KHALWAT AS A MORAL CRIME IN MALAYSIA: ISSUES AND REALITIES

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Abstract: Khalwat is considered a moral crime in Malaysian Islamic law. It is one of the Shariah criminal offences under the category of offences relating to decency in statutory provisions in states enactments and Federal Territories act. There are a few important issues to be discussed in this paper. Other than on the concept of khalwat in Islamic criminal law and the meanings of khalwat in Malaysian Islamic law and the punishments, this paper will look at the issue at the extent of truth of “criminalizing’ khalwat in the context of Islamic criminal law. Other the conceptual issues in hukum shara’, there are other practical and real issues that arise in Malaysia such as the involvement of a non Muslim in khalwat cases, the punishment provided which are too lenient and the procedure how the Department of Religious Affairs enforce the laws. At the same time, a new perspective can be looked at to minimize the current issues problems and highlight the positive sides of a current law if any.

Keywords: Khalwat, Islamic law, Non-Muslim, Shariah Court.

Introduction

Islam emphasizes on the importance of akhlaq or morality as one of the pillars of iman of a Muslim. It is indeed a person who has no akhlaq is a person who has no iman. Akhlaq is a character that one needs to observe when he is dealing with other fellow human beings and with himself and it is one of the components of shariah. Other than akhlaq, the other components of shariah are aqidah and ibadah. If ibadah and aqidah are concerned about relationship with the Creator and His commands, akhlaq on the other hand is about relationship with other human beings. In Malaysia where we have

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diversity of religions and races and dual legal system to govern the people in the nation, sometimes the meaning and the concept of morality according to their religions are different from Islam. Hence, to categorise khalwat as a moral crime is wrong according to some religions other than Islam and let alone to extend the application of law to the non muslims in Malaysia. One of the objectives punishments in Islamic criminal law is to deter the offender not to commit the offence again and to give a lesson to the public about the consequence of the prohibited act. Deterrence is not only confined to the particular crime only but any acts that lead to the commission of that particular crime. Whilst, Khalwat is an offence in Malaysian Shariah criminal offences since this kind of act is a stepping stone to commit the serious crime, that is zina. There are some literature works on Khalwat such as by Dr Fauziah Mohd Noor in Jurnal Hukum where she emphasized on the issues of khalwat raid by the religious enforcement officers whether it is in line with etiquettes and maqasid shariah. There is also a book entitled the offence of khalwat and indecent acts and their rulings according to Islamic law ( in Bahasa) which was published in 2012. However this book did not discuss on the issue related to non-Muslims as one of the contributors in the crime.

The meaning of khalwat in Islamic criminal law and Malaysian Islamic Law

Khalwat which derived from the word Khala literally means alone or zero or sometimes it can also be defined as togetherness. Technicall speaking khalwat means proximity which denotes a man and a woman who are neither married to each other nor mahram to each other being alone together in a place in which there is no fear of intrusion by anyone else, so that an opportunity exists for sexual intimacy such as touching, kissing, embracing or even for sexual intercourse. With reference to a woman, a mahram is either her husband or any male relative with whom her marriage is permanently prohibited, such as her father, grandfather, son, brother, uncle or nephew.2

The Messenger of Allah p.b.u.h stated in some of the hadiths that a man is not permitted to meet a woman in seclusion except in the presence of her mahram.

Narrated by Ibn 'Abbas: The Prophet said, "No man should stay with a lady in seclusion except in the presence of a Dhu-Muhram."

2 Professor Dr. Anwarullah, The Criminal Law of Islam, A.S.Noordeen, p.115
A man stood up and said, "O Allah's Apostle! My wife has gone out intending to perform the Hajj and I have been enrolled (in the army) for such-and-such campaign." The Prophet said, "Return and perform the Hajj with your wife."\(^3\)

Narrated by Ibn ‘Abbas: The Prophet said “No one of you should meet a woman in privacy unless she is accompanied by a mahram (i.e. a relative within the prohibited degrees).\(^4\)

This prohibition is to avoid the man and woman from zina. Rasulullah (p.b.u.h) said, "Whoever believes in Allah and the Last Day must never be in proximity with a woman without there being a Mahram with her, for otherwise satan will be the third person (with them)."\(^5\) In reference to this hadith, khalwat can be defined literally as the seclusion of a man and woman, not being as husband and wife or mahram in any secluded place under circumstances which may give rise to suspicion that they are engaged in an immoral act.\(^6\)

In al-Quran, there is no specific verse which refers to khalwat as a crime. However, verse 32 of surah Al-Israa’ had mentioned about khalwat indirectly

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ولاتقربوا الزنای انت, كان فحشة وسآء سبيلا 
\]

Meaning: Nor come nigh to adultery: for it is a shameful (deed) and an evil, opening the road (to other evils).\(^7\)

It can be understood that once Allah prohibit an act, another act which leads to the prohibited act is also prohibited. Zina or adultery was prohibited in Islam and it is liable for hadd punishment which either flogging with 100 lashes or stoning to death depending on the who is the offender. Therefore, any act which can be considered as the muqaddimah of zina is also prohibited. However, this offence is not considered as a crime but rather a ma’siyah since the punishment was not fixed in the shara’. One must take note in one legal maxim saying that, every crime is a ma;siyah but not every ma’siyah is a crime. However, it is the duty of the government to attach a specific punishment to the

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\(^3\) Hadith reported by al-Bukhari and Muslim, Volume 7, Book 62, Hadith 160.

