

A REVIEW ON LEGAL INTERPRETATION OF *KHALWAT* UNDER THE SYARIAH CRIMINAL LAW IN MALAYSIA

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Abstract

Khalwat is one of Syariah criminal offences that is prescribed under Syariah criminal offence enactments in Malaysia. The issue before hand is that there are distinctive definitions given by the Islamic jurist as well as definitons laid down in Syariah legislations of Malaysia. This article aims to discuss the definition of khalwat according to Islamic perspective in which it is not in pari materia with the interpretations from the state enactments in Malaysia. Furthermore, the discussion will be based on the category of khalwat that profounded from the Al Quran and Al-Hadith. This discussion also will be focusing more on the various interpretation of khalwat according to state enactments of Malaysia. This article uses the library research method in analyzing the documents such as books, articles and legal provisions in the Syariah criminal offence enactments of Malaysia. The study found that there are differences in khalwat interpretation in the legal provision of the Syariah criminal enactments of Malaysia. Despite the differences in the interpretation, khalwat could still be regarded as a bona fide Shariah criminal offence in Malaysia.

Keywords: *Islamic Criminal Law, Khalwat, Enactment*

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Introduction

The legal authorities on the prohibition of close proximity (*hereinafter* refers as *khalwat*) are clearly prescribed in the *al-Quran* and *al-Hadith*. The rule of *khalwat* between an *ajnabi* man and woman (a man/woman whom a woman/man is permitted to marry) is prohibited (*haram*). This is based on several definitive textual implications (*dilalat qat'ie*) pertaining to this case (al-Isra, verse 32). The Prophet (P.b.u.h) explains that *khalwat* between a man and woman who is married to one of his family members is prohibited as it dancing with death if the action could be done (Abu al Husayn al-Qushairi al-Nisaburi Muslim Ibn al-Hajjaj, 1981). Such action could lead to the destruction of religion and family relations. Al-Qurtubi further clarifies that a cause for death to religion or to the woman *in personam* refers to a woman being divorced by her husband or perhaps she would be stoned to death if she committed adultery with her in-law (al-'Ayn: n.d).

Definitions of *Khalwat*

The term *khalwat* in Arabic is derived from the verb which means to be alone (al-Bustani, n.d). The usage of that term could also bring other interpretations, for instance in adjective it could be defined as quiet (al-Marbawi: n.d). *Kamus Dewan* defines the term as the act of close proximity in a remote or hidden place; between a man and a woman neither *mahram* nor husband and wife that could consider as indecent manner (Teuku Iskandar, 2000). According to the *Kamus Besar Bahasa Melayu*, *khalwat* means a deed to isolate and seclude oneself, sitting alone or sitting together in an indecent manner between a man and a woman who are not married in a hidden place (Zainal Abidin Safarwan, n.d) Technically, Islamic jurist defines it as a solitude or as a place to free mind out of many things with a sole intention to remember Allah SWT (Said al-Syartibi, n.d). According to Hanafi, Maliki, Hanbali and Shafie, this term refer to a husband and a wife who lives together whether or not sexual intercourse or copulation take places provided that there are reasons that prevent them from copulation (Mahy ad-Din Sabir *et. al.*, n.d).

Technically, *khalwat* could be categorized into two categories which are *Khalwat Sahîhah* and *Khalwat Ihtida'* ('Abdul Rahman al-Jaziri, 1969). According to the uncodified Islamic law as embedded in the books of *fiqh* and *hadith* of the Prophet (P.b.u.h), the term of *khalwat* comes in various meanings compared to the meaning stated in the codified Islamic law which is enacted under the state enactments of Malaysia. The definition of *khalwat* according to the books of *fiqh* and *hadith* of

the Prophet (P.b.u.h) is referring to the deed of *khalwat* or cohabitation among *ajnabi* couple in which that couple has no legitimate relationships to permit the deed. By looking to the *khalwat* that occurs between a husband and wife, the then Islamic jurists such as Hanafi, Maliki, Hanbali and Shafie define the married couple who cohabitated whether there is copulation or *vice versa*, unless there is a reason that can prevent the copulation (Muhamad Syahir Amin Ibn 'Abidin, 1996).

