A SOCIO-LEGAL STUDY ON CRIMINALITY OF VOLUNTARY CARNAL INTERCOURSE AGAINST THE ORDER OF NATURE

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A SOCIO-LEGAL STUDY ON CRIMINALITY OF VOLUNTARY CARNAL INTERCOURSE AGAINST THE ORDER OF NATURE

by

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To me, sex is simple, beautiful and a natural phenomenon.
If two persons want to share energy with each other,
then it is nobody's business to interfere.

– Osho (2000: 129)

ACKNOWLEDGEMENT

> WHEN Dr. P. Sundramoorthy speaks, he commands respect. People stop and listen, irrespective of what he's talking about. (The Star, 3 Nov 2007)

One morning, after completing the Master of Criminal Justice degree programme at University of Malaya, I was perusing The Star newspaper when I saw the article titled "The Life and Loves of a Criminologist", which begins with the abovementioned paragraph. I immediately told myself that I should my Ph.D in the field of criminology at USM under Dr. Sundramoorthy's supervision. Without any hesitation, I contacted him and he agreed to act as my supervisor. So, let me first extend my sincere gratitude to Dr. Moorthy (as I affectionately call him), for accepting me as his candidate and critically guiding me all along. I am also grateful to my co-supervisor, Dr. Azrina Husin, for sharing her expertise with me.

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Shamsher Singh Thind
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P.S. My mother wants me to be a doctor but my father needs a lawyer. I think I have made both of them happy.

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KAJIAN SOSIO-PERUNDANGAN BERHUBUNG KRIMINALITI PERSETUBUHAN DENGAN KERELAAN YANG BERTENTANGAN DENGAN ATURAN TABII

ABSTRAK

Seksyen 377A Kanun Keseksaan memperuntukkan bahawa mana-mana lelaki yang memasukkan zakarnya ke dalam dubur atau mulut orang lain telah melakukan kesalahan persetubuhan yang bertentangan dengan aturan tabii, yang jika sabit kesalahan boleh dihukum penjara sehingga 20 tahun dan disebat sehingga 24 sebatan kali di bawah seksyen 377B Kanun yang sama. Perbuatan ini walaupun di antara seorang lelaki dan isterinya dengan kerelaan secara persendirian termasuk dalam definisi kesalahan ini. Kajian ini telah dijalankan untuk memahami intipati pengalaman seks mulut atau dubur dengan kerelaan secara persendirian seperti yang digambarkan oleh beberapa pasangan suami isteri walaupun status jenayahnya. Dengan menggunakan kaedah persampelan tidak kebarangkalian seperti kuota, bertujuan dan bola salji, 20 pasangan suami isteri telah dipilih dalam kalangan rakyat Malaysia bukan Islam yang rela hati, dengan mempunyai tahap pendedahan kendiri seksual yang tinggi, yang berumur sekurang-kurangnya 21 tahun, berkahwin secara sah, boleh membaca, bertutur dan memahami bahasa Inggeris dengan munasabah dan telah melakukan seks sekurang-kurangnya dua kali dalam satu bulan lepas tetapi bukan seorang biseksual atau melakukan seks rambang. Data kualitatif dikumpulkan melalui temubual mendalam dan dianalisis menggunakan pendekatan tujuh langkah fenomenologi yang dimajukan oleh Colaizzi (1978) dan dipinda oleh Moustakas (1994). Sebanyak 26 makna telah dirumuskan daripada kenyataan penting yang dibuat oleh semua responden, yang kemudiannya dikelompokkan ke

