

Hudud and the Struggle for Malaysia's Constitutional Soul

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The recent case of Raif Badawi, sentenced to 1000 lashes for his blog in Saudi Arabia, made international news and met with widespread condemnation. However, away from international headlines, lawmakers in the Malaysian State of Kelantan are looking to impose similarly harsh criminal law penalties for Muslims, penalties contrary to the Malaysia's Federal Constitution and its English common law tradition. On 19 March 2015, the State Assembly of Kelantan, one of the 13 states of the Malaysian Federation, unanimously passed amendments to the 1993 *Syariah* (Sharia) Criminal Code, providing for the implementation of a range of [Islamic criminal law punishments \(*hudud*\) in the state](#).

The Code provides for three main crime categories: *hudud* (Islamic punishments), *qisas* (just retaliation), and *ta'zir*, a discretionary punishment that courts can impose for offences other than *hudud* and *qisas* offences. The discretion of the court may also be invoked for *hudud* and *qisas* offences which do not fulfill the strict requirements for *hudud* and *qisas* punishments. This analysis focuses on the *hudud*, which is defined in the Code as offences that are fixed by the Quran and the *Sunnah* (practices of the Prophet). The Code spells out six *hudud* crimes – *sariqah* (theft), *hirabah* (robbery), *zina* (unlawful sexual intercourse), *qazaf* (slandorous accusation of *zina*), *syurb* (consumption of alcohol), and *irtidad* (apostasy). The Code specifically provides that it would be applicable to Muslims only. But, unlike its predecessor, in the amended Code the proposed punishments include amputation of the right hand for first-time theft offences, although this cannot be carried out if one of seventeen prescribed conditions listed in the Code is met. Same-sex sexual conduct or such 'unlawful sexual conduct' as adultery or intercourse outside marriage could even entail stoning to death, provided that four adult, male eye-witnesses 'of just character' testify to the act. Alcohol consumption could be punished by 40 to 80 lashes. These initiatives by the Kelantan State Assembly pushing for the *hudud* law have serious constitutional implications, especially *vis-à-vis* the allocation of federal and state powers and the fundamental liberties of Muslims and non-Muslims in Malaysia. Kelantan is the first state in the Federation that has sought to implement *hudud* law, which will be applied only within the state.

Islam in the Constitution: from the beginning

The Federation of Malaysia, comprising 13 states and 3 federal territories is based on the Westminster system of parliamentary democracy, although the powers of government are defined and circumscribed by its written constitution. Article 4 of its [Federal Constitution](#) (“FC”) declares itself to be the “supreme law of the Federation” such that inconsistent legislation is unconstitutional and void. Article 162 preserves the continuity of existing English common law and local legislation enacted by British authorities, unless specifically repealed.

Malaysian society is [multi-ethnic and multi-religious](#) accommodating roughly 50% Malays, 12% bumiputera natives, 22% Chinese and 6% Indians (including non-citizens). Thus, while article 3(1) of the FC declares Islam to be the religion of the federation, the original consensus among the political elites was that this clause would have symbolic rather than substantive effect and would not change the essentially secular nature of the state or the civil rights of non-Muslims. The Constitutional Commission, the Malay sultans as well as non-Malay parties opposed the inclusion of article 3(1). The Malay rulers were also concerned that including the confessional clause in the constitution would undermine their authority over Islamic matters within their respective states. The Federal Constitution thus retains the Malay sultans as constitutional heads of state, with sovereignty over Islamic matters and Malay customs. Article 3(1) was eventually included after its proponents, the United Malays National Organization (UMNO), part of the *Barisan Nasional* alliance that had won the first legislative assembly elections, assured that it would not affect non-Muslims’ civil rights or change the Federation’s secular nature.

This originalist understanding of article 3(1) as having limited effect was affirmed by the Supreme Court, then Malaysia’s highest court, in the 1988 case of *Che Omar Bin Che Soh v PP* case. The court held that article 3(1) only authorizes the use of Islamic “rituals and ceremonies” in public and official events, and was not meant to incorporate Islamic doctrines as controlling principles of constitutional interpretation. In other words, article 3(1) was not meant to be a repugnancy clause, unlike article 227 of the [Pakistani Constitution](#) which states that “no law shall be repugnant to the teachings and requirements of Islam as set out in the Holy Quran and Sunnah, and all existing laws shall be brought into conformity therewith.”

In the last 25 years, however, this original understanding of article 3(1) has been increasingly challenged within a broader contention about the nature of the Malaysian state. Not only have Islamists demanded a more expansive space for Islam in the public sphere, including in public law, but Malay nationalists have also joined in the chorus demanding stronger recognition of the prioritized status of Islam as part of their ideal Malay-Muslim state. The State Assembly’s recent push for the implementation of *hudud* laws in Kelantan state must be understood within this broader political and social conflict surrounding the status of Islam in the constitutional order.

