

COMPLIMENTARY IN THE PROSECUTION AND ENFORCEMENT PERSPECTIVES IN MORAL MISCONDUCT CASES: ANALYSIS IN KELANTAN AND PENANG

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ABSTRACT: *Misconduct literally refers to moral-related offences, both in behaviour and Islamic traits of an individual in public as well as in private. Moral misconducts are defined clearly in every criminal enactment of each state in Malaysia. However, the terms used for this offence category are different according to each state enactment. Offences such as close proximity, premarital sex, indecent behaviour in public and men behaving like women are among the offences that are frequently prosecuted and tried in court. Structured interviews are carried out in order to obtain the latest and practical data. The interviews conducted are with the Sharia Chief Justice, Sharia Prosecutor and Religious Enforcers. Besides, the documentation method is also used in explaining theories. This research is expected to identify moral misconducts between the two states as well as understanding the enforcement procedures conducted until the prosecution process is carried out in the effort of enforcing related provisions as well as the task scope and authority of the prosecutors and enforcers. Both are mandatory elements that support and complimentary one another. The analysis obtained helps in the strengthening of the sharia enforcement institutions, judicial institutions and prosecution in sharia crime cases.*

Keywords: Ethics, enforcement, prosecution, moral and sharia crimes

1. INTRODUCTION

Issues related to moral discrepancies, social problems and vices are heavily discussed today in Malaysia. Malaysia is known for its polite and well-behaved citizens that still hold on firmly to their eastern cultures. The community is concerned over this negative development since it will become worse and uncontrollable. If it is not dealt with correctly, the negative impacts brought by it will surely affect the whole country.

Unlike laws created by men, Islamic criminal laws highlight on moral values in every provision and sentencing. Morality is the main pillar of the societal construction structure. Therefore, when the morals of the community deteriorate it will lead to the societal and familial institutions will be destroyed. Thus, since the beginning, the Prophet Muhammad stressed on moral elements in the construction of a Muslim's personality as well as sentencing for every act that is against moral values. In this matter, a Quranic verse conveyed the words of Allah S.W.T with the meaning:

“And you truly have high morality” - (Al-Qalam 64:8)

The verse above explains that morality cannot be separated from Islamic teachings. Hence, it is found that every Islamic law has Islamic moral values or elements in it. For example, an individual will not commit an offence unless he is morally corrupt. When studied, manmade criminal law provisions do not consider moral values since they are secular and created based on the weak and limited minds of men. When considering moral values, they will only be taken into account when a direct negative impact will be felt by specific individuals or when there is a disruption of peace, public safety and public order [1]. Lately, the community is facing various kinds of social discrepancies especially the ones committed by Muslim teenagers and young adults. The crimes of raping female acquaintances, baby dumping in public places, drug abuse, underage prostitution and others are a manifestation of uncontrolled interaction between sexes and the separation of moral values from public lives as well as the absence of *wazi' al-din* (a sense of awareness and internal religion control that exist in an individual). These

discrepancies, if not prevented, will happen without control and may weaken the younger generations as well as threaten the sustainability of the nation's leadership in the future.

2. MORALITY DEFINITIONS

“Moral” includes subtle definitions such as discipline, principles, norm, behaviour, board, rule, order and tradition while “morality” refers to decency, morality, courtesy, politeness, etiquette. In Arabic, morality has similar definitions of many words such as *latif, karim, kayyasaah, ihtiram, muwafaqah, muhazzab, adab and hasan* [2]. With in-depth explanation, the term morality refers to a polite, courteous, civilised, decent and moral behaviour [3]. Its connotation stresses on an organised human behavioural system especially when paired with the suffix -ty that refers it as a courteous system, code and method, an organised moral sequence and polite customs that is generally accepted as a societal principle. These definitions interpret morality as a set of good behaviour to be appreciated and expanded from generation to generation in a community that is based on religious beliefs, race and strong customs which then leads to the establishment of a systematic moral ethics whether in the forms of ideologies, codes, rules and laws.