\(^4\) Riyadus Soliheen, Book 18, Hadith 119 (http://sunnah.com/riyadussaliheen/18)


ma’siyah so that the ma’siyah can qualify to be a crime. This type of punishment created by the government or those who are in charge of the affairs is known as ta’zir.

In Malaysia, the definition of khalwat is given based on the law provisions of the States and Federal Territories. The literal interpretation of the hadith of the Prophet Muhammad (p.b.u.h) was gazetted as the law provisions of the States. Among the Malays, khalwat is understood as seclusion between a man and woman who has attain puberty and they are not married to each other in the secluded area.

In Section 152 of the Administration of Islamic Law (Johor) Enactment 1978, khalwat was defined as:

(1) Any Muslim person who is found in retirement or in close proximity, or in suspicious circumstances in any place, with a person other than by reason of consanguinity, affinity or fosterage he is forbidden by Hukum Syarak to marry, shall be guilty of khalwat and on conviction shall be punishable with fine not exceeding one thousand ringgit or imprisonment not exceeding three months or both.

(2) Any male Muslim who cohabits as man and wife with any female whom he is forbidden by Hukum Syarak to marry or is found in retirement and in close proximity or in a suspicious manner, with such female person shall be guilty of an offence and on conviction shall be liable to the same punishment as laid down under subsection (1) of this section.

(3) The Court may order that any female found guilty of an offence under this section shall be committed to a welfare home provided by the government for such time not exceeding six months as the Court shall consider appropriate.

The same definition also can be seen in the law provision of other States in Malaysia. This offence is classified under offences

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relating to decency. Thus, the interpretation of *khalwat* in Islamic criminal law is based on the Quranic verse and hadith of the Prophet Muhammad (PBUH).

**Khalwat: Criminalized or crime per se?**

In Islamic criminal law, to constitute a crime there are three fundamental elements that need to be fulfilled. 1. Legal element. 2. Physical element (Actus reus) 3 Mental element (Mens Rea)

*Khalwat* is a not accrime per se in Islamic law but rather is a ma’siyah or sin since this is a prohibited act in Islam. This is stated in surah al-Isra’ verse 32:

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\text{وَلَاتَقْرِبُواَ الْإِنْطَىُهُ، كَانَ فَحْشَةً وَسَأَلَ سِبِيلًا}.
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Meaning: Nor come nigh to adultery: for it is a shameful (deed) and an evil, opening the road (to other evils).\(^{11}\)

In Islam, *zina* or adultery is prohibited therefore the act which can lead to the commencement of *zina* is also prohibited.\(^{12}\) The prohibition of *zina* was clearly stated in verse 2 of surah an-Nuur:

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\text{الْزَّانِيَاتُ وَالْزَّانِىُّانَ فَاجْلَدُواُ كُلُّ وَاحِدٍ مِّنْهُم مَّائَةٌ جَلَدَةً}
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Meaning: The woman and the man guilty of adultery or fornication - flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment.\(^{13}\)

In surah al furqan verse 68, Allah says to the effect

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\text{وَاللَّذِينَ لَا يَدْعُونَ مَعَ اللَّهِ إِلَةً مَّوْلِئٌ وَلَا يَقْتُلونُ النَّفْسَ الَّتِي حَرَّمَ اللَّهُ إِلَّا بِالْحَقِّ وَلَا يَزَّنُونَ}
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Those who invoke not, with Allah, any other God, nor slay such life as Allah has made sacred, except for just cause nor commit fornication.

The above verse has stated three major things which are condemned by Allah; to associate Allah with other gods, to kill one’s life without any valid cause and to commit adultery or fornication.

On the other hand, in the Malaysian context, khalwat is described as a ‘criminalized offence’ since the worldly punishment was created by man and not by Allah. This sin has become a Shariah criminal offence is in Malaysia it has been incorporated in Malaysian Islamic law. Malaysia practices the dual courts system where it consists of the Civil and the Shariah Court.14 For the Muslim, it is a crime as the law provisions on this offence are provided in the Shariah crime enactment of the states. However, for the non-Muslim it is only a moral issue as they only caught by Penal laws, which is not Shariah per se. There is no such thing as khalwat in the non-Muslim religions.15

Tam Chee Jack in his article entitled “The Shariah and the Social Contract”16 set up an illustration as follows:

“Andrew, an atheist gentleman, and Aini, a Muslim lady, are caught in the act of pre-marital copulation in Malaysia. Such acts are permissible under Secular law but prohibited under Shariah law.”

Thus, Shariah law and Common law, though different in the vocabulary of personal laws, they are both under the same legal framework in Malaysia.17

The author also suggest that the existence of different streams of personal laws made possible by religious and cultural liberties should thus remain pure and unmingled and unless convincing argument can be found to justify its use, cross-overs of different legal systems, howsoever creative, should be resisted.18

Therefore, khalwat only be a crime per se for the Muslim as they are governed by the Shariah law provision. It is administered

14 Article 121 of the Federal Constitution.
15 www.malaysiakini.com/news/80869
by the Shariah Court which is only applicable to those who have submitted to its jurisdiction who the persons are professing the religion of Islam. For the non-Muslim, khalwat is just a moral issue as there is no such offence in their religion.