***Khalwat* Categories**

Khalwat could be categorized into two categories which are *Khalwat Sahihah* (the copulation between a husband and a wife has actually taken place) and *Khalwat Ihtida'* (the copulation between a husband and a wife in a hidden place out of public eyes).

Khalwat Sahihah

Khalwat Sahihah is a true seclusion where a husband and wife have met together privately (a complete privacy) and the venue is away from the public eyes. It allows the husband to have copulation or sexual intercourse when there is nothing to obstruct/prevent the copulation or sexual union between the two. This privacy is a kin to sexual union. There are three factors which may not allow copulation taking place which are *hissi* (sexual or sentimental), *tabi'i* (physical) or *syar'ie* (Islamic rulings). If one of these factors taking place, *khalwat sahihah* could be rendered as *khalwat fasidah* (invalid seclusion) (Ahmad Nasr al-Jundi, 1978). *Khalwat Fasidah* has the same weightage and meaning as a typical *khalwat* (seclusion between *ajnabis*) (Muhammad Abu Zahrah, 1958). The main requirement in *Khalwat Sahihah* is that there is no factor to prevent the sexual union between the two (Ibn Qudaamah: n.d.).

The first factor or obstacle in *Khalwat Sahihah* is *hissi* where the husband or wife is prevented from having a sensual emotion between them. For instance, some ailment suffered by the husband or wife which does not permit them from having the copulation. While *Tabi'i* means the presence of a third person between a couples. It is also one of the obstacles in *Khalwat Sahihah* and that third person could either be awake or asleep between the two. For illustration, the presence of a small child who can tell others what he sees or the presence of a sleeping blind man who can understand the intimacy conversation of a couple (Ibn Qudaamah: n.d). Furthermore, from the point of Islamic rulings (*Syarie*) a couple is not permitted to have copulation if one of them is fasting or the woman herself is in

her menses (*haidh*) (Ibn 'Abidin, 1996). Thus, this couple should refrain themselves till the obstacles are ended.

If the abovementioned circumstances occurred, it will be no more rendered as *Khalwat Sahîhah*. Abd Rahman al-Jaziri (1969) further explains that the *Khalwat Sahîhah* could either occur in a huge or remote place or even in a quiet street or at the corner of wall which are away from public. It is also noted that *Khalwat Sahîhah* could take place in a hidden room of a house occupied by others (Abd Rahman al-Jaziri, 1969). Notwithstanding *Khalwat Sahîhah* could not be deemed occurs in public places like mosques, toilets and other public places that are free for public use (Syahir Ibn Mohammed Amin. 'Abidin 1996).

Khalwat Sahîhah can be convicted between couple if it is a *prima facie* case and backed by concrete evidence. The evidence that could be tendered such as a copulation of a husband and a wife in a remote place that away from public eyes. Moreover, there should be no obstacles at all that can prevent them from having copulation. Pursuant to that, the husband is obliged to pay dowry (*mahr*) *in toto* because this *khalwat* is *pari materia* to the sexual intercourse (Ahmad Nasr al-Jundi, 1978). The husband also is required to pay maintenance and providing shelter during *iddah*. He is barred from getting married to any sister of his wife. The jurists are differed in the issue of *khalwat* between a husband and a wife without any copulation till they divorced. The Kufah jurists and Imam Malik believe that it is mandatory upon husband for the full *mahr* as well as the wife's *iddah*. On the other hand, Imam Shafi'i opine that it is not mandatory upon husband for the full *mahr* and *iddah* of his wife since there is no copulation (Muhammad Abu Zahrah, 1958).