dalam empat tema. Intipati yang diekstrak daripada perihal pengalaman menunjukkan bahawa seks oral dan seks dubur, dalam beberapa kes, memjadikan seks lebih baik dengan meningkatkan keseronokan, menambah kepelbagaian seks, meningkatkan libido, mewujudkan keyakinan dalam kalangan wanita atau perasaan keunggulan dalam kalangan lelaki, memuaskan fantasi seks, membantu dalam mencapai puncak syahwat, mencipta ikatan cinta yang kuat dan melengkapi seks faraj. Seks oral dan seks dubur juga menjadi satu keprluan apabila seks faraj bukan satu pilihan, sebagai contoh, semasa mengandung dan datang haid, dan juga untuk mengekalkan keperawanan, dalam beberapa kes. Seks oral mempunyai peranan yang penting semasa bercumbu-cumbuan dan juga apabila masa dan tempat adalah terhad untuk seks lain. Terdapat isu-isu seperti kepentingan mengekalkan badan yang bersih bagi mengelakkan jangkitan, dan juga memperlahankan diri dan berkomunikasi antara satu sama lain semasa hubungan seks untuk mengurangkan ketidakselesaan dan mengelakkan kesakitan. Walau bagaimanapun, isu-isu ini agak umum dan tidak khusus kepada seks oral atau seks dubur sahaja. Tambahan pula, seks dubur adalah kurang popular berbanding seks oral, tetapi bukan kerana perbuatan itu adalah bukan semulajadi atau tidak bermoral, kerana ia boleh menyebabkan kesakitan yang teruk kepada rakannya, terutama di peringkat awal, dan juga kerana ia dianggap oleh sesetengah pihak sebagai kotor. Seks faraj, mulut atau dubur adalah satu perkara peribadi yang tidak memerlukan apa-apa bentuk peraturan undang-undang, melainkan jika ia menyebabkan kemudaratan yang serius kepada mana-mana pihak. Sementara itu, pasangan tidak berminat untuk mematuhi undang-undang yang tidak adil ini yang menjenayahkan perbuatan tidak berbahaya dan akan terus melibatkan diri dalam seks oral atau dubur tetapi oleh ia adalah jenayah, mereka sanggup menyimpan rahsia untuk mengelakkan tindakan undang-

undang. Implikasi dibuat daripada dapatan kajian ini adalah bahawa semua undang-undang liwat perlu dimansuhkan selaras dengan perkembangan dalam bidangkuasa lain, dan pada masa yang sama, undang-undang rogol perlu dipinda untuk memasukkan seks oral atau seks dubur tanpa kerelaan dalam definisinya.

A SOCIO-LEGAL STUDY ON CRIMINALITY OF VOLUNTARY CARNAL INTERCOURSE AGAINST THE ORDER OF NATURE

ABSTRACT

Section 377A of the Penal Code provides that any man who inserts his penis into the anus or mouth of another person commits the offence of carnal intercourse against the order of nature, which upon conviction is punishable to an imprisonment up to 20 years in jail and to whipping up to 24 strokes under section 377B of the same Code. Even a consensual act between a man and his wife in private falls within the definition of this offence. This research was carried out to discover the essence of the experience of engaging in consensual oral or anal sex in private as described by certain married couples notwithstanding its criminal status. Using the non-probability sampling methods like quota, purposive and snowball, 20 married couples were selected among those consenting non-Muslim Malaysians with high sexual self-disclosure level, who are at least 21 years old, legally married, be able to read, speak and understand English reasonably and have done sex at least twice in the last one month but not a bisexual or promiscuous. Qualitative data was collected by way of in-depth interviews and was analysed using the seven-step phenomenological approach as advanced by Colaizzi (1978) and amended by Moustakas (1994). A total of 26 meanings were formulated from the significant statements made by all respondents, which were later clustered into four emerging themes. The essence extracted from the descriptions of the experience shows that oral sex and anal sex, in some cases, make sex better by increasing pleasure, adding variety to sex, increasing libido, creating confidence in women or the feeling of superiority in men, satisfying sexual fantasies, helping in reaching orgasms, creating

a strong bonding of love and complementing vaginal sex. Oral sex and anal sex also become necessary when vaginal sex is not an option, for example, during pregnancy and menstruation, and also for maintaining virginity, in some cases. Oral sex has an important role in foreplay and also when time and place are limited for other form of sex to take place. There are issues like the importance of maintaining a hygienic body to avoid infection, and also of slowing one down and communicating with one another during sex to reduce discomfort and to avoid pain. However, these issues are quite general and not in specific to oral or anal sex alone. Furthermore, anal sex is less popular than oral sex, but not because the former is unnatural or immoral, because it may cause severe pain to the partner, especially in the beginning stage, and also because it is regarded by some as dirty. Whether vaginal, oral or anal, sex is a private matter which does not need any form of legal regulation, unless it causes serious harm to either party. Meanwhile, the couples are not interested to abide by this unjust law that criminalises a harmless act and will continue to engage in oral or anal sex but due to its criminality, they wish to keep it a secret to avoid legal consequences. The implications made from the findings of this research are that all sodomy laws should be repealed in line with the developments in other jurisdictions, and, at the same time, rape law should be amended to include non-consensual oral or anal sex in its definition.