An attempt was made in civil courts to challenge constitutionality of enforcement of morality in the case where a subsidiary legislation makes it an offence to behave indecently in public parks. In this case a couple was found kissing in the park of the Petronas Twin Towers and they were confronted by a security officer of the park and were issued summons for indecent behaviour. The couple brought the matter up to the apex court but the Federal Court ruled that creating the offence of indecent behaviour is within the power of the City Hall to ensure public order in public places and it is not contrary to the right to life provided under the Federal Constitution.

There is no specific law available in the religion or customs of the non-Muslim offender to deal with khalwat as they cannot be charged under the Malaysian Penal Code. What is wrong with khalwat if it involves the consenting parties? It may be religiously and morally disgusting, and yet completely acceptable in the legal sense.

The involvement of a non-Muslim in khalwat cases

It was reported in The Star Online on 10 December 2012 that four non-Muslims who were hauled up for khalwat in Kota Bharu, Kelantan. This report brought up an issue on the involvement of a non-Muslim in khalwat case in Malaysia.

The policy of issuing summonses on khalwat should not be implemented on non-Muslim. Such practice is not the norm in many Muslim countries and moral policing by state religious authorities has often led to rampant abuses of power.

Associate Professor Dr Shad Saleem Faruqi stated in his article gave an illustration of a couple, one of whom is a Muslim

20 Ooi Kean Thong & Anor v Public Prosecutor[2006] 3 MLJ 389 (FC)
21 Dr. Wan Azhar Wan Ahmad, Islamic Law and Non-Muslims, The Star, 20/05/2008.
22 www.malaysiakini.com/news/80869
and the other a non-Muslim, who commit *khalwat*, where only the Muslim is prosecuted. The learned Professor opined that the non-Muslim is, rightly, not subjected to the Islamic rule. By professing a particular religion in Malaysia, one has impliedly entered into a contract to which he or she is accorded the obligation and protection of the law of the particular religion. When a person professed Islam as his religion, the Shariah becomes the law of the faith that a Muslim is obliged to follow. To the non-Muslim, he is not bound to follow the Shariah nor will he be under its protection as he is not submitted to its jurisdiction. He is only agreed to be protected and bound by Secular law.

The 9th Schedule of the Federal Constitution consolidated by numerous other Acts of Parliament and state enactments that in general Islamic laws are not applicable to non-Muslims. Therefore, how about charging and punishing non-Muslims for *khalwat* in Malaysia? The answer for this question is the Shariah Court has no jurisdiction to try such a case. The non-Muslims are not professing the religion of Islam and they are not subject to the jurisdiction of the Shariah Court. There are several cases which can illustrate the jurisdiction of the Shariah court in Malaysia.

The decision in *Mohd Habibullah Mahmood v Faridah Dato’ Talib* stated:

“Indeed that Muslims in this country are governed by Islamic personal and family laws have been in existence with the coming of Islam to this country in the 15th Century. Such laws have been administered not only by the Shariah courts in the administration of such Islamic laws. In other words, Article 121 (1A) is a provision to prevent conflicting jurisdictions between the Civil courts and the Shariah courts.”

In *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor.*, it was held that as the matter fell within the jurisdiction of the Shariah Courts, the High Court, by

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26 See Ong Cheng Neo v Yap Kwan Seng (1897) SSLR Supp 1
27 Dr. Wan Azhar Wan Ahmad, Islamic Law and Non-Muslims, *The Star*, 20/05/2008.
28 (1992) 2 MLJ 793.
virtue of Article 121 (1A) of the Constitution, did not have jurisdiction to hear the appellant’s case.

Recently, in *Syarie Prosecutor v Muhaizad bin Ahmad Mustapha (Ako Mustapha)*\(^{30}\), the accused was found alone with a woman, Anang Sagunting who is a non-Muslim, in Block B-2-9 Oalief Park Condominium, Hulu Klang and thereby committed an offence of *khalwat*. Yang Arif Wan Mahyuddin, the Shariah Subordinate Court Judge, stated that an act of *khalwat* with a non-mahram, even if it is with a non-Muslim, is prohibited by Hukum Sharak. The act of the accused that had been caught for *khalwat* with a non-Muslim would be followed by other teenagers if the court did not sentence him appropriately. The sentence was imposed to the accused who professed Islam as his religion. No punishment was imposed on his partner who is a non-Muslim.

The decision of the court follows the fundamental teachings of Islam where the non-Muslims are guaranteed freedom to practice their religions and customs without any restriction as long as the non-Muslims reciprocate by not being insensitive to the Muslim community.

Although Muslims may not be comfortable seeing non-Muslims committing *khalwat* with Muslims, the authorities who advocated this new initiative must be mindful of the Federal Constitution.

In 2008, the Shariah Lawyers Association of Malaysia (PGSM) threw its support behind a suggestion to charge non-Muslims for *khalwat* in the civil court, arguing this would be the moral thing to do. The proposal by the Islamic Institute of Understanding Malaysia (IKIM) and Shariah Judiciary Department was submitted to the Attorney General. The issue of applying the Shariah law on the non-Muslims is not relevant as the non-Muslims will be charged and sentenced in the Civil Court.

