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CLASH OF LEGISLATIVE COMPETENCY ON MATTERS OF OFFENCES RELATING TO DECENCY

Najwa Azizun^{1*}, Hariati Ibrahim @ Musa², Siti Marina Amit³, Jusniza Abdul Jamal⁴, Namirah Mohd Akahsah⁵

- ¹ Faculty of Law, Centre of Foundation Studies, Universiti Teknologi MARA, Cawangan Selangor Kampus Dengkil
Email: najwa6483@uitm.edu.my
- ² Faculty of Law, Centre of Foundation Studies, Universiti Teknologi MARA, Cawangan Selangor Kampus Dengkil
Email: hariati80@uitm.edu.my
- ³ Faculty of Law, Centre of Foundation Studies, Universiti Teknologi MARA, Cawangan Selangor Kampus Dengkil
Email: sitimarina@uitm.edu.my
- ⁴ Faculty of Law, Centre of Foundation Studies, Universiti Teknologi MARA, Cawangan Selangor Kampus Dengkil
Email: jusniza@uitm.edu.my
- ⁵ Faculty of Law, Centre of Foundation Studies, Universiti Teknologi MARA, Cawangan Selangor Kampus Dengkil
Email: namirah9532@uitm.edu.my
- * Corresponding Author

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Abstract:

The Legislative Assembly of the state of Selangor has criminalized sexual intercourse against the order of nature by virtue of S. 28 of the Syariah Criminal Offences (Selangor) Enactment 1995. The power to enforce such law is vested on Jabatan Agama Islam Selangor ("JAIS"). However, the Federal Court's decision in *Iki Putra bin Mubarak v. Kerajaan Negeri Selangor & Anor* [2021] MLJU 213 has garnered the attention of the public when the apex court ruled that the Selangor State Legislative Assembly had no power to create the offence of sexual intercourse against the order of nature. The impact of this judgment is immense as it is taking away the power of prosecution of such offence by the Syarie Prosecutor in Selangor. Furthermore, the Federal Court's judgment also points out that the Penal Code has a similar offence (Section 377A), hence excluding the legislative competence of the state of Selangor to regulate the same. The *Iki Putra* judgment has become the impetus of this research that aims at identifying and examining the provisions in the Penal Code and Syariah Criminal Offences (Selangor) Enactment 1995 that are considered redundant, with specific reference to offences relating to decency only. In doing so, the research employs qualitative research design. Since this is a doctrinal and library-based research, the research adopts a content analysis method on the primary and secondary materials which include the study into legislation, case law, textbooks and journal articles. The research also applies a comparative approach to determine similarities and differences (if any) between the Penal Code and 1995 Enactment. The finding shows that some offences in both legislations are redundant which will lead to conflict of

jurisdiction between civil and Syariah courts. These redundancies will ultimately cause difficulties in the future with the enforcement of Syariah criminal offences.

Keywords:

Syariah Criminal Offences, Conflict Of Jurisdiction, Decency, Legislative Powers, Unnatural Offences

Introduction

Malaysia is a federation of thirteen states and Federal Territories. Each state retains autonomy in several aspects, including the power to enact laws. This division of legislative authority between federal and state government, though has been prescribed in the Ninth Schedule of the Federal Constitution, has resulted in many controversial conflicts of jurisdiction (as in the case of Mamat bin Daud (1988), Sulaiman Takrib (2009), Latifah (2007), Nordin Salleh (1993)). The power to enact criminal laws lies with the Parliament (item 4 of the Federal List in the Ninth Schedule). At the same time, item 1 of the State List in the Ninth Schedule empowers the state legislature to create (and punish) offences by persons professing the religion of Islam against precepts of that religion. Syariah-related conflict is considered as an everyday issue because of the considerable extent of ambiguity around the application of syariah in the Malaysian legal system. (Daniels, 2017) The civil and syariah law/court conflict to some extent lead to open debates of Islamic law and secular law. (Moustafa, 2018) The conflicts have led to what can be considered as a never-ending saga of disputes that could be detrimental to the whole system of law, civil and syariah. One of the issues that remains unsolved is how to differentiate criminal laws and Syariah criminal offences to determine which legislative body has the competency under the law to enact such offences.

In February 2021, the Federal court decided on the case of Iki Putra (2021), the decision of which this paper aims to discuss. This is a case of sexual intercourse against the order of nature. The petitioner, a Muslim man, has been alleged to attempt to commit sexual intercourse against the order of nature with other male persons, who are not Muslim. The Syarie Prosecutor has charged him under section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 (the 1995 Enactment). However, the petitioner has raised the issue of constitutionality of section 28 of the 1995 Enactment, saying that only Parliament has the competency to create such crime, not the Selangor State Legislature. The Parliament has enacted section 377A of the Penal Code which criminalises carnal intercourse against the order of nature, referring to the introduction of the penis into the anus or mouth.