CHAPTER 1
INTRODUCTION

1.1 OVERVIEW

Every society needs a body of formalised rules in order to efficiently and fairly regulate the day-to-day behaviours of its members, and these formalised rules are collectively known as law (Black, 1976; Vago, 2006). There are many categories of law, depending on the function that it plays. Where its function is to punish those who behave in certain manners under certain circumstances, such law is known as the criminal law (Gordon, 1978). Any behaviour which is punishable by the criminal law is then known as a crime[1] (Fitzgerald, 1960). Ashworth (1987: 1) stated that the '... fundamental reason for having a system of criminal law is to provide a framework for the state to punish wrongdoers, and thereby to preserve an acceptable degree of social order.' He explained that '[w]ithout criminal laws and their enforcement, each individual's person, property and family would be substantially less safe from deliberate violation by others ...'

As such, it is not uncommon for sociologists and criminologists to choose crime as a field of research. However, Gottfredson and Hirschi (1990: 1) contended that the '[c]riminologists often complain that they do not control their own dependent variable, [that is to say,] that the definition of crime is decided by political-legal acts rather than by scientific procedures.' Nevertheless, Hester and Eglin (1992: 27) argued that crime cannot exist without criminal law, and until certain behaviour is proscribed by the criminal law, it cannot be considered as

[1] In this thesis, the words "crime", "criminal act", "offence" and "criminal offence" are all synonymous, and may be used interchangeably.

crime. They concluded that '[c]rime … is a relative or legalistic, rather than an absolute concept'.

One of the most celebrated maxims in the criminal justice system (which is in Latin) is *nulla poena sine lege*, meaning that there can be no punishment without law (Hall, 1937). It is this maxim that inspired Dicey (1889: 172) to pen down the oft-quoted proposition that '… [n]o man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land ...' The purpose of this maxim is to protect the members of a society from being arbitrarily, or even retrospectively, punished for their behaviours which are or were not criminal at the time of their commission.

In context of the Malaysian criminal justice system, Article 5(1) of the Federal Constitution[2] provides that '[n]o person shall be deprived of his life and personal liberty save in accordance with law.' Article 7(1) of the Federal Constitution provides that '[n]o person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.'

Be that as it may, the aforementioned maxim has a major problem. It does not distinguish the criminal laws which are just from the ones which are unjust. In other words, the practitioners of the criminal justice system (*e.g.* police,

[2] Federal Constitution is the supreme law in Malaysia and according to its Article 4(1), any law passed after Merdeka Day which is inconsistent with its provisions shall, to the extent of the inconsistency, be void.

prosecutors, judges, prison officers, *etc*.) are not concerned with the fairness or otherwise of the criminal law. As long as the criminal law is validly passed, it shall be strictly applied. For instance, the criminal law that authorises the police to detain a person indefinitely without trial (*e.g.* Internal Security Act 1960, which has now been repealed) is as “fair” as the law that punishes drug traffickers (*e.g.* Dangerous Drug Act 1952). In the case of *Cattell* v. *Ireson* (1858: 97-98), Lord Campbell C.J. opined as follows.

> It is our business not to estimate the degree of moral guilt in the act … but to see how such act is treated by the legislature … I cannot be bound by any opinion that I may form of the morality of that act but I must see what it is that the legislature has chosen to punish.

Farmer (1996) acknowledged that where some crimes are also morally wrong (*mala in se*), there are also some which are not (*mala prohibita*).

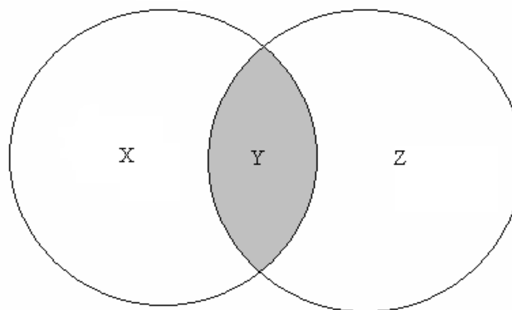

Figure 1.1 The overlapping relationship between behaviours that are criminally wrong (*X*) and that are morally wrong (*Z*).