This proposal has raised the ire of non-Muslims in Malaysia. The Sister in Islam objected the current practice of moral policing by the state. They argued that such practice is not the norm in many Muslim countries and it against the Quranic injunctions. John Liu, the Coordinator of Suara Rakyat Malaysia (SUARAM), stated that in Malaysia, where ethnicity and religion are intertwined, and the proposal of imposing laws on non-Muslims based on Shariah principles could cause ethnic relations to further deteriorate. He also of the opinion, in the recent years, the issues

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\(^{30}\) [2010] 4 SHLR 179.
relating to religion has put ethno-religious relations and nation-building in Malaysia to a serious test. Forcing Islamic law upon non-Muslims will definitely not help resolve, and could even further worsen, the situation.

Thus, the Islamic criminal law is inapplicable for the non-Muslim in Malaysia as they are not subjected to the jurisdiction of the Shariah Court. The state legislative organ has no power to create offences committed by non-Muslims. The Federal Constitution provides a framework for Shariah criminal justice to be implemented by the Shariah Courts.31

The punishments for khalwat offences are too lenient

Basically, the Islamic law in Malaysia is not codified. Malaysia is a federation and it consists of 13 states with different legislative and executive organs.32 The punishment was prescribed by the states in the State Enactments. These punishments must be within the jurisdiction of the Shariah Court.33 For the judicial organ, Shariah courts are put under state’s powers and civil courts are under federation’s powers.34 The Shariah Court only can exercised its jurisdiction on any person professing religion of Islam in respect of any offences with imprisonment for a term not exceeding three years or with fine not exceeding five thousands ringgit or with whipping not exceeding six strokes or with any combination thereof.35 Even there is specific punishment stated in the Qur’an and hadith for hadd and qisas offences, the Shariah Court cannot impose a sentence beyond its jurisdiction. Most of the punishments for hadd and qisas offences are prescribed under the Penal Code and it is enforceable to everyone in Malaysia.

The Islamic criminal law in Malaysia deals with the takzir punishment only.36 Briefly, takzir literally means to prevent, to honour, to correct, to moderate, to avoid or to assist. In terms of Islamic criminal law, takzir signifies punishment for a crime for which punishment has not been fixed by the al-Qur’an and the

32 Articles 44, 80 and Eight Schedule under the Federal Constitution.
33 Article 121 (1A) of the Federal Constitution of Malaysia and Section 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965.
34 Article 121 and Item 1 of the State List under the Federal Constitution.
35 Section 2 of Syariah Courts (Criminal Jurisdiction) Act 1965
Sunnah of the Prophet Muhammad (p.b.u.h) and has been left to the
discretion of the Ruler or the judge to fix it in accordance with the
prevailing circumstances so as to reform the culprit and restrain him
from committing the crime. Generally, the law provision of the
States provides the punishment for the specific offences for the
Muslim in Malaysia and these offences are not laid down in another
written law of Malaysia such as Penal Code.

The State Enactments provide both the imprisonment and
fine as the punishment for khalwat offences. *Section 29 of Shariah
Criminal Offences (Selangor) Enactment 1995, Section 31 of
Shariah Criminal Offences (Takzir) (Terengganu) Enactment 2001,
Section 53 of Shariah Criminal Offences (Malacca) Enactment
1991, Section 54 of Crimes (Shariah) (Perak) Enactment 1992,
Section 27 of Shariah Criminal Offences (Federal Territories) Act
1997, Section 27 of Shariah Criminal Offences (State of Penang)
Enactment 1996 and Section 24 of Shariah Criminal Offences
(Sarawak) Ordinance 2001* stated that the person who is guilty of
an offence of khalwat shall be liable on conviction to a fine not
exceeding RM 3,000.00 or to imprisonment for a term not
exceeding two years or both.

*Section 84 (1) and (2) of Shariah Criminal Offences
(Sabah) Enactment 1995 and Section 9 of Shariah Criminal Code
(Kelantan) 1985* stated clearly that the punishment for those who
liable for khalwat is a fine not exceeding RM 2,000.00 or to
imprisonment for a term not exceeding one year or to both. *Section
152 of The Administration of Islamic Law (Johor) Enactment 1978*
stated that any Muslim person who is liable for khalwat shall be
punishable with fine not exceeding RM 1,000.00 or imprisonment
not exceeding three months or both.

However, there is also an addition to the punishment in the
Shariah Criminal Offences for Sabah, Perlis and Kedah Enactment
where the Court shall order any female person found guilty for
khalwat be committed to a welfare home for a period of three years.

*Section 145 of The Administration of the Religion of Islam
and the Malay Custom of Pahang Enactment 1982* provide different
amount of fine and length of the imprisonment for the male and
female offender. The male offender is liable to a fine not exceeding
RM 1,000.00 or to imprisonment for a term not exceeding six
months or both while the female offender is liable to a fine not
exceeding RM 2,000.00 or to imprisonment for a term not
exceeding one year or to both.

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37 Professor Dr. Anwarullah, *The Criminal Law of Islam*, A.S.Noordeen, p.208
From the analysis above, it can be seen that almost every state has the same provision for the khalwat offences. The main features that should be proven in order to convict a person for khalwat are as follows:

a) A man or woman who is not husband and wife or his/her mahram
b) A man or woman who is found together with one or more man or woman, not being his/her mahram
c) In any secluded place or in a house or room
d) Under circumstances which may give rise to suspicion that they are engaged in an immoral act

The conviction can be done if all of the features above are fulfilled. The sentence should be imposed to the offender as prescribed in the State Enactments.