Generally, Selangor State Legislature has the legislative competency to enact offences against the precept of Islam. In Sulaiman Takrib's case (2009), the precept of Islam is interpreted to go beyond the mere five pillars of Islam and can cover Syariah criminal offences. It is no doubt that sexual intercourse against the order of nature is one of Syariah's criminal offences that go against the precept of Islam. However, the court had ruled that this legislative competency is restricted by the preclusion clause. In other words, the power to legislate offences is wide insofar as the 'precept of Islam' are concerned but limited by the preclusion clause. Having regard to the preclusion clause in Item 1 of the State List, when the two legislatures (Federal and State) touch on the same matter, the said laws cannot co-exist even if the said law is said to be against the precept of Islam.

The impact of this decision may cause the State Legislative Assembly to not be able to enact a law if the subject matters are listed in the Federal List in the Ninth Schedule or Federal Constitution in general. Even though there is no federal legislation on the subject matter, the State Legislative Assembly may still be incapable of enacting the law which further reduces the power to enact Syariah criminal law, including offences relating to decency. Also, Iki Putra's judgment leads to the possibility of future attempts to challenge the validity of any Syariah criminal law by anyone who has been charged with offences against the percept of Islam on the ground that it is unconstitutional. This could give rise to more confusion and absurdity in the law, affecting the administration of justice.

The ruling in Iki Putra's case serves as the foundation for this paper. The ruling posed an enormous impact as it led to Section 28 of the 1995 Enactment being declared unconstitutional. The present legislation in Selangor must be amended, which implies that no prosecution under section 28 of the 1995 Enactment can be brought in the Selangor Syariah Court in the future. The authors will examine other unnatural offences covered by the 1995 Enactment and the Penal Code to determine whether any redundancies might lead to a similar conflict of jurisdiction in the future. It should be noted that this research focuses on Syariah Criminal Offences (Selangor) Enactment 1995 only but similar offences are covered in other States Enactment too. Although there are differences in the administration of this law in different states, what remains similar is its letter and spirit, that is protection of moral and ethics. (Abdul Hamid & Mat Rashid, 2018) Therefore, the findings of this research also applies to the same offences in other states Syariah Criminal Offences Enactment.

Methodology

This research adopts a qualitative method of research. The content analysis method was adopted in examining the provisions in 1995 Enactment regarding offences relating to decency as well as analyzing the provisions in the Penal Code to find whether those offences are also covered by the Penal Code. This method consists of pure legal research on all primary and secondary materials. The primary sources of law include legislations and decided cases while secondary sources comprise articles in journals, textbooks as well as online database sources and websites. After examining the sources, the next process involved a comparative analysis of the data found. This approach is employed to identify similarities and differences in offences under the 1995 Enactment and the Penal Code.

Result and Discussion

Effects of the Decision: Co-Existence of Federal and State Laws

Having said that both legislatures (Federal and State) have the power to enact the law, the most important question is what are the laws that each and both of them can enact? This paper will only focus on the area of criminal laws and Syariah criminal offences.

Demarcation of legislative authority is stated in Article 74 of the Constitution which reads:

Subject Matter Of Federal And State Laws.

(1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

(2) *Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.*”

Item 4 of the Federal List in the Ninth Schedule is as follows:

“4. Civil and **criminal law** and procedure and the administration of justice, including -

(a)...(g)

(h) **creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;**”

Whereas item 1 of the State List in the Ninth Schedule is as follows:

“...creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, **except in regard to matters included in the Federal List** (emphasis added)”

Looking at the two lists, the Parliament is empowered to regulate criminal laws and the state legislature can create Syariah criminal offences. What if an offence is a crime under criminal laws and at the same is an offence against the precept of Islam? Can both laws co-exist? The court said no because allowing both crimes to co-exist will make the preclusion clause under item 1 of the State List otiose.

Therefore, when there is an issue of legislative competency, the question that must be answered first is; who can make the law? If the subject matter, in pith and substance, falls under the jurisdiction of the Parliament to make law, then the state legislature has no power to enact such similar offences even though it is an offence against the precept of Islam.

