolutions. Among all the reviewed resolutions – listed in Table 7 – only UNHRC Resolution 17/19 was adopted with a voting system. For these reasons, it is adequate to conclude that the comparison of MSM-targeted HIV response gap between Indonesia and Malaysia is unable to be sufficiently measured.

³⁰ United States of America Mission Geneva, "Over 80 Nations Support Statement at Human Rights Council on LGBT Rights," US Mission Geneva, accessed August 20, 2013, <http://geneva.usmission.gov/2011/03/22/lgbtrights>.

³¹ Meeting report refers to a report that narrates the progress of meeting on resolution's adoption starting from the beginning until the very end of it. Details such as points of objection and remarks made by the member states towards each article of the resolution are recorded in the meeting report.

Table 6 Signatory Status of Indonesia and Malaysia on MSM/HIV-related Resolutions

| Resolution | Content Summary | Indonesia's Status | Malaysia's Status |
|---|---|---------------------------|--------------------------|
| 2010 ILO Recommendation 200 | Recommendation concerning HIV/AIDS and the world of work | Signatory | Signatory |
| 2010 UNHRC Resolution 15/22 | The right of everyone to the enjoyment of the highest attainable standard of physical and mental health | Signatory | Signatory |
| 2010 World Health Assembly Resolution 63/19 | Compliance of WHO's HIV/AIDS strategy for 2011–2015 | Signatory | Signatory |
| 2011 ASEAN Declaration of Commitment | Declaration of ASEAN member states' commitment to achieve MDG 6 which specifically refers to halting and reversing the spread of HIV and AIDS by 2015 | Signatory | Signatory |
| 2011 ESCAP Resolution 67/9 | Asia-Pacific regional review of the progress achieved in realizing the Declaration of Commitment and the Political Declaration on HIV/AIDS | Signatory | Signatory |
| 2011 GA Resolution 65/277 | Political declaration for intensifying UN member states' efforts to eliminate HIV and AIDS | Signatory | Signatory |

Table 6 Signatory Status of Indonesia and Malaysia on MSM/HIV-related Resolutions (Cont'd)

| | | | |
|-------------------------------------|---|-----------|----------------|
| 2011 UNHRC Resolution 16/28 | The protection of human rights in the context HIV/AIDS | Signatory | Signatory |
| 2011 UNHRC Resolution 17/14 | Access to medicine in the context of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health | Signatory | Signatory |
| 2011 UNHRC Resolution 17/19 | Declaration to include LGBT individuals in Universal Declaration of Human Rights and there should be no violence or discrimination based on sexual orientation or gender identity | Signatory | Voting Against |
| 2012 ASEAN Human Rights Declaration | Promotion and protection of human rights and fundamental freedom, including creation a positive environment for HIV response | Signatory | Signatory |

CHAPTER V

CONCLUSIONS AND RECOMMENDATIONS

This chapter discusses the findings presented in the previous chapter on the substantiation of sodomy law as an instrument of institutional homophobia induced by Malaysian government and the assessment of national HIV responses of both the Indonesian and the Malaysian governments. The discussions from these two analyses are then interpolated to postulate a final conclusion and recommendations that accomplish the aim of the study. In addition, suggestions for further research are presented at the end of the chapter.

5.1 Discussion

The theoretical analysis corroborating law as a tool of social reform verified the perception of the Malaysian government employing sodomy law as a tool of institutional homophobia that created a cultural hatred against homosexuals within Malaysian society. The sodomy charge against Anwar Ibrahim signifies the “high status prosecution as enhancement” conjecture made by Zimring and Hawkins that, in turn, fulfils the precondition of “transmission of information” asserted by Vago. The completion of the two theories by Anwar’s first sodomy charge and the political drama surrounding it leads to a further authentication of an establishment of sodomy law as social reform tool, whether intentionally or not. Evan’s “theoretical preconditions” are brought to verify such a notion and the exercise of the theory exerts other evidential value of the sodomy law’s function in epitomizing institutional and cultural homophobia within Malaysian society. The sodomy statute was portrayed as originating from an authoritative and prestigious source as well as being compatible with Malaysian values. Its pragmatic model of compliance, element of time and positive and negative sanctions can be identified in the company of law enforcers’ commitment, if not over-commitment, in enforcing the law.

