

## THE PROSECUTION OF ISLAMIC CRIMINAL OFFENCES RELATED TO LGBT IN ONLINE PLATFORMS: AN ANALYSIS OF SYARIAH CRIMINAL OFFENCES (SELANGOR) ENACTMENT 1995

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### ABSTRACT

*Over the recent years, the promotion of Lesbian, Gay, Bisexual and Transgender (LGBT) immoral behaviour has been done publicly on online platforms such as Instagram, Facebook, Twitter, TikTok and so on. Apart from that, several dating apps have been widely used for these purposes. Hence, the objective of this paper is to review and analyse the provisions of the Syariah Criminal Offences (Selangor) Enactment 1995 related to LGBT offences and to propose improvements to the existing provisions to prosecute LGBT offences committed on online platforms. This qualitative study uses a document analysis approach to collect data. The findings found that there are existing provisions that can be used to prosecute LGBT offences committed online. However, these existing provisions have several issues in terms of substantive, evidence and procedures that require further improvements. To overcome these issues, this paper suggests several improvements such as enacting specific provisions for Islamic criminal offences committed online, amending the Syariah Courts Act 1965 or known as Act 355 to increase the limit of punishment and establishing a technology unit and appointment of skilled officers in the Department of Prosecution.*

**Keywords:** LGBT-Islamic criminal offences-digital forensic

## 1. INTRODUCTION

The advancement and development of technology have brought many benefits in all aspects of human life. However, in line with this progress, there has been a significant increase in cybercrime worldwide. According to the Malaysian Communications and Multimedia Commission (MCMC), the number of new media content complaint cases increased in 2020 by 99.5 per cent to 20,805 complaints out of 10,426 complaints (2019). This is also the case for Islamic criminal offences which include insulting or bringing into contempt the religion of Islam, teaching without *tauliah*, and propagating opinions contrary to fatwa. All these offences have become more prevalent on online platforms. Apart from these offences, what is more worrying is the propagation of immoral behaviour by the LGBT communities and their supporters on online platforms.

Within the context of Malaysia, the existence of the LGBT community has become prevalent in the early 1980s by using the titles *pondan*, *mak nyah* and *tomboi*. During this stage, this community is an isolated community. However, starting in the 1990s, the community began to use the term LGBT to refer to their group (Mahfudzah, 2015). Currently, the community has begun to move in a structured and planned manner to claim their rights including expressing dissatisfaction with the provisions of LGBT-related Syariah law (Azman et al., 2020). This can be seen through the demand made by these people in the 'Tuntutan Comango'. Among the demands is to recognize LGBT sexual orientation as a universal human right. They recommended for section 377A of the Penal Code on sodomy crimes be amended and suggested repealing the enactment of syariah criminal offences (Mohd Izzat et al., 2018).

In addressing the issue of LGBT crime in Malaysia, there are various initiatives undertaken by the state religious authorities, the Malaysian Department of Islamic Development (JAKIM) and non-governmental organizations. Among the initiatives carried out were the construction of modules such as the Syarie Counselling Module and Manual and the HIV AIDS Manual. Apart from that, various rehabilitation programs were also carried out through *usrah*, *mukhayyam* and religious classes (Mohamad Afandi & Mohd Sabree, 2019). In addition, the Selangor Islamic Religious Department (JAIS) has established the Al-Riqab Rehabilitation Division to rehabilitate those involved in LGBT. With the establishment of this division, LGBT people benefit from zakat through rehabilitation programs, financial assistance and business and medical capital to enable them to live their lives (Siti Solehah et al., 2020). Although various initiatives such as preaching, education and rehabilitation treatment have been undertaken, these approaches are not enough to address LGBT-related social

issues holistically. Therefore, legal enforcement also needs to be empowered in addressing this issue.