In practice, the Shariah Judge has the tendency to punish the offender with fine only. It can be clearly seen in the case where the offender pleaded guilty or he was the first offender. Yang Arif Zulfahmi Bunaim, the Shariah Judge in Johor Bahru was in the opinion that the first offender was repented and he will not repeating the same mistake again. Therefore, he only sentenced them with fine. The judge will impose the offender with imprisonment if he committed the crime for the second time. On 14 November 2012, the Health Ministry Director General Datuk Seri Dr Hasan Abdul Rahman was caught for khalwat with Wan Syarifah Nooraazmanita Wan Hassan at Pullman Putrajaya Lakeside at about 2.18 am. Both pleaded guilty to the charge before Syarie judge Mohd Amran Mat Zain and paid the fine.

The imprisonment usually imposed by the Shariah Lower Court to the offender and it can be appealed to the Shariah High Court or Shariah Appeal Court. In one of the khalwat case in Penang between Pendakwa Syarie Pulau Pinang v Muna Liyana Roslin, the OKT was liable and in her mitigation for appeal, the OKT applied for lesser sentence with the reasons that she was single, having low income and worked at the factory only. Azmi Ibrahim, the Shariah Judge, decided to sentence her with 14 days of imprisonment and RM1500 of fine. Briefly he stated that in fact of her low income, she can still enjoy at the hotel and it is curious to the court. The court was of the opinion that her act had tarnished

38 Dr Siti Zubaidah Ismail, Hukuman Alternatif Dari Perspektif Undang-Undang Syariah, Shariah Law Reports Articles (2011), Volume 4, xxv.
39 Ibid.
40 07500-143-0005-2008, Mahkamah Rendah Syariah Pulau Pinang.
the image of Islam and the Muslim, and the court should impose a heavy punishment to her in order to avoid others to repeat the same offence. It was a serious offence and the court should impose the imprisonment as the sentence.

Later, in *Syarie Prosecutor v Sukree bin Masayu*[^41], the accused was charged for committing *khalwat* (close proximity with another at a secluded place) with two women who were neither his wives nor his *muhrim*, in which the act of the accused had raised a reasonable suspicion that he was involved in the commission of an immoral act. The said offence was committed on 13th May 2004 at about 3.15 am at a rented house. The accused was convicted as charged and he was sentenced with RM 2,900.00 and 30 days imprisonment. The Syarie judge in this case stated that the aim of sentencing the accused was to ensure that the sentence imposed would raise awareness, be a lesson and would cause the accuse to repent as well as serve a lesson to the general public so as not to repeat the same offence. Therefore, the heavier sentence should be imposed on the accused for this type of offence.

The Syarie judge in *Syarie Prosecutor v Muhaizad bin Ahmad Mustapha (Ako Mustapha)*[^42] also share the same opinion with the judge in *Syarie Prosecutor v Sukree bin Masayu*[^43]. The accused was an actor who was well known in this country and he will be an idol to the youngsters. In this case, the accused was found alone with a woman, Anang Sagunting, who was neither his wife nor his mahram, in Block B-2-9 Oalief Park Condominium, Hulu Klang and thereby committed an offence of khalwat. The accused convicted and sentenced to a maximum fine, RM 3,000.00 and three months imprisonment.

The Shariah judge also imposed alternatives sentence in their judgment. Nowadays, the most popular alternative punishment is social service. Based on the Social Welfare Department website[^44], this type of punishment is designed for the young offender age 18 to 21 years old and it was ordered by the court. The Social Welfare Department will determine the suitable institutions for them to do the social service. The objective of this punishment is to prevent the young offender from repeating the same offence in the future. This punishment is in line with the amendment of

[^41]: [2008] 3 SHLR 172
[^42]: [2010] 4 SHLR 179
[^43]: [2008] 3 SHLR 172
Section 293 of the Criminal Procedure Code which was passed by the Parliament.

In the case of Pendakwa Syarie Selangor v Che Mohd Redzuan bin Che Ishak and Munirah binti Ibrahim, both of them were engaged and found liable for khalwat at the rental house belongs to the man at 11.00pm. The Shariah judge ordered them for 15 hours social service at the mosque. In 2009, the court ordered 2 days social service at the mosque to the khalwat offenders in the case of Pendakwa Syarie Selangor v Ezral Sherwany bin Ahmad and Mariyah binti Mat Daud. There is no appeal for the sentence in all of the cases above.

Furthermore, some of the states provide that the Court may order any woman found guilty of an offence of khalwat be committed to a welfare home. It is also classified as one of the alternative punishment provided by the Shariah Criminal Offences Enactment of the states. However, the Shariah court seldomly ordered the accused person to go to a welfare home. Dr Siti Zubaidah Ismail in her article mentioned that since year 2000 to March 2008, only 15 persons (cases) were ordered to go to the welfare home in Selangor and most of them were engaged with the offences relating to decency.