On the other hand, the comparison of national HIV responses between Malaysia and Indonesia showed two steadfast results: first, the Indonesian government fulfilled more accomplishments in achieving MSM-oriented HIV national commitments and policy instruments than did the Malaysian government; and second, the Indonesian national HIV authority deployed the Global Fund's HIV grant in a more MSM-oriented manner than did Malaysian. Although the two indicators did not essentially represent the full range of relevant HIV response for MSM, each was a critical measure of a comprehensive mechanism for mitigating the HIV epidemic within the MSM population. It is therefore reasonable to suggest that Malaysia has performed more poorly than its neighboring country, Indonesia – a country that does not adopt sodomy law in its constitution – in delivering commitment for an MSM-targeted national HIV response. In other words, judging these two indicators alone, the HIV response gap of Indonesia is smaller than that of Malaysia. How this response gap discrepancy intersects with the existence of sodomy law will be examined in the next section below.

5.2 Conclusion and Recommendations

The intention of this thesis is to scrutinize the extent to which a sodomy law acts or has the capability to influence the national AIDS authorities in derogating their responsibility to deliver an effective HIV response to MSM populations. In so doing, the study underwent two phases that acted as modalities of the analysis in order to assess and compare Malaysia, as a country that implements sodomy law in its constitution, with Indonesia, a predominantly-Muslim counterpart that does not employ sodomy statute. First, the study substantiated Malaysian sodomy law as a social reform tool that aspired to inflict an institutional homophobia run by a government; and second, the study demonstrated the degradation of Malaysian governmental authorities' accountability by showcasing that the Malaysian national mechanism embodied a larger HIV response gap than that of Indonesia

Constitutional implementation of sodomy law in Malaysia demonstrated the strong attitude of Malaysian government on adopting heterosexism – a belief that a sexual relationship between a man and a woman is compulsory for full acceptance into

society. Simultaneously, it put forward a notion of institutional homophobia. The government inherently portrayed LGBTs as a threat to Malaysian society. The exercise of several law theories indicating law as an instrument of social change served as the rationale behind the spread of such state-sponsored homophobia. Politicization of the sodomy statute portrayed in the political battle between Anwar Ibrahim and Mahathir Muhammad was the most prominent catalyst among all. Anwar's sodomy conviction did not only signify the regime's sentiment towards homosexuals, but also ended up inflicting and amplifying an identical sentiment within Malaysian society – including, supposedly, the stakeholders behind the national HIV response mechanism. In other words, the application of the archaic and unjust sodomy statute codified the attitude of governmental bodies in responding towards MSM-related perspectives, including HIV. It systemized a discriminative, and therefore, ineffective HIV response for MSM population. As a result, Malaysia epitomized weak organizational capacity and an incompetent effort to deliver effectual MSM-oriented HIV response despite MSM being one of the key affected populations in the country. Indonesia, on the other hand, had proven that the absence of sodomy law brought out strong commitment to orientate MSM to appropriate HIV response. As the world's largest Muslim population, the populist anti-gay stance also emerges in Indonesia, yet its legal environment still allows for a more holistic MSM-oriented HIV response. In view of this cross-legal environment comparison, it is therefore suffice to affirm that the subsistence of sodomy law might fabricate substantial roles in magnifying MSM-targeted HIV response gap as the statute hindered the capacity of the national AIDS authority to manage the epidemic proficiently.

Identification of the harms inherent in sodomy law that compose structural obstacles to effective MSM-targeted HIV response and the prospective constructive mechanism that a non-discriminatory legal environment can play, therefore, indicates the necessity for legal modification to enhance an enabling regulatory framework through which HIV response can be proficiently delivered to and accessed by MSM. Deletion of sodomy law, as done in India's penal code amendment, is a needed legal intervention that can ultimately enhance governments to ensure that the human rights of MSM are counted and protected in national HIV responses, despite the populist moral view. Sodomy law

wastes resources and limits the effectiveness of HIV investment for MSM as evidenced by the study's comparative analysis of Global Fund spending on MSM-oriented measures. Its punitive and discriminative consequences hamper public health practices, which is a fundamental rights of every human being regardless their sexual orientation and gender identity. Hence, the government should acknowledge that legal interventions that eradicate such an unconstructive environment ethically outweigh populist homophobic norms and values.

5.3 Suggestions for Further Research

Given how this study was unable to generate coherent findings from the cross-country comparison of the adoption international resolutions further study may be needed to assess the consensus-based resolution adoption through the lens of the resolution draft, the final outcome document and the attitudes of the countries during the assembly, or namely, the process of transforming the draft into the final resolution. During the research, the author was introduced to a detailed and intricate process of the UN's consensus-based resolution adoption system. The resolution's draft, which is prepared by the secretariat of UN entities, normally reflects an inclusive rights-based approach in responding to HIV and LGBT rights contexts. During the assembly, the draft will be assessed and negotiated by member states and the final resolution is oftentimes the outcome of mutually agreed evaluation. That said, the outcome may not be identical with or as inclusive as the draft since there are articles that are deleted or modified. Such deletions and modifications, nonetheless, are the key features that should be assessed further as they may entail the true stance of the member states, and therefore, portray another frame of clear-cut comparison.