Khalwat Ihtida'

Khalwat Ihtida' means seclusion in a hidden place and away from the public eyes (al-Qurtubi, 1935). It is named *khalwat ihtida'* because of the seclusion in a silence surrounding ('Abd Rahman al-Jaziri, 1969). One of the requirement for this *khalwat* is the wife must attain the age of puberty. If she is yet to reach the puberty and she contends *khalwat ihtida'* and copulation occurred between them as well as the husband acknowledged it, she is obliged to pay half of the *mahr*, while the other half will be paid when the wife has reached *sui juris* as commonly known in legal maxim as age of puberty.

On top of that, *khalwat* refers to couple who are *ajnabi* and it is based on the *hadiths* of the Prophet that *khalwat* is a deed committed by a couple who does not

have legitimate marriage relationship as the Prophet says:

“Do not seclusion with a woman who is not lawful for you, because the third person between them is the devil.”

(Al-Tarmidhi: n.d. , Ibn Hibban, 1993)

The discussion above indicates the meaning of *khalwat* as embedded in the books of *fiqh* and *hadith* of the Prophet (P.b.u.h) in which it is comprised of two circumstances, namely *khalwat* between spouse and *khalwat* between *ajnabi* couple. In short, *khalwat* is a deed that is forbidden by Islam as it triggers couple to commit adultery. Such action also could retract the harmony and unity of a society. The prohibition of such deed could be seen in the Islamic legal maxim as follows:

“anything that leads to illegal it is illegal”

(al-Qaradawi, 1980)

Islam prohibits adultery. Any deed that leads to the adultery, *ipso facto* is forbidden. Besides, the wisdom behind the prohibition of *khalwat* is to ensure the good lineage of a family or else it will affect the family relations and lead to the mixed lineage. In addition, it is hard to determine the lineage of a child born out of the wedlock (Zaid Hussein Al-Hamid, 1984). That child also will be neglected by his biological parents as the effect of adultery. Most probably the child will succeed the bad manner of their parent and certainly will not have a proper education as well as he will be distanced from his relatives. The society also will develop full hatred towards them.

Pursuant to the sentencing issue, Muhammad Abu Zahrah (1974) emphasizes that it is up to the government or the judge to impose any sentence which is deemed to be acceptable and appropriate. It is submitted that *takzir* is a punishment under Islamic law that could not be quantified. The government or the judge (*mujtahid*) has the jurisdiction to impose the punishment (Abi Bakr Muhammad al-Sarkhasit, n.d). For that reason, it is clear that the government or the judge has discretionary power in imposing such sentences.

Khalwat As Criminal Offences in Malaysian Legislation

In Malaysia, the legal provisions relating to *khalwat* is embedded in the state enactments that can be seen in Table 1 below:

State	Enactments	Category	Provision
Perlis	Syariah Criminal Enactment 1991 (Enactment 4 Year 1993)	Part II- Offences	Section 9. Khalwat
Kedah	Syariah Criminal Code Enactment (Negeri Kedah)1988 (Enactment 9 Year 1988)	Part II- Offences	Section 9. Khalwat
Pulau Pinang	Criminal Offences Enactment (Negeri Pulau Pinang) 1996 (Enactment 3 Year 1996)	Part IV – Offences relating to Morality	Section 27. Khalwat
Perak	Criminal (Syariah) 1992, Perak (Enactment 3 Year 1992)	Part VI – Offences relating to Honor	Section 54. Khalwat
Selangor	Syariah Criminal Enactment (Selangor) 1995 (Enactment 9 Year 1995)	Part IV - Offences relating to Morality	Section 29. Khalwat
Federal Territories	Syariah Criminal Offences Act (Federal Territories) 1997 (Akta 559)	Part IV - Offences relating to Morality	Section 27. Khalwat
Negeri Sembilan	Syariah Criminal Enactment Negeri Sembilan 1992 (Enactment 4 Year 1992)	Part IV - Offences relating to Honor	Section 61. Attempt to sexual intercourse.
Melaka	Syariah Offences Enactment (Negeri Melaka) 1991 (Enactment 6 Year 1991)	Part IV – Other Offences	Section 53. Cohabitation.
Johor	Syariah Criminal Offences Enactment 1997 Johor (Enactment 4 Year 1997)	Part IV - Offences relating to Morality	Section 27. Khalwat.