If refer to the English version of Section VI in the Sharia Criminal Offense Enactment/Act for Federal Territories, Johor, Penang and Selangor, the term decency is used [4]. Therefore, is used widely in both civil and sharia legal systems especially in categorising several minor offenses whether in acts, laws [5], and enactment [6] that are seen to be against the moral norms that are humiliating according to the religious and racial principles as well as customs of societies in the East.

3. MORAL MISCONDUCT ANALYSIS IN THE KELANTAN AND PENANG SHARIA CRIMINAL ENACTMENT

1. Premarital sex

Fornication refers to sexual relations between men and women out of wedlock. It is a term used to refer sexual

relations between unmarried individuals and also those who are married. It is considered as fornication when there is penetration or in other words, the entry of the penis into the vagina must occur in order to be sentenced to the offense. In Malaysia, the punishment sentenced for premarital sex in all states provided maximum sentencing of a fine not more than RM 5000 or imprisonment not longer than 3 years or caning not more than six strokes or any combination of the above [7-8]. These sentencing are general and do not consider whether the accused is chaste or not.

Premarital sex offense is among the major offenses listed and the most common case to occur. Religious Enforcement Officers are especially strict in enforcing the provision in preventing social discrepancies from occurring. To quote the statement given by the Senior Judge at the Kota Bharu Sharia High Court, he stated that the number of premarital sex cases reported is increasing every year [9]. In another aspect, there is also an opinion that said premarital sex is considered as an offense based on the spirit as well as the intentions of the lawmaker. For example in Kelantan, the term 'fornication' is used. It shows that Kelantan wishes to achieve the definition of *hudud* which is different from other states that use the term 'premarital sex'. A Religious Enforcement Officers in Penang stated:

"We in Penang are more ta'zir while in Kelantan they are more inclined towards hudud...it is its spirit..."

2. Incest

Incest is a sexual act involving men and women who are believed to have unlawful relations in order to be married in Islam. In the *fiqh* point of view, this ban is not because of lineage and blood ties but also through affiliation and breast-feeding [10]. Since it is as serious of an offense like fornication, therefore lawmakers have decided upon maximum sentencing equivalent to the ones set for fornication.

In Perak and other states, the punishment for incest by couples who are forbidden from getting married forever is more severe compared to those who are temporarily banned. It must be stressed here that incest in the context of the Malaysian Sharia Criminal Enactment refers to the act that is committed voluntarily by both parties. If it is not consensual, the offense will be categorised as rape [11].

Incest offense is rarely enforced and acted upon Religious Enforcement Officers. This is because this offense is in the Penal Code. Therefore, if there is any complaint received, the Religious Enforcement Officers will submit it to the Malaysia Royal Police since the sentencing will be made under the Penal Code which is more severe. In addition, there are several legal issues in enforcing this section [12]. Interestingly, Kelantan has no provision for incest in its enactment while in Penang, the offense is provided under section 20 of Penang Shariah Criminal Offense Enactment 1996.

3. Prostitution

Prostitution refers to an individual who offers to engage in unlawful sexual relations with the purpose of receiving payment for such services. Prostitutes or individuals who pay for sex that are assumed to fornicate can be sentenced for *hudud* according to the Islamic law since it involves premarital sex. Those who are involved indirectly can be

sentenced to severe *ta'zir* sentencing [13]. Prostitution offense is provided under section 21 of the Penang Sharia Criminal Enactment 1996 and section 10 of the Kelantan Sharia Criminal Code Enactment 1985.

Besides a provision regarding offenses of becoming a prostitute, the states enactment has the provision for criminal responsibility of husbands who pimped out their wives and parents or guardians who pimped out their children or child under their care. Most states provided maximum sentencing for prostitution except in Malacca that sets a fine of not more RM 3000 or imprisonment no longer than 2 years.