Mala prohibita offences are those which are wrong only for the reason that they are expressly prohibited by the law (labeled *X* in Figure 1.1), and the examples whereof include parking and traffic rules and tax regulations. On the other hand, *mala in se* offences are those which are wrong in themselves regardless of the

law, arguably based on the morality that is existed within the society (labeled *Y* in Figure 1.1), and the examples whereof include rape, murder and theft. The area labeled *Z* in Figure 1.1 comprises of those behaviours which may be considered immoral but are not illegal, the examples whereof include adultery and pre-marital sex by non-Muslims[3], and until 31 July 2002, incest.[4]

Therefore, any behaviour which is proscribed by the criminal law does not have to be immoral at the same time. Similarly, any behaviour which is deemed immoral by the members of a society, it does not have to be criminal at the same time.

1.2 PROBLEM STATEMENT

Section 377A of the Penal Code, provides that any man who inserts his penis into the anus or mouth of another person is said to commit the carnal intercourse against the order of nature. This act amounts to an offence, regardless of whether

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[3] Adultery and pre-marital sex are offences if committed by Muslims, and are punishable by the state-run *Shariah* courts. For instance, section 23 of the Syariah Crime Misconduct (Penang) Enactment 1996 provides that any Muslim person who performs sexual intercourse with another person who is not his or her lawful spouse shall be guilty of an offence and shall on conviction be liable to a fine not exceeding MYR 5,000 or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

[4] Section 376A of the Penal Code provides that '[a] person is said to commit incest if he or she has [consensual] sexual intercourse with another person whose relationship to him or her is such that he or she is not permitted, under the law, religion, custom or usage applicable to him or her, to marry that other person.' Section 376B(1) of the same Code provides that anyone who commits incest shall be punished with imprisonment for a term of not less than 10 years and not more than 30 years, and shall also be liable to whipping. These sections were inserted by virtue of section 6 of the Penal Code (Amendment) Act 2001, which came into force on 1 August 2002, and was later amended by section 20 of the Penal Code (Amendment) Act 2014.

the act is carried out by an adult or a child, in private or in public, between heterosexual or homosexual partners, and with or without the consent of the parties involved. Given the wide definition of carnal intercourse against the order of nature, it is an offence even for married couples to engage in consensual oral or anal sex within the four walls of their bedrooms.

As for the punishment, section 377B of the Penal Code provides that any man who commits the carnal intercourse against the order of nature shall, upon conviction, be sentenced to an imprisonment for up to 20 years in jail and be liable to whipping for up to 24 strokes.[5] If the act is a non-consensual one, then section 377C of the Penal Code provides that such person shall be subjected to the same punishment as stated in section 377B above but with a minimum of five years in jail.

It is interesting to note that the punishment for committing the consensual carnal intercourse against the order of nature under section 377B of the Penal Code is

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[5] By definition, this offence can only be committed by men. Nevertheless, where the offence is committed by any man with the consent of his partner (whether a male or female person), then that partner is also liable for the same punishment, in accordance with the provision under section 109 of the Penal Code, which provides that '[w]hoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.' However, section 289 of the Criminal Procedure Code provides that '[n]o sentence of whipping shall be executed by instalments, and none of the following persons shall be punishable with whipping … (a) females; and (b) males sentenced to death; (c) males whom the Court considers to be more than fifty years of age, except males sentenced to whipping under section 376, 377C, 377CA or 377E of the Penal Code.

as severe as, if not more severe than, other offences like attempt to murder[6], voluntarily causing grievous hurt using a dangerous weapon[7] and gang-robbery.[8] Moreover, the offence of consensual oral or anal sex under section 377B of the Penal Code is listed in the First Schedule of the Criminal Procedure Code as a non-bailable[9] and non-compoundable[10] offence, and the police may arrest any person suspected of committing this offence without a warrant.

In one occasion in Singapore, a police coastguard named Sergeant Anis Abdullah was convicted under section 377 of the Singapore Penal Code [Cap. 224], which is *in pari materia* with sections 377A and 377B of the Penal Code,

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[6] Section 307 of the Penal Code provides that '[w]hoever does any act with such intention or knowledge and under such circumstances, that if he by that act caused death he would be guilty of murder, shall be punished with imprisonment for a term which may extend to … [10] years and shall also be liable to fine, and if hurt is caused to any person by such act, the offender shall be liable to imprisonment for a term which may extend to … [20] years.'

