

# SHARIA CRIMINAL OFFENSE ENACTMENT IN MALAYSIA: STANDARDISATION AND NON-STANDARDISATION RESEARCH FOR MORAL OFFENSE PROVISIONS

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**ABSTRACT:** *Moral offense is literally referring to moral offenses, good behaviour and Islamic morality of someone, be it in public or not. The moral offenses are stated clearly in the Malaysian states criminal enactment. However, the terms used for the type of offenses are different according to the state enactments in Malaysia. For example, several state enactment has specific provisions related to moral offenses and several states have no specific offense provision but placed under the 'various' offense categories. Several states do not have a direct provision on certain offenses that are provided in other enactments. Structured interviews are conducted to obtain the latest and more practical data with the Chief Sharia Justice, Sharia Prosecutors and Religious Officers as well as choosing a documentation method that is able to explain about the theories applied. This research is hoped to discuss standardized items as well as those that are not standardized yet which will impact the sharia enforcement, prosecution, and judicial systems. The analysis obtained may help in the strengthening of the sharia enforcement institutions, judicial institutions, and prosecution in sharia crime cases.*

**Keywords:** Morality, enforcement, prosecution, sharia crimes, standardization

## 1. INTRODUCTION

Basically, Islamic criminal laws in Malaysia only cover the *ta'zir* scope. Until today, there are no special *hudud* or *qisas* laws that are executed even though there are efforts to execute them in Kelantan and Terengganu once. In fact, the Sharia Court criminal jurisdiction is very limited compared to Civil Courts. Before the establishment of state sharia criminal enactment, laws related to sharia crimes are mostly provided under the state Islamic Law Administration Enactment. From the aspect of criminal jurisdiction, the maximum sentencing provided in the enactments before 1965 only includes a fine of five thousand or imprisonment no longer than 4 months or both. The maximum sentencing limit is increased in 1965 with a fine of a thousand or imprisonment no longer than six months or both.

The amendments made on the Sharia Court Act (Crime Jurisdiction) is drawn in 1984 and after that, the maximum sentencing that can be given by the sharia court is a fine of five thousand or imprisonment for three years or six strokes of caning or a combination of any of the sentencing above. With that, most states have introduced their respective Sharia Criminal Offense Enactment. In 1988, there is an amendment in the Federal Constitution which is Article (1A) that brings about an addition to the credibility of the Sharia Court. The Sharia Court will be given an exclusive authority whereby the Sharia Court jurisdiction cannot be included with the jurisdiction of the Civil Court.

Since the pre-independence era until today, we have seen several innovation and expansion in the Islamic criminal law scope in Malaysia. Generally, the sharia criminal can be classified to several types of offenses that include the offenses related to sex, alcohol, faith, gambling, morality, Islamic principles, purity of Islam and its institutions, matrimony and other offenses.

## 2. SHARIA CRIMINAL OFFENSE ENACTMENT BACKGROUND

Islam begins to spread widely during the 15<sup>th</sup> century during the Malacca Malay Sultanate era. The King and people of Malacca embraced Islam during the early 15<sup>th</sup> century. In a

short time, Islam is spread throughout the Malay Peninsula, Javanese, Borneo, Sulawesi, and Mindanao islands. The arrival of Islam does not only changes the socio-culture and thinking of the local communities at the Malay Peninsula but it also brought about changes in the legal and administrative aspects [1]. Historical evidence shows that Islamic laws have been practiced at the Malay Peninsula before the arrival of Western colonialist which involves the overall Islamic principles, be it crimes, trade, families, procedures, and evidence.

The legal texts enforced in Malay states such as the Malacca Penal Code or also known as the Malacca Law proved the acceptance and execution of Islamic Law during that time. Most of the legal content is based on Islamic law in all subjects including crime, trade, families, evidence, and events. For example, there is revenge murder sentencing or *qisas*, *hudud* laws such as caning or stoning for fornication and sodomy, caning for unlawful sex accusations without witness, the death sentence for apostasy, amputations for robbery, caning for alcohol consumption and murder during the robbery while a death sentence is set for traitors. The Malacca Penal Code has also provided sentencing related to the *ta'zir* and *diat* principles besides several provisions related to trade such as banning of bribery, the validity of a contract, hire purchase contract, loans, and trust that are in line with Islamic law [2].