It is difficult to enforce a provision related to prostitution. It is because there are difficulties to convict in court. Based on the statement made by a Perak Religious Enforcement Officer, the bargaining element must be proved in order to strengthen the evidencing element for prostitution. One of the methods that can be used to prove it is through impersonation. However, this method receives criticism from a few religious scholars.

4. Foreplay as preparation to engage in premarital sex

Foreplay as preparation to engage in premarital sex is also known as *taqarrub zina*. All vice behaviours that can lead to unlawful fornication in Islam can be punishable depending on its severity. Among the examples of behaviours that can be categorised as an offense under it including men and women sleeping together on a bed, kissing, hugging and so on. Close proximity can only be categorised under this offense. It can also be said that all states in Malaysia provided the same sentencing for this offense which are a fine not more than RM 3000 or imprisonment no longer than 2 years [11]. Kelantan, however, add a caning sentencing of three strokes to that offense [8].

5. Close Proximity

When a man has no marital ties with a woman that has no familial ties to him and are alone together in a closed area without worrying that they will be disturbed by others and they may have a chance to commit a vice, there are assumed to be in committing the offense of close proximity. It does not necessarily happen between a man and a woman since it can also happen between a man and several women [14]. Close proximity cannot be sentenced to a *'hadd* punishment. In fact, a *ta'zir* sentencing is given as a lesson to the accused. In most states, close proximity is punished with a fine not more than RM 3000 or imprisonment no longer than 2 years or both. There are enactments that have different sentencing if the accused is in close proximity with one and/or many partners [14]. Additionally, the court can order the female accused to be sent to rehabilitation centre for a set period of time.

Close proximity is an offense that frequently dominates the sharia criminal offenses charts. This is because close proximity is an offense that can easily be committed by couples. Therefore, the Religious Enforcement Officers are always being accused of spying and so on. This statement is argued by Datuk Dr Mashitah Mahmood, a (then) Minister in the Prime Minister Department by stating that in the State Sharia Crime Procedure Enactment, there is a specific method provided for Religious Enforcers to take action such as through public complaints or arrest by authorised individuals [15].

Close proximity is indeed an offense that has the highest statistics and frequently committed by the accused. Therefore, the enforcement efforts carried out must be done continuously. Religious Enforcement Officers are skilled enough to conduct investigation and prosecuting proven cases in court [16].

6. Pimping

Pimps are middlemen that act as a medium for a man and woman to engage in acts that are against the Islamic Law [13]. Acts, in this context, refer to prostitution [17]. Sentencing for pimping in most states is maximum sentencing which is a fine not more than RM 5000 or imprisonment no longer than 3 years or caning not more than 6 strokes.

Pimping is not a popular offense and frequently enforced by the Islamic Department through its Enforcement Department. This is because there are problems in the evidencing burden which is difficult to do as well as lack of skills among the Religious Enforcement Officers [18].

7. Indecent Behaviour

Indecent behavior refers to acts that are against Islamic moral values. Indecent behaviour can happen in the form of kissing or hugging between men and women. It can also be in the form of words such as saying expletives. The interpretation of indecent behaviour according to the sharia criminal offense enactment or act is very wide. According to Islamic law, there is a guide to determine an act as a moral-related offense. It is interesting to say that the moral concept in Islam is very wide [19].

Indecent behaviour referred in acts or enactments are different than close proximity since it is committed in public while the latter is committed in closed, private areas. Indecent behaviors do not specifically involve men and women but also a man or women who exposed their bodies in public. The sentencing for these offenses is the same which are a fine not more than RM1000 or imprisonment no longer than 6 months.

In Selangor, the 2002 JAIS Director Standing Order (Amended 2004) is specifically about the methods to handle information and complaints from the public are established. Besides, JAIS has issued out a 2003 JAIS Director Standing order to execute prevention measures of section 31 of the Selangor Sharia Criminal Enactment (No.9. 1995) which are methods to handle and manage indecent behaviours/misconducts in public. This order is enforced on 11th August 2003 [20].