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APPENDICES

APPENDIX A

LIST OF DOCUMENTS REVIEWED

| INDICATOR 1: NATIONAL COMMITMENTS AND POLICIES INSTRUMENT | | |
|--|---|--------------------------------------|
| # | DOCUMENTS | AUTHOR |
| 1 | Indonesia's 2012 NCPI Report | Indonesia's National AIDS Commission |
| 2 | Malaysia's 2012 NCPI Report | Malaysia's STI Section of MoH |
| 3 | ToR of GWL-INA | GWL-INA |
| 4 | ToR of MAC | MAC |
| 5 | Indonesia's Law no. 39/1999 on Human Rights | Indonesia's Constitution |
| 6 | Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women | UN CEDAW |
| 7 | Indonesia 2012 Human Rights Report | U.S. Department of State |
| 8 | Malaysia 2012 Human Rights Report | |

| INDICATOR 2: DEPLOYMENT OF GLOBAL FUND'S HIV GRANT | | |
|---|--|--|
| # | DOCUMENTS | AUTHOR |
| 1 | Global Fund's 2011 Regional Results Report | Global Fund |
| 2 | Philippines' Global Fund's Round 6 – Phase II HIV Grant Proposal | Global Fund's Round 6 CCM of Philippines |
| 3 | Philippines' Global Fund's Round 6 – Phase II HIV Grant Performance Report | |
| 4 | Indonesia's Global Fund's Round 9 HIV Grant Proposal | Global Fund's Round 9 CCM of Indonesia |

| | | |
|----|---|---|
| 5 | Indonesia's Global Fund's Round 9 HIV Grant Performance Report | |
| 6 | Malaysia's Global Fund's Round 10 HIV Grant Proposal | Global Fund's Round 10 CCM of Malaysia |
| 7 | Malaysia's Global Fund's Round 10 HIV Grant Performance Report | |
| 8 | Timor Leste's Global Fund's Round 10 HIV Grant Proposal | Global Fund's Round 10 CCM of Timor Leste |
| 9 | Timor Leste's Global Fund's Round 10 HIV Grant Performance Report | |
| 10 | ISEAN HIVOS' Global Fund's Round 10 HIV Grant Proposal | ISEAN HIVOS |
| 11 | ISEAN HIVOS' Global Fund's Round 10 HIV Grant Performance Report | |

INDICATOR 3: ADOPTION OF HIV AND MSM-RELATED RESOLUTIONS

| # | RESOLUTION | SUMMARY CONTENT | ASSESSED FOR STAGE 2 |
|---|-------------------------------|---|----------------------|
| 1 | 2000 UNSC Resolution 1308 | HIV response in peacekeeping effort | No |
| 2 | 2001 GA Resolution S-26/2 | Declaration of Commitment of United Nations' member states to eliminate HIV/AIDS epidemic | No |
| 3 | 2001 UNHRC Resolution 2001/51 | The protection of human rights in the context HIV/AIDS | No |
| 4 | 2003 Resolution 47/1 | Protection of rights of women and girl child in the context of HIV/AIDS | No |
| 5 | 2003 UNHRC Resolution 2003/29 | Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria | No |
| 6 | 2003 UNHRC Resolution 2003/47 | The protection of human rights in the context HIV/AIDS | No |

| | | | |
|----|---|--|-----|
| 7 | 2003 UNSC Resolution 1460 | HIV response for children in armed conflict | No |
| 8 | 2004 UNHRC Resolution 2004/26 | Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria | No |
| 9 | 2004 UNHRC Resolution 2004/27 | The right of everyone to the enjoyment of the highest attainable standard of physical and mental health | No |
| 10 | 2004 UNHRC Resolution 2004/48 | Rights of the child, including attainment of HIV medicine | No |
| 11 | 2005 UNHRC Resolution 2005/23 | Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria | No |
| 12 | 2005 UNHRC Resolution 2005/84 | The protection of human rights in the context HIV/AIDS | No |
| 13 | 2006 CSW Resolution 50/2 | Protection of rights of women and girl child in the context of HIV/AIDS | No |
| 14 | 2006 GA Resolution 60/262 | Political declaration for intensifying UN member states' efforts to eliminate HIV and AIDS | No |
| 15 | 2009 UNHRC Resolution 12/24 | Access to medicine in the context of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health | No |
| 16 | 2009 UNHRC Resolution 12/27 | The protection of human rights in the context HIV/AIDS | No |
| 17 | 2010 ESCAP Resolution 66/10 | Regional call for action to achieve universal access to HIV prevention, treatment, care and support in Asia and the Pacific | No |
| 18 | 2010 ILO Recommendation 200 | Recommendation concerning HIV/AIDS and the world of work | Yes |
| 19 | 2010 UNHRC Resolution 15/22 | The right of everyone to the enjoyment of the highest attainable standard of physical and mental health | Yes |
| 20 | 2010 World Health Assembly Resolution 63/19 | Compliance of WHO's HIV/AIDS strategy for 2011–2015 | Yes |