It is pivotal to refer to the case of Mamat bin Daud (1986). The judge had ruled that “*In determining whether section 298A, in pith and substance, falls within the class of subject matter of "religion" or "public order," it is the substance and not the form or outward appearance of the impugned legislation which must be considered. The impugned statute may even declare itself as dealing with religion, but if on investigation of the legislation as a whole, it is in fact not so, the court must so declare. Conversely, it is not sufficient for the impugned legislation to declare itself as dealing with public order if, in substance, it seeks to deal directly or indirectly with religion or religious law, doctrine or precept, for no amount of cosmetics used in the legislative make-up can save it from being struck down for pretending to be what it is not. The object, purpose and design of the impugned section must therefore be investigated for the purpose of ascertaining the true character and substance of the legislation and the class of subject matter of legislation to which it really belongs.*”

However, the authors believe that the judgment in Iki Putra (2021) is lacking in the justification of how *liwat* is interpreted, in pith and substance, a crime under which the Parliament has the power to regulate. This is very important because the court themselves said that “*hence, we are of the view that it is untenable to take the position that the power of the State Legislature to make laws by virtue of the preclusion clause is limited to the federal laws that Parliament has*

not already enacted. It remains to be tested in every given case where the validity of a state law is questioned, for the courts to first ascertain whether a law in question is within the jurisdiction of Parliament to enact and not necessarily whether there is already a federal law in existence such that the State-promulgated law is displaced'. The court also referred to and agreed with the approach taken by the court in Latifah's case (2007) where it was said as follows:

'...even if the syariah court does not exist, the civil court will still have to look at the statutes to see whether it has jurisdiction over a matter or not. Similarly, even if the civil court does not exist, the syariah court will still have to look at the statute to see whether it has jurisdiction over a matter or not. Each court must determine for itself first whether it has jurisdiction over a particular matter in the first place.... just because the other court does not have jurisdiction over a matter does not mean that it has jurisdiction over it.'

Since both parties had not raised the issue of constitutionality of the provisions contained under the header 'unnatural offences', of the Penal Code, the court deemed such laws are legally made by the Parliament. It is unfortunate not to be able to understand how the court justified the competency of the Parliament to create unnatural offences to make it fall under the jurisdiction of the Parliament to make and therefore exclude the state legislature from regulating such offence.

Crime, according to the Britannica dictionary, means the intentional commission of an act usually deemed socially harmful or dangerous and specifically defined, prohibited, and punishable under criminal law. Therefore, the State (lawmakers) has wide power to decide what act or omission may amount to a crime. Some acts violate moral precepts such as fraud, theft, murder and slander, hence they are regulated by the Penal Code. However, some activities arguably do not relate to moral precepts but are regulated by the law. An example can be found in the Income Tax Act which prescribes punishments for certain violations of its provisions which have no direct connection with any specific moral mandate (Chaudhry, 2009). This suggests the Parliament is vested with a far-reaching authority to regulate criminal laws, while the State Legislative power to create Syariah criminal offences is residual.

Comparison between provisions in Syariah Criminal Offences (Selangor) Enactment 1995 and Penal Code

Comparison is made only on Part IV Offences relating to decency under the 1995 Enactment. There are ten (10) provisions under this part, dealing with offences against morality which include sexual intercourse against the order of nature.

Table 1: Comparison between the 1995 Enactment and Penal Code

1995 Enactment	Penal Code
Section 22: Incest	Section 376A: Incest
Section 23: Prostitution	Section 372: Exploiting any person for purposes of prostitution Section 372A: Persons living on or trading in prostitution Section 372B: Soliciting for purpose of prostitution
Section 24: Muncikari	Section 372: Exploiting any person for purposes of prostitution

	Section 372A: Persons living on or trading in prostitution Section 372B: Soliciting for purpose of prostitution
Section 25: Sexual intercourse out of wedlock	None
Section 26: Act preparatory to performing sexual intercourse out of wedlock	None
Section 27: Sexual relations between the persons of the same gender	None
Section 28: Sexual intercourse against the order of nature	Section 377: Buggery with an animal Section 377A: Carnal intercourse against the order of nature
Section 29: Khalwat	None
Section 30: Male person posing as a woman	None
Section 31: Indecent acts in public place	Section 377D: Outrages on decency

Source: Syariah Criminal Offences (Selangor) Enactment 1995 and Penal Code

Based on Table 1, the offences in section 22, 23, 24, 28 and 31 of the 1995 Enactment are also covered in Penal Code. The following are discussion on comparison between provisions in the 1995 Enactment and the Penal Code:

Incest: Section 22 of the 1995 Enactment vs. Section 376A of Penal Code

Incest is defined in the Cambridge English Dictionary as the ‘sexual activity involving people who are closely related and not legally allowed to marry’ (Dictionary, 2017). The number of incest cases in Malaysia is alarming and set off alarms bell on the effectiveness of the current law. According to Bukit Aman Sexual, Women and Child Investigations Division (D11) Assistant Commissioner (ACP) Siti Kamsiah Hassan, an average of 15 incest cases are reported to the police each month (Noorshahrizam, 2021). For the non-Muslims, section 11 of Law Reform (Marriage and Divorce) Act 1976 spells out prohibited relationships between blood relatives, and former spouses of relatives, which also include persons adopted into the family.