During the British occupation, the period after the Pangkor Agreement 1874 has become the turning point to the spread of the English influence at the Malay Peninsula. The agreement between the English and Malay rulers required them to accept an English advisor in Perak. His advice is asked and followed in all administration affairs except in matters relating to religion and Malay customs. Among the early sharia criminal laws that have English influence in them is *Adultery By Muhammadan* that is enforced in Perak through Order No.1 1894. A similar law is enforced in Selangor in the same year which is known as *The Prevention of Adultery Regulation* [3].

After that, *The Muhammadan Law's Enactment 1904* is enforced in the Federated Malay States which are Perak, Selangor, Pahang and Negeri Sembilan. This law is for the purpose of punishing Muslims that commit certain offenses. Various amendments are made to the law in those states until it is placed under *Chapter 198 Revised Law of Federated of Malay States 1935*.

Before independence, the sharia criminal offenses are provided in the special provision that is more general which is the State Religious Council Administration Enactment [4]. Since the 80s, 90s until today, we have seen several states coding the Sharia Criminal Offense Enactment. The earliest state to possess its own Enactment is the Kelantan Sharia Criminal Offense Enactment 1985 that is still enforced until today. Kelantan is followed by Kedah in 1989 while other states made amendments to the Islamic Administration Enactment during the early 90s such as Sarawak (1991), Perlis (1993), Johor (1992), Selangor (1995), Pulau Pinang (1996) and Federal Territory (1997) [5].

### 3. PROVISION FOR THE TYPES OF OFFENSE IN THE SHARIA CRIMINAL ENACTMENT

Fornication refers to sexual relations between men and women. Generally, Muslims are subjected to the State Criminal Law. However, there are criminal laws that are drawn up by the Federation that must be in compliance and followed by all Muslims. For example, offenses related to property such as robbery, stealing and other offenses that are related to the country such as treachery and so on. All offenses in the Penal Code subjected Muslims to said laws.

Criminal offenses provided in the enactments are too little and very limited including the sentencing provision. The sentencing provided only includes the *ta'zir* nature of it such as imprisonment, fines or caning. This provision can be seen in several state enactments such as the Selangor Sharia Criminal Enactment 1995, Federal Territories Sharia Criminal Act 1997, Kelantan Sharia Criminal Code Enactment 1985 and the Kelantan Malay Customs and Islamic Council Enactment (amended) 1986. For the states that have no sharia criminal enactment, the offense provision is provided in the respective state Islamic law administration enactment. Besides, there are sharia criminal offenses provided under the Parts IV and X of the Muslim Families Law Enactment which is known as matrimonial offenses such as the Selangor Muslim Families Law Enactment 2003, Federal Territories Muslim Families Law Act 1984 and the Johor Muslim Families Law Enactment 2003 [6]. In order to explain the core of the discussion, the classification of these sharia criminal offenses can be simplified as below [4]:

Offenses related to morality such as indecent behaviour in public and men behaving like women in public.

- I. Sexual offenses such as kissing partners who are not husband and wife, live-in relationships or close proximity, indecent behaviour, fornication, foreplay before sex, sodomy, lesbianism, pregnant or giving birth to illegitimate children and prostitution.
- II. Offenses related to religious practices such as issuing or spreading the news that are against the Islamic law, sponsoring, encouraging or committing vices, drinking alcoholic drinks, selling and

purchasing of alcoholic drinks as well as not fasting during Ramadan.

- III. Offenses related to welfare of others such as influencing or persuading married women or men to divorce, elope or cause someone's wife to leave the marriage as determined by the husband, pimping off children or ward, eloping or influencing a woman to elope from her parents care becomes a pimp which is the middleman for purposes that are against of the Islamic law and argue about others' piety.
- IV. Offenses related to Islam law administration such as breaching, disputing, or insulting any judge or religious affairs officer, religious teachers, breaching any law enforced in the court, disobeying and going against or disrespecting any court orders.
- V. Accomplishing in any of the offenses above.
- VI. Various offenses that are excluded in the categories above.

Besides, the sharia criminal offenses are also available in the State Muslim Families Law Enactment and Act. These offenses are: (State Muslim Families Enactment and Act):

- I. Penalty related to the solemnization of marriage and marriage registration such as failing to attend and appear in front of the Registrar at the determined time, disturbance during the marriage, fake statement or confession in order to obtain unlawful marriage and solemnization of marriage.

General penalty such as polygamy without the permission of the Court, divorce out of Court and without the permission of the Court, abusing the wife or husband and so on.