| | | | |
|----|--------------------------------------|---|-----|
| 21 | 2011 ASEAN Declaration of Commitment | Declaration of ASEAN member states' commitment to achieve MDG 6 which specifically refers to halting and reversing the spread of HIV and AIDS by 2015 | Yes |
| 22 | 2011 CSW Resolution 55/2 | Protection of rights of women and girl child in the context of HIV/AIDS | No |
| 23 | 2011 ESCAP Resolution 67/9 | Asia-Pacific regional review of the progress achieved in realizing the Declaration of Commitment and the Political Declaration on HIV/AIDS | Yes |
| 24 | 2011 GA Resolution 65/277 | Political declaration for intensifying UN member states' efforts to eliminate HIV and AIDS | Yes |
| 25 | 2011 UNHRC Resolution 16/28 | The protection of human rights in the context HIV/AIDS | Yes |
| 26 | 2011 UNHRC Resolution 17/14 | Access to medicine in the context of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health | Yes |
| 27 | 2011 UNHRC Resolution 17/19 | Declaration to include LGBT individuals in Universal Declaration of Human Rights and there should be no violence or discrimination based on sexual orientation or gender identity | Yes |
| 28 | 2011 UNSC Resolution 1983 | HIV response in peacekeeping effort | No |
| 29 | 2012 ASEAN Human Rights Declaration | Promotion and protection of human rights and fundamental freedom, including creation a positive environment for HIV response | Yes |

APPENDIX B

LIST OF KEY INFORMANTS INTERVIEWED

| NAME | POSITION | COVERED TOPIC |
|-----------------|--|---|
| Edmund Settle | HIV policy adviser of UNDP Asia-Pacific Region Office; Technical Expert for CCM of Global Fund's HIV Multicountry Grant in Asia Pacific; | Indicator 1, 2 and 3 |
| Joselyn Pang | Project Director of Global Fund Project Management Unit of MAC | Indicator 2 |
| Zaki Arzman | Manager of Media & Communication Department of MAC | Indicator 1 and 2 |
| Fifa Rahman | Policy Manager of MAC | William Evan's "Theoretical Precondition" |
| Raymond Tai | Acting Executive Director & Programme Director of Pink Triangle (MSM) Programme of PT Foundation; Member of CCM of Global Fund's Round 10 HIV Grant in Malaysia | Indicator 1, 2 and 3 |
| Shah Mohamad | Former Project Manager of MAC; Regional Program Manager of ISEAN-HIVOS | Indicator 1, 2 and 3 |
| Subatra Jayaraj | Consultant of Population Section of Social Development Division of ESCAP | William Evan's "Theoretical Precondition" |
| Harry Prabowo | National Program Manager of GWL-INA Network | Indicator 1 |
| Lingga Permana | Project Director of MSM Programme of KPA | Indicator 1 |

BIOGRAPHY

Safir Soeparna was born in Bandung, Indonesia, in 1987. He graduated cum laude from Bandung's Institute of Technology with a degree of Bachelor of Management with concentration in Marketing & Communication. His bachelor thesis examined the efficacy of sexual-suggestive HIV-awareness advertisement towards female Muslims. He then worked as creative director and public speaker for "Living with HIV" project, a project run by an NGO in Ho Chi Minh City, Vietnam, that provided HIV education to school and university students. In 2012, he enrolled in Southeast Asian Studies master program at Chulalongkorn University, Thailand. During his master education, he interned at UNESCAP's Social Development Division and at UNDP Asia Pacific Region Office's HIV Section for "Being LGBT in Asia" initiative. His paper, "How Cities Infect its Gay Dwellers", was selected as e-poster for the 11th International AIDS Congress on AIDS in Asia and the Pacific (ICAAP).