Incest is a crime in both civil and Syariah law. Section 22 of the 1995 Enactment punishes Muslim guilty of the offence with a fine not exceeding five thousand ringgit or imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or any combination thereof. In section 376B of Penal Code, however, more severe punishment awaits upon conviction with imprisonment for a term of not less than ten years and not more than thirty years and shall also be liable to whipping. In Mohamad Nazeril bin Mohamad Hamidi (2020), the defence calls that twelve (12) years of imprisonment is too hard for the 24-year-old accused. The facts established that the accused three (3) times acts of rape had not only caused severe trauma to the victim (his niece-in-law) but widened his lecherous act to other young female members of the victim’s family. Hence, it was decided by the court that the conviction and 12-year sentence stays.

Section 376B of Penal Code is more detailed than section 22 of the 1995 Enactment whereby it provides that it shall be a defence for the person charged if he/she did not know that the person with whom he or she had sexual intercourse was a person that he/she could not marry under the law, religion, custom or usage applicable to him or her to marry that person. In addition, section 376B (2)(b) of Penal Code provides it also serves as a defence if the person charged successfully proved that the act of sexual intercourse was done without his/her consent. It is obvious that the Penal Code provides more severe punishment to persons convicted for crimes related to prostitution as compared to the 1995 Enactment.

Prostitution: Section 23 of the 1995 Enactment vs. Sections 372, 372A, 372B of Penal Code

Prostitution in the 1995 Enactment is defined as an act of offering sexual services and punishable with a fine not exceeding five thousand ringgit or imprisonment of not exceeding three years or whipping not exceeding six strokes or any combination thereof. Penal Code is more detailed and covers acts connected to prostitution including selling the body for sexual gratification in return for money or kind, acts as a middleman who controls the movements of prostitutes, seeking information about prostitution, making advertisement about it (section 372 of Penal Code) living on the earning of prostitution (section 372A of Penal Code) and solicitation of prostitution (section 372B of Penal Code). In comparison with the 1995 Enactment, the Penal Code provides heavier punishment for the activities related to prostitution. In *Mohamad @ Muhammad Bin Ibrahim v. Public Prosecutor* (2021), the accused was convicted under section 372A and accorded with 9-year imprisonment.

Muncikari: Section 24 of the 1995 Enactment vs. Sections 372, 372A and 372B of Penal Code

Muncikari is defined in section 2(1) of the 1995 Enactment as a person who acts as a procurer between a female and a male for any purpose which is contrary to Islamic Law. Such act is an offence under section 24 of the 1995 Enactment which carries the punishments of a fine not exceeding five thousand ringgit or imprisonment for a term not exceeding three years or whipping not exceeding six strokes or any combination thereof.

This offence can also be found in sections 372, 372A and 372B of the Penal Code but the coverage is wider and the punishments are heavier compared to the enactment because the Penal Code equates '*muncikari*' with 'prostitution'. Section 372 describes six (6) circumstances that can be considered as exploiting any person for the purpose of prostitution and carries the punishment of imprisonment for a term up to fifteen years and with whipping and also be liable to fine. However, the number of strokes and the amount of fines are not mentioned. In *James Jeffrey & Ors* (2022), the appellant was charged with offences under section 372(1)(f) and was sentenced to 7 years imprisonment and 5 strokes of whipping.

Section 372A extends the offence to persons living on or trading in prostitution with the same punishments as section 372. Section 372B provides for a lesser offence of soliciting for the purpose of prostitution which carries the punishments of imprisonment for a term not exceeding one year, or with a fine or both. Therefore, a person committing the offence of '*muncikari*' can easily fall under any of the three sections described in the Penal Code but with heavier punishments. This could also mean that any Muslims convicted under section 24 of the enactment would be subjected to lighter punishments compared to a non-Muslim convicted under section 372 of the Penal Code. Muslims who committed *muncikari* can be charged under

Syariah law or civil law depending on who is policing them, for example, policemen or Majlis Agama (State Islamic Religious Council).