[7] Section 326 of the Penal Code provides that '[w]hoever … voluntarily causes grievous hurt by means of any instrument for shooting, stabbing, or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment for a term which may extend to [20] years, and shall also be liable to fine or to whipping.'

[8] Section 395 of the Penal Code provides that '[w]hoever commits gang-robbery shall be punished with imprisonment for a term which may extend to [20] years, and shall also be liable to whipping.'

[9] Section 388(1) of the Criminal Procedure Code provides that the officer in-charge of the police district or the court may discretionally release on bail any person arrested in connection with a non-bailable offence.

[10] Non-compoundable offences are regarded as the offences against the public policy, and, as such, the victims of such offences are not permitted to forgive the wrong-doers. It is up to the Attorney-General to decide whether or not to initiate or continue the prosecution of such offences, per section 260(6) of the Criminal Procedure Code and Article 145(3) of the Federal Constitution.

and was sentenced to two years in jail for engaging in a consensual oral sex with an adult female person in private (*Public Prosecutor* v *Anis Abdullah*, 2004).[11]

This brings us to the question of whether the law that criminalises oral and anal sex between consenting heterosexual adults in private is a just law or otherwise. Should such act be criminalised on the sole ground that it is purportedly unnatural and therefore immoral, although it poses no harm to anyone? Considering the words of Ashworth (1987), as stated in unit 1.1 above, the purpose of the criminal law is to protect people, their properties and their families from the deliberate violation by others. Then, from what harm does section 377B of the Penal Code intend to protect the public?

At this juncture, it is prudent to consider another maxim of law (which is also in Latin), that is, *cessante ratione legis, cessat ipsa lex*, meaning that when the reason for the law ceases, the law itself should cease to exist. Davey and Davey (2001: 38) concisely explained this maxim as follows.

> ... [E]very rule should have a reason. There should be some underlying rationale for each law in order to justify its existence and if ... the rationale no longer exists, the law should be changed.

As seen above, an unjust law – unless it is amended, repealed or avoided by the court of law under Article 4(1) of the Federal Constitution – is a law that demands the same amount of compliance on the part of the member of society, like any just law demands. The courts of law in Malaysia are not discouraged

[11] Although the accused person in this case is a Muslim, he was convicted under the secular criminal law of his country, and not under the Islamic law or *Shariah*. The verdict of this case would have been the same had he not been a Muslim.

from enforcing any validly passed law on the sole basis that it is an unjust law. It is the job of the Parliament to make the necessary amendments, or even abolitions, if necessary, according to the Federal Constitution. In other words, the lawmakers should distinguish all acts which offend the public morality from those which do not, and the criminal law should only strive to punish those behaviours which are deemed reasonably offensive to public. As stated in the report prepared by the Wolfenden Committee (1957: para 61) in the United Kingdom, '[t]here must remain a realm of private morality which is, in brief and crude terms, not the business of criminal law.'

There are many factors that have to be taken into consideration before making a call either to criminalise any behaviour or to decriminalise one, including the financial implications on the country's budget, governmental policies, expert reports and public opinions (Wan and Ramy, 2003).

1.3 AIMS OF RESEARCH

This research is socio-legal in nature. Anwarul (2007: 10) explained that a socio-legal research refers to '... a study that combines legal research with an investigation of some problem or question which is essentially of a social nature, and uses techniques of data collection used in social science research.' He further explained the underlying aim of such study is '... to determine the nature and extent of the adequacy or inadequacy of the existing law, or the need for a new law, or to ascertain whether an efficacious use of law can offer some kind of solution or answer to the problem or question or whether the law can be used as an instrument of control, change and reform.

The approach used in this research is that of phenomenology, which Creswell (2016: 280) defines as '… a qualitative design with the intent to develop a detailed description of how a number of individuals experience a specific phenomenon …' Phenomenology has a strong philosophical connection and it draws heavily on the writings of Edmund Husserl and those who expanded on his views, such as Martin Heidegger, Jean-Paul Sartre and Maurice Merleau-Ponty (Spiegelberg, 1982). However, phenomenological methodology as advanced by Colaizzi (1978) and modified by Moustakas (1994) was employed in this research.