Initially, punishment is one of the preventive measures taken to deter crime. According to rational choice theory, punishment is one of the best means to deter individuals from committing crimes. From the Syariah perspective, punishment whether it is stipulated directly from the text (*nusus*) or prescribed by the rulers based on the concept of *maslahah*, is intended to protect the five higher objectives of Islamic law; the preservation of religion, the preservation of life, the preservation of lineage, the preservation of property, and the preservation of intellect. In the context of LGBT offences, all states and federal in Malaysia enacted provisions related to LGBT offences to deter this crime. For instance, most states have provisions related to *liwat*, *musahaqah*, and male persons posing as a woman.

However, there is a question on the effectiveness of the law. Are the provisions related to LGBT offences in Syariah Criminal Offences (Selangor) Enactment 1995 and other states effective enough to curb the crime? To date, there is no specific data that reports the decline in cases of LGBT offences. However, it is argued that these provisions are significant and become a threat to the LGBT community and human rights organizations which are against these laws in Malaysia. This is indicated by the demand made in '*Tuntutan Comango*' by the LGBT community and recently the case of Nik Elin Zurina vs Kelantan Government who filed a constitutional challenge questioning the competency of the state's legislative assembly to create and pass 20 offences under a syariah enactment. Among the 20 offences challenged is the offence of *liwat*.

With regards to LGBT syariah criminal offences committed online, through an examination of the enactment of syariah criminal offences of the states, there are no specific provisions. However, this does not mean that these offences cannot be prosecuted. According to Atras (2022), there are still existing provisions that can be used to prosecute these offences. However, the existing provisions are still lacking and require substantial improvements (Muhammad Hariz & Ahmad Hidayat, 2021; Mohammad Izzat Amsyar et al., 2018). Based on the problems mentioned above, the objective of this article is to review and analyse the provisions of the Syariah Criminal Offences (Selangor) Enactment 1995 related to LGBT offences and propose improvements to prosecute LGBT offences committed on online platforms.

## 2. METHODOLOGY

This study uses a qualitative approach with a content analysis design.

The primary data is collected from Syariah Criminal Offences (Selangor) Enactment 1995, Syariah Criminal Procedure (State of Selangor) Enactment 2003 and Syariah Court Civil Procedure (State of Selangor) Enactment 2003 while secondary data is collected through books, journal articles and seminar proceedings discussing topics related to the empowerment of Syariah law related to LGBT. These data are then analysed thematically guided by the objectives of the study.

### **3. FINDINGS AND DISCUSSION**

As a result of the analysis, there are indeed LGBT-related provisions in the Syariah Criminal Offences (Selangor) Enactment 1995. However, improvements need to be made to enable prosecutions for LGBT-related Syariah criminal offences committed online. To explain the findings, this discussion will be divided into the following subtopics:

#### **3.1 *Existing Provisions Related to LGBT Offences in the Syariah Criminal Offences (Selangor) Enactment 1995***

In the Syariah Criminal Offences (Selangor) Enactment 1995 there are specific as well as general provisions relating to LGBT offences. Among the specific provisions related to LGBT lies under the offences relating to decency. The details are as follows:

##### **3.1.1 *Section 27. Sexual relations between persons of the same gender***

This section stipulated that any person who engages in a sexual act with another person of the same gender shall be guilty of an offence and shall be liable on conviction to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding one year or to both.

##### **3.1.2 *Section 30. Male person posing as a woman***

Any male person who, in any public place, wears a woman's attire or poses as a woman for immoral purposes shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

In addition to these specific provisions, some provisions are more general and can be used to prosecute LGBT-related offences. These provisions are either placed under offences relating to the sanctity of Islam and its institution or

under offences relating to decency. The details of these provisions are as follows:

### 3.1.3 Section 10. *Insulting, or causing contempt, etc. Islamic religion*

This section stipulated that any person who by words which are capable of being heard or read or by drawings, marks or other forms of representation which are visible or capable of being visible or in any other manner-(a) insults or brings into contempt the religion of Islam; (b) derides, apes or ridicules the practices or ceremonies relating to the religion of Islam; or (c) degrades or brings into contempt any law relating to the religion of Islam for the time being in force in this State, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.