From the discussion on the issue of the punishments provided for khalwat offences, it can be seen that the Shariah judges are lenient in sentencing the accused. The imprisonment usually imposed by the Shariah Lower Court to the offender and it can be appealed to the Shariah High Court or Shariah Appeal Court. On appeal, the punishment of imprisonment was set aside and the higher fine will be imposed on the accused. It must be noted that the higher fine punishment for khalwat is only RM 5,000.00. The

48 Dr Siti Zubaidah Ismail, Hukuman Alternatif Dari Perspektif Undang-Undang Syariah, Shariah Law Reports Articles (2011), Volume 4, xxv.
amount for this fine is ‘affordable’ to be paid by the accused nowadays. Therefore, the punishment imposed by the court has failed to achieve its aim where it should be a lesson to others for not repeating the same offence.\textsuperscript{50}

The procedure of how the Department of Religious Affairs took this matter in their hands

For the judicial organ, Shariah courts are put under state's powers and civil courts are under federation's powers.\textsuperscript{51} The administration of Islamic law enactments establishes religious enforcement bodies to investigate offences under Shariah offences enactments and other laws.\textsuperscript{52} Compared with the duties of the police force, the religious enforcement officers’ duties are very narrow.\textsuperscript{53} It is limited to the Shariah offences only.

Jasri Jamal in his article\textsuperscript{54} stated that in order to enforce the law, there are many challenges faced by the religious enforcement officers especially in the support system such as the logistic, lack of skilled officers, no firearms supply, handcuffs, lock, lack of training on how to start an investigation and taking of samples or exhibits at the scene. There are few overenthusiastic religious enforcement officers doing their honest job but who need caution and guidance to observe the correct and proper procedures.\textsuperscript{55}

In Malaysia, one of the methods which are taken by the religious enforcement officers to prevent zina offences is by conducting a raid for khalwat cases.\textsuperscript{56} However, based on the recent development, the authorities stated that a group of religious officers performing ‘khalwat snoop operation’ is seen as performing religious acts even though it contradicts the teachings of Islam. The

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  \item \textsuperscript{50} Pendakwa Syarie v Mohd Zulkifli bin Adam & Anor [2012] 2 ShLR 113, para 17.
  \item \textsuperscript{51} Article 121 and item 1 of the State List under the Federal Constitution.
  \item \textsuperscript{52} Section 58 (4) of the Administration of Islamic Law (Federal Territories) Act 1993
  \item \textsuperscript{53} Farid Sufian Shuaib, Administration of Shariah Criminal Justice under the Malaysian Constitutional Framework: Issues and Suggestions, [2011] 6 MLJ 1.
  \item \textsuperscript{54} Assoc. Professor Dr Jasri Jamal, Pertambahan Bidang Kuasa Jenayah Syariah: Impaknya Terhadap Institusi Kehakiman Syariah di Malaysia, [2012] 1 ShLR xx
  \item \textsuperscript{55} Mohd Darbi bin Hashim, Opinion Column of Morality and Individualism in Malaysia, Akademika 67 (Januari), 2006, p.103-108.
\end{itemize}
procedures for ‘khalwat snoop operation’ should be revised. In the meantime, the task performed by the police or members of rukun tetangga (community center) to prevent crimes that ruin the community is deemed as ordinary tasks or social duties. They do not see it as executing the duty commanded by Allah and His Messenger.

There were countless khalwat arrests made by the religious enforcement officers, involving local artistes and public figures. The opinion of Dr Mohd Asri bin Zainul Abidin which was published in The New Straits Times on 15th December 2006 entitled “Stop Snooping Around for Khalwat Couples” became a controversy and it was criticized by many scholars. He stated that the state religious authorities must stop spying, snooping and the practice of looking for couples to be charged with khalwat (close proximity). Dr Mohd Asri explained that prevention against sins or evil deeds must only be confined to those that would affect society and the environment, or when it would encourage others to commit them publicly. He said the recent case of a khalwat raid mistakenly carried out against an elderly American couple in Langkawi was an example of an operation that did not follow Islamic principles. He also questioned the practice of bringing along unauthorised people for khalwat raids such as the Press. He hoped religious enforcement authorities would prioritize their job, such as addressing the menace of Mat Rempit, which is giving a bad name to Islam as most of them are Muslims, instead of snooping around for couples in private residences.

As the response to Dr Mohd Asri’s article, al-Ustaz Mohd Khairuddin Aman Razali at-Takiri give his opinion on that issue. The act of preventing evil and promoting good is an obligation for all Muslims. It is in line with the Quranic verse 104 in surah Ali-'Imran:

Let there arise out of you a band of people inviting to all that is good, enjoining what is right, and forbidding what is wrong: They are the ones to attain felicity.

Based on the same verse, Mohamad Syafiqe bin Abdul Rahim said that the concept of ‘amr ma’ruf nahi munkar’ was clarified in

57 Dr Mohd Asri bin Zainul Abidin, Tajassus Dalam Operasi Pencegahan Munkar, Majalah ‘I’, Bil. 54/April 2007, p.67
58 Al-Ustaz Mohd Khairuddin Aman Razali at-Takiri is the President of Nadwah Ilmuwan Islam (NAIM).
Islam. The main thing to be concerned is the procedure to implement the law. The procedures are clearly stated in the law provision of the states. It includes the power to investigate, arrest and search.