Therefore, the humble aim of this socio-legal study is to extract the essence of a composite description of the phenomenon of engaging in oral sex and anal sex, as experienced by the consenting heterosexual adults in private, through the collection and analysis of qualitative data obtained from in-depth interviews. It is hoped that the findings of this research may provide the members of Parliament with some scientific data for them to reconsider the logic for section 377B of the Penal Code.

1.4 RESEARCH QUESTIONS

Blaikie (2007: 6) postulated that the research questions '… are the foundations of all research, [for] they make a research problem researchable.' Creswell (2007: 108) recommended that a researcher should '… reduce her or his entire study to a single, overreaching [central] question and several sub-questions.' These subquestions can be divided into two categories, *i.e.* issue sub-questions and topical sub-questions. Creswell (2007: 109) defined the issue sub-questions as the questions that are formed by breaking down the central question for the

purpose of examination, whereas the topical sub-questions (also known as procedural questions) are those subquestions that advance the procedural steps in the process of doing the research. Therefore, the central question and the sub-questions (both those of issue and topical/procedural) are as follows.

Central Question

What is the essence of the experience of consensual oral or anal sex in private as described by certain married couples, notwithstanding its criminal status?

Sub-Questions (Issues)

1. Do they do oral or anal sex and, if so, why do they do it?

2. Do they appreciate the criminality of oral or anal sex and, if so, to what extent?

3. What impact will it make to their sexual behaviour if they were to stop engaging in oral or anal sex?

4. To what extent they are willing to tolerate, if not accept, any act of state intervention into their private lives?

Sub-Questions (Topical/Procedural)

1. What significant statements of their experience may be obtained from them by way of in-depth interviews?

2. What meanings may be formulated from such statements?

3. What common themes may be clustered from such meanings?

4. What textural and structural descriptions may be inferred from such themes?
5. What essence of such phenomenon may be extracted from such descriptions?

1.5 LIMITATION OF SCOPE

In this research, the discussion on the practice of oral sex and anal sex is limited to the one between the heterosexuals only. The reason is that any discussion on homosexuality will give rise to certain issues which are not relevant in the discussion pertaining to heterosexuality. For example, it is argued that homosexuality undermines the institution of marriage (Eskridge, 2003) and that it is also a threat to the security of a nation, as alleged by some politicians and NGOs, which led to the banning of *Merdeka Seksualiti* movement festival (The Star, 2011, November 3).[12] Besides, the respondents in this research are, as shall

[12] In fact, the Chief Minister of Malacca, Datuk Seri Mohd Ali Rustam, said that he will move a motion to amend its state Islamic enactment to prosecute gays and lesbians, and once the enactment was gazetted as a law, homosexuals and lesbians could be tried at the *Shariah* court (The Star, 2011, November 9).

be seen later in unit 3.7, married people, who are all heterosexual couples[13] and, as such, their views may be prejudicial against the male homosexuals.[14]

Furthermore, this research is concerned with the oral and anal sex performed by consenting adults in private only. Non-consensual sexual act is a despicable behaviour which the society must be protected from, and as such the offence created under section 377C of the Penal Code is a non-issue in this research.

Also, performing sex in public is deemed offensive, and may be rightly punished by section 294 of the Penal Code[15] or section 21 of the Minor Offences Act 1955.[16] These are also non-issues in this research.

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[13] Section 69(d) of the Law Reform (Marriage and Divorce) Act 1976 provides that a same-sex marriage between non-Muslims in Malaysia is void *ab initio*. Section 11 of the Islamic Family Law (Penang) Enactment 2004 provides that a marriage between Muslims shall be voided unless all conditions necessary, according to the Islamic law, for the validity thereof are satisfied. Haron (2007) wrote that there are five compulsory requirements for a valid marriage in Islam (*nikah*), namely, offer and acceptance (*ijab-qabul*), bride's guardian (*wali*), two witnesses, bridegroom (male) and bride (female).

[14] There is nothing in the Penal Code that penalises the sexual act between female homosexual couples, although such act amounts to an offence if committed by Muslim females. For instance, section 26 of the Syariah Crime Misconduct (Penang) Enactment 1996, read together with section 2 of the same Enactment, provides that any Muslim female person who commits *musahaqah*, which means a sexual relation with another female person, shall be guilty of an offence and shall on conviction be liable to a fine not exceeding MYR 5,000 or to imprisonment for a term not exceeding three years or to whipping not exceeding six strokes or to any combination thereof.

