### Article: Hudud - test for the Constitution

There are provisions for the federal legislature to authorise Kelantan to implement its Islamic criminal enactment.

**PARTI Islam SeMalaysia (PAS) appears determined to introduce a Private Member's Bill in Parliament this June to implement its Syariah Criminal Code Enactment of 1993. The Enactment had, two decades ago, sought to apply hudud, the Islamic criminal code, to Muslims in Kelantan. However, it could not be implemented due to many constitutional hurdles.**

**Federal-state division:** First, under Schedule 9, List II, Paragraph 1, State have authority relating to "tenure and punishment of offences by persons professing the religion of Islam, except in respect to matters included in the Federal List." Criminal law and procedure, administration of justice, Kelantan, and powers of all courts, creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law are in federal hands. Theft, robbery, rape, murder, incest and unnatural sex are all dealt with by the federal Penal Code. These offences are, therefore, out of bounds for the States—yes, even though they are also serious wrongs in Islamic criminal jurisprudence.

Second, Schedule 9, List II, Paragraph 1 clearly provides that Syariah Courts shall have jurisdiction only over persons professing the religion of Islam. This means that Syariah Courts have no power to apply the hudud laws to non-Muslims even if the non-Muslims consent to be so subject. Jurisdiction is a matter of law and not of submission or acquiescence.

Third, the Constitution in Schedule 9 List II para 1 says that Syariah Courts "shall not have jurisdiction in respect of offences except in so far as conferred by federal law". The relevant federal law is the Syariah Courts (Criminal Jurisdiction) Act 1965. It imposes limits on penalties that the Syariah Courts can impose. These are maximum three years jail, RM5,000 fine and six lashes. Death by stoning, amputations and life imprisonments are outside the powers of the States.

Fourth, police, prisons, reformatories, remand homes and places of detention are all in the Federal List. Therefore, State-run detention or rehabilitation centres enforcing hudud penalties are all beyond State powers.

**Constitutional crevices:** PAS is hoping that these significant hurdles can be overcome if it takes the battle to the federal Parliament and gets the federal legislature to authorise Kelantan to implement its Islamic criminal enactment. Indeed, such provisions exist.

**Article 76A:** This Article permits the Federal Parliament to extend the legislative power of the States to enact laws on matters in the Federal List. This means that if the political equation is favourable, the Federal Parliament could by a simple majority pass an Act to authorise Kelantan to enact laws on crimes in Kelantan. The Kelantan law would then supersede any federal law on the point. In addition, under Article 80(4), the federal government can by law extend the executive authority of the State to cover the authorised federal topic.

**Private Member's Bill:** Perhaps Kelantan intends to initiate a Private Member's Bill to launch the Article 76A initiative. Private members are those MPs not holding ministerial posts. They may, under Standing Orders of the two Houses, draft a Bill and seek leave of the House by way of a motion to introduce the Bill. If leave is granted, then the Bill shall be referred to the Minister concerned. With his report, the Bill can be taken up for second reading, debate and vote.

Such a Bill requires a simple majority of those present and voting. With 21 MPs and two independent MPs, PAS, 88 from Umno and some Muslim MPs from PBN and Sabah and Sarawak, the Bill could squeeze through. The political dynamics is, of course, immensely complicated. Constitutional crevices: Presuming that PAS succeeds under Article 76A to make inroads into the Federal List or through a Private Member's Bill to legislate for criminal law in Kelantan, will the hudud issue be settled once for all? No one with knowledge of constitutional law will argue that the issue is straightforward and simple. Even if the Law Enactment is passed, it may be challengeable in a court on constitutional grounds.

For example, if the State law on crime is made applicable only to Muslims and two thieves, one a Muslim and the other a non-Muslim, or conviction receive radically different penalties, is this not a flagrant violation of the rule of equality before the law under Article 9?

Article 8 forbids differentiation between persons or the ground of religion "except as expressly authorised by this Constitution." There is an exception in Article 8(5) in relation to personal law. "This Article does not invalidate or prohibit any provision regulating personal law."

Matters of theft, robbery, rape, incest and homosexuality are not by stretch of imagination matters of personal law. This means that it is arguable that our Constitution does not permit the States to impose on non-Muslims.

It would be different, of course, if Malaysia were a full-fledged Islamic state. Then the hudud or any other uniform criminal law would apply to all.

Which leads one to the perennial polemic about whether Malaysia is an Islamic or secular state? The issue is immensely complicated and cannot be covered here in detail save to say that we have a Supreme Constitution and the Syariah applies in only a limited (though expanding) field and only to Muslims.

Any change to this arrangement will necessitate radical amendments to many provisions of the Constitution, require special two-thirds majorities in both Houses, and must be agreed by the Conference of Rulers and consent of the Governors of Sabah and Sarawak.

It is clear that the PAS attempt to secure the enforcement of its 1993 Islamic Code is part of its broader aspiration of an Islamic state. There are many slippery slopes and constitutional conundrums.

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