The establishment of several standing orders proved the determination of authorities at the policymaker levels in order to handle social problems. It must be executed transparently and with dedication at the enforcement and execution levels without any exemption or intervention of external parties that can fail the fulfillment of the legal objectives set.

4. ISLAMIC DEPARTMENT PROSECUTION AND ENFORCEMENT DEPARTMENT COMPLIMENTARY

The role of enforcing sharia criminal law is on the Enforcement Department of the State Islamic Department. This department is headed by a Chief Religious Enforcer and assisted by a few Religious Enforcement Officers. In the definition of sharia criminal offense law enforcement, it

involves the offenses that are provided under any Islamic law that is enforced. This includes provisions contained in the Sharia Criminal Offense Enactment and then act on any individuals who commit the offense [20].

For the Prosecution Department, all sharia crime cases are handled by it which is also under the State Islamic Department. The department plays the role of inspecting investigation files that have been completed by the Enforcement Department. The definition of prosecuting crime cases, in the context of this department, is to ensure the suspects are brought to justice. Hence, they must revise the investigation papers, plan a prosecution and carry out prosecution once satisfied [21].

A raid operation and arrest of a moral misconduct case is initiated with a complaint received by someone in the Enforcement Department of the State Islamic Department. This is the common practice in most cases. A complaint can be received based on intelligence collected by appointed individuals by the enforcement department. Before any action can be taken for a raid and arrest for any moral offense, a complaint must be made by any party, be it individuals, group and so on. Except the times during Malaysia yearly night celebrations such as Independence Day and New Year's Eve celebrations, enforcers will conduct operations based on the public complaints made. The enforcers and operations department make lesser arrest and operations for an attempt to engage in unlawful sexual relations without complaints in order to avoid public perspectives that assume the enforcement and operations departments likes to 'spy', interfere and humiliate people. Therefore, they focus mainly on other Sharia criminal offenses such as alcohol consumption, gambling and other crimes.

Complaints refer to statements made verbally or in written form to a Judge if an individual is known to commit or guilty on an offense with the purpose of ensuring the judge to act upon them [22]. Although it is said that compliments should be given to the judge, usually the public will directly inform to the State Islamic Department or the operations and enforcement department. This is because finally, the complaint will be extended to the operation and enforcement department even though the complaint is made to the judge. Complaints received by the enforcers can be made through phone calls from the public or they can come straight to the enforcement office. All complaints will be recorded in the complaint form which is Form 5 wherein this form where the name, identification card number and complainant address as well as complaint details such as the type of complaint, address where the offense is committed, the appropriate time to conduct the operation based on the time the accused will be at the stated location and other information related to the complaint. The form will be signed by the complainant.

After the complaint is received or a sounding is conducted, the raid and arrest operations is headed by the Chief Operation and Enforcement or individuals appointed by the Operation Head that is not lesser than 27 categories in their position organisation. Every member of the Operation and Enforcement Department of the State Islamic Department is authorised to make arrest. The numbers of people that conduct arrest is no lesser than four people excluding the driver. The total number too depends on the type of cases and

every operating group must be participating by two female officers.

In an arrest, the enforcement officers, police officers or others who are involve in the arrest must touch or caged the body of the individual to be arrested unless he surrenders in words or actions. If he uses violence and resists arrest or tries to avoid from being arrested, the officers or the other individuals involved can apply all the necessary measures to execute the arrest and nothing in this section gives right to cause death of any of the individuals involved [23].

After the arrest is made, an enforcer cannot detain the arrested individual for more than 24 hours without court permission but within the 24 hours, not included the time taken to travel from the arrest location to the court. The arrested individual must be taken to court for a prosecution hearing or his case is postponed [23]. Before release, the judge will put the arrested individual on bail.