[15] 'Whoever, to the annoyance of others … does any obscene act in any public place, … shall be punished with imprisonment for a term which may extend to three months, or with fine, or with both.'

[16] 'Any person who … is guilty of any … disorderly or indecent behaviour, … in any … public place …, shall be liable to a fine not exceeding ... [MYR 25] or to imprisonment for a term not exceeding … [14] days, and on a second or subsequent conviction to a fine not exceeding … [MYR 100] or to imprisonment for a term not exceeding three months, or to both.'

Next, oral sex means the oral stimulation of the penis (*fellatio*), not the oral stimulation of the vagina (*cunnilingus*) or of the anus (*anilingus*), as the latter two are not criminalised by the Penal Code. Further not included within the definition of oral sex is the oral stimulation of the penis of an animal, although it is an offence under section 377 of the Penal Code.[17]

The anal sex means penile penetration of the anus. Any consensual penetration of the anus using artificial penis (*dildo*), fruits/vegetables (like carrot, unpeeled banana, brinjal, *etc*.) or other inanimate cylindrical objects are not offences under the Penal Code, and, as such, not included within the definition of anal sex.[18] Also not included within the definitions of anal sex is the penile penetration of the anus of an animal, although it is an offence under section 377 of the Penal Code.

Finally, although some references to religious texts are made where necessary in Chapter 2, this research adopts a non-religious, secular perspective. It is argued that any transgression of the codes of a particular religion must be dealt in accordance with the provisions of that religion, and only those who profess and practice such religion shall be subjected to such provisions. Malaysia, although its citizens are predominantly Muslims, is by and large a multi-religious

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[17] 'Whoever voluntarily has carnal intercourse with an animal shall be punished with imprisonment for a term which may extend to … [20] years, and shall also be liable to fine or to whipping.'

[18] Section 377CA of the Penal Code provides that '[a]ny person who has sexual connection with another person by the introduction of any object into the vagina or anus of the other person without the other person's consent shall be punished with imprisonment for a term not less than five years and not more than … [30] years and shall also be liable to whipping.'

society.[19] As such, any attempt to make all persons in Malaysia subjected to the criminal law which enforces the morality of a particular religion, tantamount to a breach of Article 3(1) of the Federal Constitution, which provides that 'Islam is the religion of the Federation, but other religions may be practised in peace and harmony in any part of the Federation', and also of Article 11(1) of the Federal Constitution, which provides that '[e]very person has the right to profess and practise his religion.'

1.6 DEFINITIONS

Unless expressly defined otherwise, the following words or phrases shall be interpreted as follows in this research:

- *sex* means sexual intercourse, and not the gender of a person;
- *oral sex* means the sexual intercourse between two persons where the penis of one is inserted into the mouth of the other;
- *anal sex* means the sexual intercourse between two persons where the penis of one is inserted into the anus of the other;
- *sodomy* means anal or oral sex;
- *adult* means any person who has attained the age of 18 years;
- *consent* does not include any consent which is obtained by way of duress, undue influence or deception, or given as a result of a mistake

[19] The Population and Housing Census 2010 shows that Malaysian citizens are divided in the following religious composition: Islam (61.3%), Buddhism (19.8%), Christianity (9.2%) and Hinduism (6.3%) and other religions (3.4%) (Source: Department of Statistics, Malaysia)

of fact, and the meaning of the adjectives *consenting* and *consensual* shall be construed accordingly; and

- *private* means any enclosed area which is not commonly accessible to public but does not include public toilet, *etc*.

CHAPTER 2
LITERATURE REVIEW

2.1 OVERVIEW

Creswell (2007: 102) argued the importance in any qualitative research is to provide '… a rationale or reason for studying the problem' and further stressed that the '… strongest and most scholarly rationale for a study … comes from … a need … to add or to fill a gap in the literature or to provide a voice for individuals not heard in the literature …' Baritt (1986: 20) explained the said rationale as follows.

> [Rationale] is not the discovery of new elements, as in natural scientific study, but rather the heightening of awareness for experience which has been forgotten and overlooked. By heightening awareness and creating dialogue, it is hoped research can lead to better understanding of the way things appear to someone else and through that insight lead to improvements in practice.