For instance, in the case of Safiey Ilias, the state religious authorities proposed that this provision could also be used against Safiey Ilias who made public videos on his personal Instagram wearing women's attires.

### 3.1.4 Section 13. *Opinion contrary to fatwa*

- a. Any person who gives, propagates, or disseminates any opinion concerning any issue, Islamic teachings, or Islamic Law contrary to any fatwa for the time being in force in this State shall be guilty of an offence and shall be liable on conviction to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.
- b. The Court may order any document or other medium containing the opinion referred to in subsection (1) to be forfeited and destroyed, notwithstanding that no person may have been convicted of an offence in connection with such opinion.

Some argued that this provision can be used to prosecute a person who propagates or disseminates LGBT opinions or activities. At the national level, the *Muzakarah Fatwa Kebangsaan* addressed the issue of transgender in 1982 and 2008. Apart from that, there are also other states such as Perak and Johor which issued fatwa related to LGBT. Among the fatwa issued related to LGBT is as follows:

**Table 1.** The Fatwa Issued Related To LGBT

<b>Fatwa Institutions</b>	<b>Fatwa relating to LGBT</b>
<i>Muzakarah Jawatankuasa Fatwa Kebangsaan (April 1982)</i>	The change of gender from male to female or vice versa through surgery is haram in Islam.
<i>Muzakarah Jawatankuasa Fatwa Kebangsaan (Oktober 2008)</i>	Pengkid can be defined as a woman posing as a man in terms of appearance and sexual desire. The ruling is haram in Islam
<i>Mesyuarat Jawatankuasa Fatwa Negeri Perak (Jun 2010)</i>	<i>Pengkid</i> is a woman posing as a man and <i>maknyah</i> is a man posing as a woman is considered haram in Islam.
<i>Mesyuarat Jawatankuasa Fatwa Negeri Johor (Disember 2008)</i>	The ruling for a man posing as a woman and committing sexual intercourse between persons of the same gender is haram in Islam.

At the Selangor state level, on 18 March 2009, the state official authority issued a fatwa related to *pengkid* as follows,

“*Pengkid* can be defined as a woman posing as a man in terms of appearance and sexual desire. The ruling is haram in Islam”

Based on this fatwa, the Islamic religious authority can use this fatwa to prosecute a woman posing as a man. However, the fatwa is only limited to *pengkid* and no other LGBT-related offences.

### 3.1.5 Section 31. Indecent acts in public places

Any person who, in any public place, wilfully acts or behaves in an indecent manner contrary to Islamic Law shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

All these provisions mentioned above can be possibly used to prosecute LGBT-related offences committed on online platforms.

### 3.2 Issues in the Existing Provisions

After thorough examinations of the provisions listed above, several issues and problems need to be addressed when it is intended to be used to prosecute

LGBT-related offences committed on online platforms. Among the issues identified are the following:

### 3.2.1 *Ambiguous Provisions*

In the previous section, it is elaborated that some relevant provisions can be possibly used to prosecute LGBT-related offences in the existing enactment. However, it is important to understand that most of the LGBT-related provisions in the Syariah Criminal Offences (Selangor) Enactment 1995 were enacted to cater for a crime that is committed openly and occurs in public places. This is considered one of the basic principles for the enforcement of Syariah crime (Siti Zubaidah, 2017). Thus, when it is intended to prosecute LGBT-related offences committed on online platforms, it has some issues that need to be addressed such as the ambiguous definition of public places.