Therefore, the religious enforcement officer should not try to spy on others who commit the wrongful act. In al-Ahkam as-Sultaniyyah\(^{61}\), if there are overwhelming indications and signs that someone is committing such actions in secret, then they are to be treated in one of two ways:

i) In the case where a violation of a prohibition might occur before it can be found out, for example, when a trustworthy man informs the muhtasib that a man has gone to be alone with a woman to fornicate, or with a man in order to kill him, then in such circumstances he may spy on him and proceed to investigate and examine, lest some forbidden or prohibited act should occur which might have been avoided: likewise, if people voluntarily (make hisbah), they may proceed to investigate and examine the matter and denounce it, as happened in the case of Mughirah ibn Shu‘bah: it is narrated that a woman of the Banu Hilal, known as Umm Jamil bint Mahjam ibn al-Afqam, who was married to a Thaqafi man called Jajjaj ibn ‘Ubaid, used to visit him regularly. News of this reached Abu Bakrah ibn Masruh, Shibli ibn Ma‘bad, Nafi’ ibn al-Harith and Ziyad ibn ‘Ubaid who then lay in hiding – and when the woman went in to him, they rushed in upon them: their bearing witness in front of ‘Umar did not reprove them for having rushed in upon them – even though he gave them the hadd-punishment for slander for shortcomings in their evidence;

ii) This concerns those acts which are not subject to this hadd and which fall short of this degree of gravity – in such cases it is not permitted to spy on the persons in question, nor to try to expose any attempt to conceal.

Thus, these guidelines may be applicable in the issue of spy or snoop for khalwat offences in the private houses or hotels. The religious enforcement officer can start the investigation upon the information given by the public.\(^{62}\) Besides that, the religious enforcement officer may conduct a raid during certain celebrations.

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\(^{60}\) Mohamad Syafiqe bin Abdul Rahim, Department of Syariah & Law Academy of Islamic Studies, University of Malaya.

\(^{61}\) Abu’l – Hasan ‘Ali ibn Muhammad ibn Habib al-Basri al-Baghdadi al-Mawardi, Al-Ahkam as-Sultaniyyah, Translated by Dr Asadullah Yate, Ta Ha Publishers, London, United Kingdom.

\(^{62}\) Section 55 of Syariah Criminal Offences (Federal Territories) Act 1997.
in Malaysia depending on the public information. The religious enforcement officer is rarely making arrest and operating without the complaint from the public in the cases involving illicit sexual intercourse in order to avoid the bad perspective from them.

Dr Fauziah Mohd Noor in her article said the raid in khalwat offences is permissible by the principle of Islamic jurisprudence such as Maqasid as-Syari’ah, maslahah, sadd al-dhara’i and istihsan. However, Islam prohibits the Muslim to conduct raid for khalwat offences based on the vague information or defamation in order to embarrass the couples.

Furthermore, the religious enforcement officers should be given a special training in the procedure to implement the law on Shariah offences. The khalwat raid at the hotel should be carried out in order to avoid the greater evil such as zina. Upon the complaint from the public, individual or authorities, the khalwat raid at the private house can be conducted. Male and female officers must present during the raid in order to conduct the inspection in the Islamic manners. Other than that, the arrest of the couple must be in secrecy and not to be published in the media.

**A new perspective on khalwat**

Professionalism in the workplace is important to ensure good performance by all. It was reported in Berita Harian (2010) that 10% of women in this country are suffering from sexual harassment in the form of threats, another 10% experienced the misconduct in the form of verbal harassment such as hand signal, lips licking, and blowing kisses, winking and ogling. Sexual harassment does not recognize the categories of employees. In the case of Jennico Associates Sdn Bhd v. Lilian Therera De Costa, the victim was a Director of Operations in a hotel, in Sitt Tatt Berhad v. Flora Gnanapragasam, a human resources executive was subject to sexual harassment, in Porcelli v. Strathclyde Regional Council, the victim was a laboratory technician; in Vishakha v. State of

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64 Ibid.
Rajasthan, social workers were harassed and in the case of Varitronix (M) Sdn Bhd v. Thandavanaiker P. Raman, the victim was a male store hand who was harassed by his security assistant. In the case of Fuchs Petrolube (Malaysia) Sdn Bhd v. Chan Puck Lin @ Chan Pak Nean, the Technical Manager of the company was dismissed for having grossly misconduct himself by making harassing phone calls to a female employee employed by the company’s customers. Even women sport athletes may be subject to sexual harassment as illustrated in the case of C Ramanathan v. Dato Hj Khalid Yunus.

For these reasons, the issue of sexual harassment in the workplace has become a matter of national concern. The Malaysian Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace was introduced by the Ministry of Human Resources on 17 August 1999. The aim of the Code is to ensure that sexual harassment in the workplace does not occur and, if it does occur, adequate procedures are available to deal with the problem and to prevent its recurrence.\(^\text{67}\)

The code is in line with the Islamic principle and value as it is directing and encouraging people towards good (ma’ruf) and away from evil (munkar). This principle is regarded as a moral and ethical safety-net for the Muslim community and the human society at large.\(^\text{68}\)

Islam prohibits fornication and adultery (zina) as Allah says, ‘Nor come nigh to adultery: for it is a shameful (deed) and an evil, opening the road (to other evils).’\(^\text{69}\) Khalwat is closed to zina and it is hard to avoid khalwat at the workplace. It is based on a hadith of the Prophet Muhammad (p.b.u.h):

Narrated by Ibn ‘Abbas: The Prophet said “No one of you should meet a woman in privacy unless she is accompanied by a mahram (i.e. a relative within the prohibited degrees).”\(^\text{70}\)

However, it is permissible for a man and a woman to meet in the open places. In one hadith, the Prophet Muhammad (p.b.u.h) met the Ansari woman privately but not secluded from the people. The voice cannot be heard by others but they still can be seen by the

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\(^\text{67}\) See para 1 of the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace 1999.