Creswell (2007: 102-103) argued that '[a]lthough opinions differ about the extent of literature review needed before a study begins …', his personal view is that it is '… helpful to visually depict where [a] … study can be positioned into the larger literature …', that is to say, '… a research map …of existing literature and show in this figure the topics addressed in the literature and how one's proposed research fits into or extends the literature.'

I read with interest the points advocated by Silverman (2010: 318) on whether '… a separate chapter dealing with the literature …' is needed. He seems to have been influenced by Wolcott (1990: 26) which stated that '… [t]here is no longer

a call for each researcher to … provide an exhaustive review of the literature …’ Although I followed the traditional method of having a separate chapter for literature review, I am also mindful to the advice given by Walcott (1990: 17), which is as follows.

> I expect my students to know the relevant literature, but I do not want them to lump … it all into a chapter that remains unconnected to the rest of the study. I want them to draw upon the literature selectively and appropriately as needed in the telling of their story.

Even if it is agreed that literature review as a separate chapter is necessary to show existing knowledge and the gap therein (if any), it is still disputed when a researcher who is embarking a phenomenological study should do his literature review. One argument is that literature review should be delayed until data collection and analysis tasks have been completed to avoid a researcher being influenced by what he read rather than by what he was found, as suggested Hamill and Sinclair (2010).

I will revisit this point in unit 3.3 since some background knowledge with regards to phenomenology is required to be able to appreciate this dilemma. For now, it is sufficed to say that only basic literature review was carried out before data collection and analysis and the majority of the literature was reviewed thereafter.

2.2 THE INDIAN PERSPECTIVE

The Penal Code was adopted from the Indian Penal Code[20] (Cheang, 1990: 1) and was originally enacted in the Federated Malay States in 1936 as the Penal Code (F.M.S. Cap 45).[21] Subsequently, it was revised and renamed in 1997 to Penal Code. The Penal Code is still to a large extent *in pari materia* with the Indian Penal Code, although it has been amended for a number of times since its enactment and subsequent revisions, As such, any discussions concerning the Indian Penal Code are also relevant to that of Penal Code.

The draft of the Indian Penal Code was originally prepared by Lord Macaulay, the first member of the Law Commission of India and it was presented to the Governor-General's Council in 1837 (Morgan and Macpherson, 1861). The draft was only enacted as the criminal code of India in 1860, after a careful revision made by his successor, Sir Barnes Peacock (Trevelyan, 2006; Smith, 2004). Thereafter, this code was used as the basis of criminal law in other British colonial states, including Burma (Myanmar), Kenya, Nigeria, Singapore, Ceylon (Sri Lanka) and, of course, Malaysia (Cheang, 1990; Yeo, 1997).

Section 377 of the Indian Penal Code creates the offence of carnal intercourse against the order of nature. This section provides as follows.

> Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment

[20] The full citation of this statute is the Indian Penal Code (Act No. 45 of 1860), but for the convenient sake, this statute shall be hereinafter simply referred to as the Indian Penal Code.

[21] A federation of four Malay states, *i.e.* Perak, Selangor, Pahang and Negeri Sembilan, which was formed in 1895 and was headed by a British Resident-General (Wan and Ramy, 2004).

> for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
>
> *Explanation* - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Thakker (1998: 1822) wrote that the scope of this section is to criminalise '… carnal intercourse against the order of nature by man with man, or in the same unnatural manner with woman, or by man or woman in any manner with beast.' In other words, Chandrachud, Manohar, Singh and Saha (2002: 1818) commented that '… [t]his section is intended to punish the offence of … buggery and bestiality.' Manohar and Singh (2011: 806) explained that 'even the slightest degree of penetration is enough and it is not necessary to prove the completion of the intercourse by the emission of the seed.' Morgan and Macpherson (1861: 326) explained that lack of consent is not an ingredient of this offence, which means that a person can be found guilty of this offence even though his human "victim" has consented to the act. Gaur (2006: 1213) justified that the '… British drafted the present law … under section 377 … in the Victorian era … when homosexuality was considered as an aberration that needed to be rectified by the State by criminalizing all forms of sexual behaviour other than penile-vaginal.'

Nowhere in the Indian Penal Code, the meaning of the phrase "carnal intercourse against the order of nature", is explained. Therefore, resort must be made to the judicial pronouncements in the law cases. Chandrachud, Manohar, Singh and Saha (2002: 1819) stated that '… any act like putting [the] male organ into victim's mouth which was an initiative act of sexual intercourse for the purpose