Pahang	Administration of Religion of Islam and Malays Traditions Enactment of Pahang 1982 (Enactment 8 Year 1982)	Part IX – Offences	Section 145. Kissing or khalwat.
Terengganu	Syariah Criminal Offences Enactment (Takzir) (Terengganu) 2001 (Enactment 7 Year 2001)	Part IV - Offences relating to Morality	Section 31. Khalwat
Kelantan	Syariah Criminal Code Enactment 1985 (Enactment 2 Year 1985)	Part II – Offences	Section 9. Khalwat
Sarawak	Syariah Criminal Offences Ordinance 2001 (Sarawak) (Ordinan 46 Year 2001)	Part IV - Offences relating to Morality	Section 24. Khalwat
Sabah	Syariah Criminal Offences Enactment 1995 (Sabah) (Enactment 3 Year 1995)	Part IV – Offences	Section 84. Khalwat

Table 1: Law relating to khalwat criminal offences in Malaysia

The table above shows that the entire state of Malaysia (100%) has legal provisions with regards to *khalwat*. There is a slight difference in categorizing the offence of *khalwat* in each state enactment in Malaysia. Six states (42.86%) which are Perlis, Kedah, Melaka, Pahang, Sabah and Kelantan categorize *khalwat* under the general offences. On the other hand, Pulau Pinang, Selangor, Wilayah Persekutuan, Johor, Terengganu and Sarawak (42.86%) categorize *khalwat* under the offences with regards to morality. The two remaining states (14.28%) which are Perak and Negeri Sembilan categorize it as offences relating to honor/ dignity. This is illustrated in Table 2 below.

State	Category
Perlis, Kedah, Melaka, Pahang, Sabah and Kelantan	General Offences
Pulau Pinang, Selangor, Wilayah-wilayah Persekutuan, Johor, Terengganu and Sarawak	Offences with regards to morality
Perak and Negeri Sembilan	Offences with regards to honor/dignity

Table 2: Categories of Khalwat

Apart from categorizing the offence of *khalwat*, the term of *Khalwat* has been used interchangeably among state enactments in Malaysia. Majority of the state enactments (78.57%) have clearly used the term "*khalwat*" in their respective provisions. On the other side of coins, Negeri Sembilan has used the term "attempt to sexual intercourse" to resemble *khalwat*. Likewise Melaka and Pahang in which they have used the term "cohabitation" and "kissing or *khalwat*" in their respective statutory provisions as to define *khalwat*. This can be illustrated in Table 3 below.

State	Term
Perlis, Kedah, Pulau Pinang, Perak, Selangor, Wilayah-wilayah Persekutuan, Johor, Terengganu, Kelantan, Sarawak, Sabah	<i>Khalwat</i>
Negeri Sembilan	Attempt to sexual intercourse
Melaka	Cohabitation
Pahang	Kissing or <i>khalwat</i>

Table 3: The term used for *Khalwat* in state enactments

Conclusion

There is always a silver lining when certain things are prohibited by Allah. Similarly to the prohibition of *khalwat*. The prohibition gives a lot of benefits to mankind. Nevertheless, the cases of *khalwat* are kept on hiking nowadays with what will surely be catastrophic result if it is not well-handled immediately. Thus, it would obviously lead the dysfunctional society and moral intolerance. For that reason, Allah has forbidden *khalwat* and the wisdom behind it is to avoid adultery,

to prevent children born out of wedlock and to restrain abortion.

According to the books of *fiqh* and *hadith* of the Prophet PBUH, the meaning of *khalwat* is given in various forms other than stated in the codified Islamic law as well as in the context of Malaysia. The term “*khalwat*” is defined as an offence under state enactments of Malaysia. Indeed, adultery is forbidden and any deed that leads to it, such as *khalwat* and indecent manners are totally prohibited. The appropriate sentence for this offence is in the form of *takzir* punishment as agreed by Islamic jurists and also enacted in the State Syariah Criminal Enactments of Malaysia.

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