\(^\text{68}\) Muzaffar Syah Mallow, The Islamic Approach towards the Issue of Sexual Harassment in the Workplace [2011] 1 ShLR lxvii.


\(^\text{70}\) Riyadus Soliheen, Book 18, Hadith 119 (http://sunnah.com/riyadussaliheen/18)
people around them.\textsuperscript{71} This kind of khalwat is permitted in Islam. In the working environment where there is man and woman in the same office, meeting between them is permissible if they follow the guideline mentioned in the hadith above.

Since the sexual harassment in the workplace issue and deserves sensitive and respectful treatment, the proposed law on sexual harassment must provide the victims of sexual harassment in the workplace with easy and meaningful access to seek legal redress by the creation of a special tribunal, procedures and effective remedies.\textsuperscript{72}

The positive sides of a current law

The current law was codified based on the Qur’an and hadith of the Prophet Muhammad (p.b.u.h). The Islamic criminal law in Malaysia deals with the takzir punishment only.\textsuperscript{73} The law provision of the States provides the punishment for the specific offences for the Muslim in Malaysia and these offences are not laid down in another written law of Malaysia such as Penal Code.

It is in line with the protection of maqasid as-Shariah which promotes the Muslim to protect the dignity of oneself and the lineage. The judge in Pendakwa Syarie v Mohd Zulkifli bin Adam & Anor\textsuperscript{74} stated that these kinds of cases will lead to social problem nowadays. The social illness such as baby dumping and birth out of wedlock will ruin the family system in the society and if it is not prevented with the appropriate punishment, it will not be a lesson to the public at large.

However, the current law is only applicable to the Muslim. The non-Muslim cannot be charged for khalwat as it is not an offence in their religion. This offence is a criminal per se according to the Shariah Criminal Offences enactment by the states. It is only a moral issue for the non-Muslim as the Penal Code has no provision on khalwat as an offence. The issue of jurisdiction of the court is settled after the amendment of Article 121 of the Federal

\textsuperscript{71} Hadith reported by al-Bukhari and Muslim, Volume 7, Book 62, Hadith 161.
\textsuperscript{72} Muzaffar Syah Mallow, The Islamic Approach towards the Issue of Sexual Harassment in the Workplace [2011] 1 ShLR lxvii.
\textsuperscript{74} [2012] 2 ShLR 113, p.121
which laid down the jurisdiction of the High Court for Civil law and the Shariah Court for Islamic law.

Furthermore, the power of Shariah Court should be revised especially the punishment involving the Islamic criminal offences. The Shariah Court only can exercised its jurisdiction on any person professing religion of Islam in respect of any offences with imprisonment for a term not exceeding three years or with fine not exceeding five thousands ringgit or with whipping not exceeding six strokes or with any combination thereof.\(^{75}\) The value of the monetary punishment in 1984 has a different value in 2011.\(^ {76}\) The current criminal Shariah offences not deal with the offence to the human, body or property but it is an offence to the religion, a clear collision to the order of Allah and it is categorized as *maksiat*.\(^ {77}\) Dr Siti Zubaidah Ismail stated that the jurisdiction of the court is not the main issue but how far the judges of the Shariah court fully utilized the jurisdiction of 3-5-6 which was granted to them.\(^ {78}\)

### Table: Statistic on Khalwat Cases In Perak

<table>
<thead>
<tr>
<th>Year</th>
<th>Registered cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>170</td>
</tr>
<tr>
<td>2012</td>
<td>467</td>
</tr>
<tr>
<td>2013</td>
<td>541</td>
</tr>
<tr>
<td>Total</td>
<td>1178</td>
</tr>
</tbody>
</table>

Source: Department of Religious Affairs, Perak

**CONCLUSION**

The increasing numbers of *khalwat* offences show that the punishment imposed by the Shariah judge failed to educate the offenders and the society. The jurisdiction of the court is not fully utilized by the judges. The religious enforcement officers are not well trained in the Shariah criminal procedure, investigation, non-adequate of equipments and other technical matters has resulted to the controversies and negative issues raised by the public. Besides that, the parallel legal systems may be well sustained for the goods

\(^{75}\) Section 2 of Syariah Courts (Criminal Jurisdiction) Act 1965


\(^{77}\) Dr Siti Zubaidah Ismail, Tinjauan Semula terhadap Undang-undang Jenayah Syariah di Malaysia [2009] 2 ShLR xivii.

\(^{78}\) Ibid.
of the Muslim and the non-Muslim. Therefore, the Shariah judge should use the power given to them in order to prevent khalwat offences in Malaysia. A special training should be carried on the religious enforcement bodies by the states. It is suggested that a uniform department such as Jabatan Kehakiman Shariah Malaysia (JKSM) is established to standardize the Shariah criminal procedures in the Federation level.

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