### 4. STANDARDISATION AND NON-STANDARDISATION OF THE SHARIA OFFENSES RELATED TO MORALITY IN THE STATE SHARIA CRIMINAL ENACTMENT

The role of enforcing sharia criminal law is on the fourth edition of Kamus Dewan defines moral as teaching or principles of the good and bad of an act, attitude or behaviour that is based or measured from the good and bad of morality whereas morality is defined as politeness, behaviour or habit [7]. In order to analyze moral related offenses in the sharia criminal offense enactment, references have been made to classified offenses under the moral offenses since it is defined as politeness and decency. Clearly, these three terms have related definitions and refer to the same meaning. Based on the definition given to these terms, it can be summarised that moral-related offenses are seemed appropriate to be referred to as ethical offenses or indecencies.

This discussion focuses on ethical and moral offenses only. Offenses related to ethics can be found in the State Sharia Criminal Offense Enactments, generally which includes ethical offenses. Section 30 of the Selangor Sharia Criminal Enactment 1995 provided for an offense involving men behaving like women [8] and section 31 of the same enactment that is provided for indecent behaviour in public. These offenses are provided with sentencing involving a fine not more than a thousand ringgit and imprisonment no longer than six months or both.

For sexual offenses, the Selangor Sharia Criminal Enactment 1995 [9] had eight provisions related to the offense such as incest, prostitution, pimping, premarital sex, foreplay as

preparation to engage in premarital sex, same-sex sexual relations, unnatural sex, and close proximity. There are four other provisions that are related to the persuasion of married women to elope, restricting married partners to live as husband and wife, influencing husband or wife to carry out their duties and selling or giving children away to non-Muslims.

Since the power source granted by the Federal Constitution enables the State Assemblies to draw up sharia criminal offenses as allowed, hence many forms of sharia criminal laws are created. The non-standardisation approaches will cause difficulties for enforcement and prosecution. Based on the interviews conducted with the Chief Sharia Prosecutor for the Perak Sharia Prosecution Department stated [10]:

*Non-standardisation brings a huge impact especially to the prosecution and the court. So, the non-Muslim community will see that the Sharia laws are not comprehensive...*

Initial analysis showed that standardization can be seen in almost all of the state sharia criminal offense enactment and have the provisions related to unlawful sex, foreplay as preparation to engage in unlawful sex, pimping, close proximity, indecent behaviour, prostitution, selling or giving off to non-Muslim, pregnancy out of wedlock, men behaving like women, lecherous acts, sodomy, lesbianism or encouraging vices. However, the extent of enforcement to the provision requires further research.

This discussion looks at the standardization in the aspect of punishment for these offenses. The power limitations authorized by Act 355 to the Sharia Court that are able to sentence the guilty of imprisonment no longer than 3 years, a fine no more than five thousand ringgit and no more than six strokes of caning. By inspecting the existing provisions, for example in Perak, there are six provisions that have a high sentencing provision which is for offenses like incest, prostitution, pimping, unlawful sexual relations, sodomy and lesbianism [11]. These offenses are serious and must be sentenced to the maximum punishment. The honourable Ipoh Sharia High Court, Tuan Mohamad Esham Bin Abdul Samad stated [12]:

*A severe offense like pregnancy out of wedlock, unlawful sexual relations and so on are very heavy...Or if look at the High Court jurisdiction, there is a caning punishment and part of it is severe...*

Since there are various sharia criminal offense enactments in Malaysia that are drawn by the states, there is surely inconsistency. By placing the offense in its class will help law practitioners and the public to understand the legal provisions properly. By setting an offense according to the correct and appropriate category, it will be easier to be applied. However, in the enactment itself, there are several inconsistencies in the offense category classification. There are states that classify moral offenses in the correct category and section. A good example is the Negeri Sembilan Enactment that placed all moral-related offenses in the Offense related to Self-Virtue. In this section, there are 18 offenses that are included in this category such as seducing or eloping with a married or unmarried woman [13], pimping off wife and children [13], and also the offense of influencing

a married man or woman [13]. It is different in Melaka, Sabah, and Perlis that placed moral offenses together with other offenses.

Besides the problems stated above, non-standardisation and inconsistencies of the organisation of the sections can become a problem. Problems can arise when references are made to an offense. A standard and consistent sections organization will help law practitioners and also the Religious Enforcement Officers in referring to an offense in another state. Close proximity offense provided in the Kelantan Criminal Code Enactment 1985 is placed under section 9 whereas in Sabah, the same provision is placed under section 84. However, there are several countries that are more inclined to have similarities such as the offense for incest is set under section 20 in the Federal Territories Sharia Criminal Offense Act 1997 followed by Penang [14] which place the offense in the same organization.