PAS and the Path towards *Hudud*

The Pan-Malaysian Islamic Party (PAS) sits at the center of the controversy to implement Syariah-inspired criminal law. This is not the first time that PAS has attempted to pass such laws. In November 1993, just over three years after PAS won the state of Kelantan from the ruling coalition (*Barisan Nasional* (BN)) through a landslide victory in the 1990 general election, the PAS-led state legislature unanimously passed the Syariah Criminal Code Enactment. The Criminal Code thus provided 72 clauses, including six *hudud* offences. These

offences were mostly retained in the latest amendments passed by the state legislature in March 2015. However, in light of existing conflicts with the Federal Constitution and the Syariah Courts (Criminal Jurisdiction) Act 1965, which will be discussed below, the Code could not be implemented and enforced.

The passing of the *hudud* legislation is also part of a broader political contest within Malaysian politics for Malay-Muslim votes, where PAS has emerged as the main contender of UMNO which dominates the ruling coalition government, especially in the Malay heartlands of Kedah, Kelantan, and Terengganu. The issue is closely intertwined with ethnic nationalism as there is a close association between Islam and Malay ethnicity. The issue is accentuated in Kelantan because while the Malay-Muslim population comprises about 60 percent of the electorate in Malaysia, they make up at least 95 percent of the electorate in Kelantan. The fierce electoral contest between the two parties, especially since the Islamic resurgence in the 1970s, has increased the salience of religious issues in local politics. Since the 1980s, PAS has maintained its desire to establish an Islamic state, although this might not have always been expressed explicitly in favor of political expediency. In spite of that, where it could – in its capacity as state government – PAS promoted various initiatives furthering its vision of an Islamic agenda and to safeguard Muslim interests.

Indeed, the 1993 Criminal Code was advanced to fulfil PAS' electoral promise of introducing *hudud* laws, although PAS was well aware that such laws could never be implemented due to the limitations spelled out in the [Syariah Court \(Criminal Jurisdiction\) Act 1965](#) and the Federal Constitution, as explained below. One way to understand this maneuver is to see it as a means of putting the BN federal government on the spot, given the continuing battle between UMNO and PAS to 'out-Islamize' one another. The federal government staved off PAS' efforts, with the then Prime Minister arguing that the PAS-proposed Criminal Code was against the teachings of Islam and was advanced for political mileage. The Prime Minister was not alone in his opposition to the 1993 code; a renowned Muslim legal scholar – Professor Mohammad Hashim Kamali – has also written a [critique of PAS' hudud laws](#), arguing that they fail to acknowledge the present realities of the Malaysian society and that strict adherence to such literal rules misses Islam's broader, more important objectives. Nevertheless, besides politics, it must also be acknowledged that from PAS' perspective, putting forward the 1993 Criminal Code that penalized *hudud* offences was also a matter of religious duty that must be carried out to avoid sin. Similar claims were made in the wake of the latest amendment to the Criminal Code, with members of the Legislative arguing from across the political divide that the *hudud* agenda [furthers God's commands](#) and that it was not a mere political move. Still, there are suggestions that the recent push for [hudud was motivated by both internal and external electoral considerations](#), in light of the impending PAS general assembly in early June 2015, as well as the next general elections in 2018.

Federal vs. State Power

Regardless of the motivations, there are serious legal and constitutional issues to consider. The implementation of *hudud* in Kelantan would violate the 1965 Syariah Courts (Criminal Jurisdiction) Act. This federal law limits the power of Syariah courts to impose a maximum punishment of three years imprisonment, a fine not exceeding RM 5,000 and/or 6 strokes of the cane. The constitution further clarifies that “[i]f any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.”

The law is also arguably unconstitutional because it is inconsistent with the allocation of federal and state powers in the constitution. While the FC envisages the administration of Islamic law and Syariah courts as part of the permanent powers of the constituent states, criminal law is assigned to the federal power. The Federal List (List I) of the Constitution's Ninth Schedule along with article 74 on the subject matters for federal and state laws, allocates both civil and criminal laws to the legislative powers of the federal Parliament - with the exception of the enumerated matters falling under the jurisdiction of state legislatures. Under the State List (List II) of the Ninth Schedule, state legislatures are authorized to enact Islamic, personal and family laws that are applicable to persons professing the religion of Islam. With this limitation, the states are also entitled to create and punish "offences by persons professing the religion of Islam against precepts of that religion, *except in regard to matters included in the Federal List*".