Sexual Intercourse Against the Order of Nature: Section 28 of the 1995 Enactment vs. Section 377A of Penal Code

Statutorily, under section 377A of the Penal Code, carnal intercourse against the order of nature is a punishable offence. Likewise, sexual intercourse against the order of nature is an offence under Syariah law as provided in section 28 of the 1995 Enactment. Both provisions use the word 'against the order of nature'. Order of nature means events that are normal and expected to occur naturally if there is no artificial or man-made impediment to the same. Unnatural is something, an act or behaviour, contrary to that considered as natural. As per Section 377 (similar to section 377A of Malaysian Penal Code), only the peno-vaginal sexual intercourse is natural, all other forms of carnal intercourse such as anal or oral are unnatural (Deswal, V., 2019).

In the case of Dato' Seri Anwar bin Ibrahim v. Public Prosecutor and Another Appeal (2015), the accused had been sentenced to five (5) years imprisonment after the Federal Court found him guilty for the offence under section 377 of the Penal Code. Comparatively, if the charge is brought under Syariah law, on conviction, the accused can only be punished with a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or any combination thereof. Under civil law, the maximum term of imprisonment is twenty years and shall also be liable to whipping. Clearly, Penal Code carries heavier punishment for anyone convicted for this offence.

Section 28 of the 1995 Enactment and section 377A of Penal Code can be considered as a legal effort to curb the Lesbian, Gay, Bisexual and Transgender sexual activities (LGBT) in Malaysia. This issue needs to be curb aggressively as in this era of globalisation, the public could be easily influenced by things that they see and hear from social media. (Afandi & Sabree, 2019)

Indecent Acts in Public Place: Section 31 of the 1995 Enactment vs. Section 377D of Penal Code

This offence is punishable by a fine not exceeding one thousand ringgit or imprisonment for a term not exceeding six months, or both under section 31 of the 1995 Enactment. However, the 1995 Enactment does not provide any specific definitions of what constitutes indecent actions which is similar to section 377D of the Penal Code.

Similar offences are addressed by section 377D of the Penal Code; however, they are not confined to public places. It also covers abetting, procuring or attempting to procure the commission by any person of any act of gross indecency with another person in private, which is punished by up to two years imprisonment. This shows that the chances of getting convicted under Penal Code is higher due to a wider definition of the offence. The redundancy serves no purpose in preventing such offence from being committed and the variation of sanctions offered by both provisions undermines the relevance of the Enactment.

Basically, section 377D of the Penal Code deals with any act of gross indecency involving any person, and it can be between male persons, between female persons, or between male and female persons. As to what act constitutes indecency or gross indecency, the legislature has left

it entirely to the court to determine as it is not possible to define what is an indecent or grossly indecent act. As the High Court judge in *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* (1999) had stated in his judgment: 'Every person may have a different view of what is indecent. Our perception of what is indecent depends upon our upbringing, which includes religious, cultural and family values.' Gross indecency certainly includes sexual relations between male persons.'

Conclusion

In conclusion, the Federal Constitution establishes dual government i.e. federal and state governments with their own sets of legislative powers, as available in the Ninth Schedule of the Federal Constitution. However, there have been numerous cases where this division has resulted in jurisdictional conflicts that brought into question the ability of civil and Syariah courts to make decisions on specific issues. Even though List II, paragraph 1 of the Federal Constitution's Ninth Schedule grants the State Assemblies the legislative power to make law in matters of Islam, this proved to be more difficult to separate than originally intended because both laws encompass the dynamic of our lives. The conflict becomes more complicated and debated especially when it comes to criminal jurisdiction of civil and syariah courts. The ruling of the Federal Court in the case of *Iki Putra* does not indicate the downfall of Islamic law or the acceptance of LGBT sexual activities. It served only to highlight the inconsistencies and redundancy in our legal system on the same issue. This paper has listed down the potential areas of jurisdictional conflict in matters regarding decency that can draw a strong interest in its application in the future. It also describes what acts are categorised as crimes against decency and how those offences work under both the 1995 Enactment and the Penal Code, so that it may be used as a reference in determining which court will have the jurisdiction to hear a decency case in the future. It can also be used as guidance for Syariah prosecutors in helping them decide whether or not to prosecute their case as a Syariah offence. More importantly, the Selangor State Legislative Assembly (as well as other State Legislative Assemblies) must take necessary steps to make sure the provisions of the 1995 Enactment are in line with the Federal Constitution.

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