There is a provision in states that are biased towards only one gender. In fact, Islam has never differentiated people based on their gender. If a *mukallaf*, be it a man or woman, commits a sin, he or she will be condemned. The offense of a man behaving as women is available in all of the states [14]. However, the provision for women who behave like men is still yet to be drawn up except for states like Perlis, Pahang, Terengganu, and Sabah. Therefore, another research must be conducted to solve the issues of women behaving like men that are worsening with the emergence of butch culture.

Besides, the issue in term usage that is inconsistent can cause confusion. The correct and standard term usage can ensure the intention of the lawmakers can be executed accordingly. However, the term usage must be done carefully since it can cause technical issues in the future. In Melaka, the term close proximity is not used and replace with unlawful live-in relationships [10] that has the same elements and requirements such as close proximity. Perak, through section 51 provision used the term cohabitation. Terms used for cross-dressing men is applied in the Selangor Sharia Criminal Offense Enactment 1995 but in Kedah, through section 7 [15], the term transvestites are used. This term has a wider scope compared to the term cross-dressing men.

## 5. SUGGESTIONS

This brief initial analysis results showed several suggestions that can assist in standardizing and strengthening the state sharia criminal law in Malaysia. Among them are:

### **Continuous efforts that are taken proactively by the Malaysia Islamic Development Department (JAKIM)**

The Malaysia Islamic Development Department (JAKIM) is the main agency for Islamic affairs management in the federal level, as well as the secretariat to the Malaysia Islamic Affairs National Council (MKI) and among of its responsibilities, are in the creation and standardization of the Islamic Law. JAKIM has an important role in establishing the posterity of Islamic law in Malaysia besides requiring proactive and continuous measures by considering the important measure in handling related issues. In order to carry out the functions, JAKIM is responsible for carrying out these duties:

(i) Coordinating and executing the Kings Council orders on Islamic affairs through (MKI);

- (ii) Coordinating and standardizing Islamic laws throughout Malaysia;
- (iii) Drawing up Islamic law and acts for Federal Territories;
- (iv) Coordinating the state Islamic law enforcement;
- (v) Coordinating the Islamic rulings and execution compliance.

So far, JAKIM is successful in the effort to coordinate the five other laws and obtained the permission of the Kings Council which are Muslim Families Law, evidence, mal-procedure, and criminal procedure as well as administrative law. However, the Kings Council that are in a meeting on 21<sup>st</sup> March 2001 agreed to execute the sharia criminal offense laws.

#### **Preparing the Standing Orders or SOP**

Since there are inconsistencies in the legal provision, the Director's Standing Order can be prepared or a specific 'Standard Operating Procedure' - SOP related to various provisions or there are possibilities in the enforcement aspect of it. For example, the Selangor Islamic Department (JAIS) can issue the JAIS Director Standing Order 2003 that explains the actions that can be taken by Religious Enforcers in the prevention effort toward the breaching of section 31 for indecent behaviour in public. This suggestion is supported by the Sarawak Chief Religious Enforcer in which he stated that with a clear SOP, enforcement processes can be done easily and becomes more organized and systematic [16].

#### **Organizing courses or inter-state collaboration**

A proactive approach such as the approach taken by the Melaka Islamic Department with the Melaka Sharia Judicial Department wherein every year, they will organize meetings among the religious agencies that involve the Prosecution, Enforcement and Judicial Departments [17]. In the meetings, all of the problems are discussed from the aspects of legal interpretation, SOP and so on. This discussion is good since the three religious agencies will discuss together in order to solve all issues and problems faced in the efforts to strengthen the provisions under the respective Sharia Criminal Enactment enforced in each state.

## **6. CONCLUSION**

Initial analysis has several provision related to moral offenses that are discussed at length which show the difference and inconsistencies in the moral-related provisions for Muslims. Although these inconsistencies are due to the state administration source that is provided in the Federal Constitution for sharia laws but the inconsistencies in several offenses can give rise to negative perceptions and can cause problems in the community. For example, Perak and Melaka have provision related to cohabitation while other states do not have such provisions. Inconsistencies surely have impacts on the execution of said provision in the related states since the community will question and compare the position of such laws in other states. Moreover, cases involving runaways or hiding pregnancies out of wedlock are not available in other states except in the sharia criminal enactment of the mentioned states. It can cause

misconceptions or misunderstanding among society members about an offense provision.

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