According to the law, there is no clear interpretation of a public place that can be understood from the provisions of the offence. The ambiguity of this definition from a legal point of view causes the question to arise, of whether syariah criminal offences committed online meet this aspect and in turn affect the enforcement process that can be carried out by religious enforcement officers (Zanariah Dimon, 2021)

On the other hand, there is the ambiguity associated with the determination of jurisdiction if a criminal offence occurs online. For example, in the Syariah Criminal Procedure (State of Selangor) Enactment 2003, Section 68 provides, "When a person is accused of the commission of any offence because of anything which has been done or of any consequence which has ensued, such offence may be tried by a Court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued." Based on this provision, continuing the investigation of those who commit these offences online, requires an investigation of the location of the incident to determine which jurisdiction the state will continue the investigation and prosecution (Nurul Atira & Hendun 2020).

### 3.2.2 *Limited Punishment*

Apart from the ambiguity of the existing provisions, the penalties that can be imposed for Syariah criminal offences are also limited according to the Syariah Courts (Criminal Jurisdictions) Act 1965 better known as Act 355. This Act provides for the maximum jurisdiction that a syariah court may have for a fine not exceeding RM5000, whipping not exceeding 6 times, or imprisonment not exceeding 3 years or a combination of all three. Although the amendment

effort has been carried out since 2016, until now it has not been amended in Parliament for various factors and reasons (Mohd Sabree 2018).

### **3.2.3 Methods Of Proof**

Besides that, another issue is related to the method of proof if the offence is committed online. Among the risks faced in proving such cases are the use of fake accounts, posts deleted after being reported to the authorities and so on. Therefore, the collection of evidence for LGBT-related cases committed online requires expertise in digital forensics. Due to the lack of expertise in this field, such cases require the services of forensic digital experts and cost a lot of money (Mohd Sabree & Ruzman, 2020).

### **3.3 Improvement Proposals**

Based on the issues discussed above, in line with the development of technology and information, proactive measures should be taken to ensure that criminal offences related to LGBT are relevant to be enforced. Hence, the proposed improvements to overcome the issues discussed are as follows:

#### **3.3.1 Enacting Specific Provisions for Islamic Criminal Offences Committed Online**

It is pertinent to understand that there are relevant acts under the Malaysian Communications and Multimedia Commission (MCMC) to combat cybercrime such as the Communications and Multimedia Act 1998 (Act 588), Malaysian Communications and Multimedia Commission Act 1998 (Act 589), Digital Signature Act 1997 (Act 562) and Computer Crimes Act 1997 (Act 563). However, there are no specific provisions for Islamic criminal offences which have been committed online. Thus, it is suggested that specific provisions must be enacted to address this lacuna.

#### **3.3.2 Amendment of the Syariah Courts Act 1965 or known as Act 355**

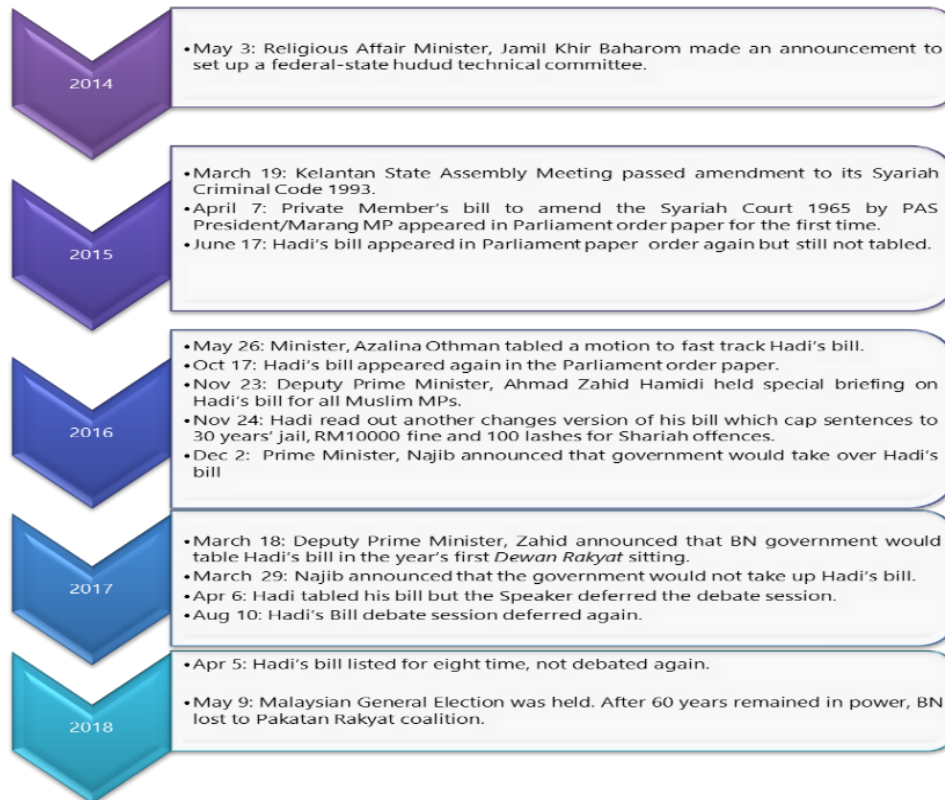
Efforts to amend the Syariah Courts Acts 1965 have been made since 2015 by Marang MP, Abdul Hadi Awang, who proposed a private member's bill to amend the *Syariah* Court Act (Criminal Jurisdiction) 1965. Initially, the private bill sought to expand the *Syariah* court jurisdiction - which limits the *Syariah* court to meting out punishments to only a maximum of three years jail terms, five thousand ringgits fine, or six strokes of the (Syariah) whip, or any of combination thereof - to be unlimited, except for the death penalty. This private member bill first appeared in the Parliament order paper on 7 April