Investigation toward the arrested individual for unlawful sexual relations attempt cases will be carried out by the Head of the investigation department under the enforcement department of the State Islamic Department or an individual appointed by him in order to execute the investigation process. It is understood that the method, time and date of investigation as well as statement recording taken from the arrested individuals will be determined by the investigation authorities. It can be done as soon as after arrest on at another date set by the investigation officer. When an investigation is carried out, an investigation papers will be opened and the investigation department will take statements without warning of the arrested individuals as well as the witnesses (other enforcers that conduct the arrest). The statements made by anyone to the religious enforcers on the way of an investigation cannot be used as evidence except in certain situations allowed by the court [12].

The prosecution department plays an important role in an attempt to engage in unlawful sexual relations cases before follow-up actions can be taken towards the accused. Prosecution must be based on the sufficient evidence collected in order to prove and convict an offense committed by the accused. The prosecution functions is to study the investigation papers made by investigation officers from the operations and enforcement department, providing advice and instructions to the investigation and enforcement departments for follow-up investigation if needed. The prosecution is responsible in handling the prosecution and criminal proceedings as well as managing appeals and case revision, if necessary.

The Sharia prosecution department is involved when the investigation papers are submitted by the investigation officers from the operations and enforcement department of the State Islamic Department. The contents of the investigation papers can be studied by the prosecutors in the aspects of arrest procedures and investigation whether they fulfil the legal requirements, case facts, statements, witnesses and case evidence that can be used and determining the type of offense convicted that is appropriate with the details provided in the investigation papers. If follow-up investigations are required, the prosecutor will collaborate with the investigation officers to carry out the follow-up process on the items requested.

When the prosecutors found that the investigation papers are complete, the accusation papers against the arrested individual will be made. Accusation is defined as a statement that an individual commits an act that is against the law [3]. In the accusation papers, it will state the name and address of the accused, the form of offense committed, related sections and enactments as well as the accusation details such as the date, time, place and offense description.

After the accusation papers are completed, the case will then be filed at the Sharia Court where the accused will be called to hear the accusation and given the choice to confess the accusations or to confess as innocent and requested to be tried. In Sharia Courts located in cities and other districts in each state, both accused involved in the same case, even though have their very own file and case numbers, can be called together and simultaneously for the accusations made. However, in some cases, the accused do not come together and proceed with their case individually.

The trial for attempt to engage in unlawful sexual relations case is similar to the process conducted for other criminal cases. It begins with the prosecutors presenting their case by reading the accusation clearly and can be understood by the accused. The accused will then be questioned by the judge whether he is confessing as guilty of the accusation made or not. If he confesses to be guilty, the court will record his guilt admission without terms and be sentenced provided that the accused understands the repercussions of his guilt admission [22].

Based on the procedure stated above, it can be understood that both departments complimentary one another. This is confirmed by the Sharia Prosecutor of the Penang Islamic Department. He stated that if there is a lack of evidence provided by the Enforcement Department, then it is difficult for the Prosecution Department to prosecute the suspect in court [17]. In addition, if the Prosecution Department is unable to prove that the suspect committed the offense as accused due to lack of evidence and statement, the case may be denied and the accused will be released.

5. CONCLUSION

The Federal Constitution via the Ninth Table of the Dual State List and article 121(1A) have provided the jurisdiction of the Sharia Court in handling Muslim affairs including the ones related to crimes which is under the administration of the state. The Sharia Court must be given more power and freedom to evaluate and decide the types of Sharia crimes as well as the appropriate sentencing that are in line with the changing surroundings and keep up to date with the times. Therefore, the efforts from the state government as well as the federal government are needed to improve the weakness and disadvantages that are identified in the two important agents of the State Islamic Department which are the enforcers, operations, investigation and prosecution of Sharia in combating moral offense cases as well as other Sharia crimes. This collaboration is not only limited to Penang and Kelantan but also the other states that face the aforementioned problems and challenges. The execution and enforcement of Sharia criminal offenses are very much needed today and must be given full attention by all involved parties.

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