2015 (Hansard, 2015). The bill appeared again several times in the Parliament order paper but has yet to be tabled until now.

On 24 November 2015, Hadi proposed an amendment to his private member bill. Instead of proposing unlimited jurisdiction (except the death penalty) to the *Syariah* court, the suggestion is to limit the punishment to 30 years' jail, RM10000 fine, and 100 lashes for *Syariah* offences (Hansard, 2016). Unexpectedly, on 2<sup>nd</sup> December 2016, the Prime Minister announced that the government would take over Hadi's bill, and there followed an announcement on 17 March 2017, by Deputy Minister, Zahid Hamidi that the bill would be tabled by the government in the year's first *Dewan Rakyat* sitting (Astro Awani, 2017). However, on 29 March 2017, the Prime Minister made another announcement saying that the government would not now take up Hadi's bill and that would remain a private member's bill, with tabling and voting subject to the speaker's ruling (Harian Metro, 2017).

Finally, on 6 April 2017, Hadi tabled the private bill for the first time. However, the Speaker deferred the debate session (Hansard, 2017). The bill appeared several times, but the debate session was deferred on each occasion. The situation remained like this until the final sitting of the Parliament before the general election. On 9 May 2018, the Malaysian General Election was held, which finally witnessed the defeat of the BN government to the opposition coalition, Pakatan Harapan, for the first time in Malaysian history. After this general election, the private member bill has not re-appeared in Parliament up to the present day.



**Figure 1.** The key events and amendments of the *Syariah* Court 1965

Based on the chronological event above, it can be concluded that the amendment of this act has faced many hurdles and challenges. It is also suggested that this effort must not be politicised by any party and all MP Muslims despite their different background and political parties must unify to pass this amendment in the Parliament.

### 3.3.3 Establishment Of a Technology Unit and Appointment of Skilled Officers

The increasing number of Islamic criminal offences committed online has made a call for the establishment of a technology unit and the appointment of skilled officers in the Prosecution Department. The current practice which is outsourcing the investigation process to accumulate evidence is not cost-effective as it will use a huge amount of money to hire experts.

## 4. CONCLUSION

The development of technology and information along with the increasing number of Islamic criminal offences committed online has made an urge for the Islamic Religious Department or Islamic court specifically to

respond proactively. Further improvement to the current enactment is important to preserve the sanctity of Islam and its institutions and more importantly to act as a deterrence to immoral behaviours related to LGBT in online platforms.

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