Some of the crimes contained in the Kelantan law like *sariqah* (theft) and *hirabah* (robbery), are already covered under federal criminal law. The Federal Court of Malaysia's judgment in *Sulaiman bin Takrib v Kerajaan Negeri Terengganu*, where it addressed the distinction between criminal law and offences against the precepts of Islam, would also mitigate against the constitutionality of the *hudud* law. Although the Federal Court declined to conclusively lay down the principles for the distinctions to be made between the two, preferring for the matter to be decided on a case by case basis. Nonetheless, the Court stated that if an offence has been recognized in federal law since before independence, it should be classified as 'criminal law' within federal jurisdiction. Where such a law did not exist prior to independence, it still did not mean States had jurisdiction to legislate upon the matter that, instead, would have to be determined on a case by case basis. Since the federal Penal Code predates independence, the federal law (the Penal Code) should prevail over the 1993 Syariah Criminal Code in areas of overlap.

Religious Freedom and Equal Protection

Implementing the *hudud* law, would curtail the fundamental liberties of Malaysians, with a disparate impact on Muslims and non-Muslims. For instance, the *irtidad* (apostasy) offence goes against an internationally recognized tenet of freedom of religion that encompasses the right to choose one's own religion. Criminalizing apostasy would also aggravate the restrictions that Muslims have increasingly faced in exercising their right to freedom of religion. There have been many instances, where Muslims who wish to follow unorthodox beliefs within Islam or to leave Islam entirely have [faced prosecution under Syariah laws](#) and/or were denied their right to convert out of Islam. This is despite the fact that the constitution guarantees the right to profess and practice one's religion.

Thus far, the Federal Court's position has been to decline jurisdiction over constitutional challenges involving apostasy by deferring to the Syariah courts - given that the constitution explicitly delineates the jurisdiction of the High Court from that of the Syariah courts. The Court has not conclusively stated though that article 11(1) does not guarantee the right to choose one's religion. If the Federal Court upholds the implementation of the *hudud*, specifically the provision on *irtidad* (apostasy) - should the matter come before it - this would sound a death knell to the very core of religious freedom for Muslims in Malaysia.

While some may argue that the implementation of the Criminal Code vindicates the rights of Muslims, who wish to be governed by an Islamic system, it, however, goes against the rights

of Muslims who do not wish to be governed by the law since they are not able to opt out of them. The implementation of *hudud* would also mean that [Muslims and non-Muslims would be subject to different criminal laws](#) and face differing punishments, as the law only applies to Muslims. For example, under Section 7 of the state's *hudud* law, a Muslim guilty of theft in Kelantan can be punished by amputation of his limbs. In contrast, a non-Muslim convicted of the same crime of theft would face a maximum seven-year jail term and/or fine under Section 379 of the federal Penal Code. The injustice of unequal application of the law becomes even starker when Muslims and non-Muslims are co-perpetrators of the same offence criminalized under *hudud* state law and the federal Penal Code. In the case of joint commission of theft, one could face permanent amputation, while the other would face an arguably lighter sentence of a jail term or even just a fine. Thus, the implementation of *hudud* would further widen the differential treatment of Muslims from non-Muslims. This goes against the equality and equal protection guarantees of the constitution. To be clear, the equality provision states that the article “does not invalidate or prohibit - any provision regulating personal law...” Indeed, Malaysia has a pluralistic legal system, where family, inheritance, and other religious matters for Muslims are dealt with under the Syariah legal system. However, the proposed *hudud* laws would seriously expand the scope of the Syariah legal system in the effected states. Such expansion of the *hudud* could even mean that it goes beyond “personal law” and thus would enjoy no exception from the equality requirement of the federal constitution.

Lastly, even though *hudud* laws are only applicable to Muslims, their implementation could have unforeseen adverse impact on non-Muslims as well. It cannot be gainsaid that the rising restrictions non-Muslims face on their religious freedom, such as harassment in the form of [raids by state religious departments](#) and denial of equal rights stem from an increasingly assertive demand to prioritize Islam in Malaysia. These restrictions have often been justified on the basis of the need to ‘protect Islam’ and the government has been complicit or active in [such violations of religious freedom](#). The courts have also not appeared active in stopping such practices. In a recent case concerning the state-imposed prohibition to use the word ‘Allah’ by Christians, the Court of Appeal even stated that “insulat[ing] [Islam] against any threat faced or any possible and probable threat to the religion of Islam” is necessary and that “the most possible and probable threat to Islam, in the context of this country, is the propagation of other religion to the followers of Islam.”

Conclusion

The recently concluded PAS party convention, where the pro-*hudud ulama* faction of the party overwhelmingly won key positions, brings PAS a step closer to realizing its aspirations to fully implement the Syariah Criminal Code in the state of Kelantan. The faction is pushing ahead with the plan to table a private member's bill to amend the Syariah Court (Criminal Jurisdiction) Act 1965 that would allow Syariah courts to impose *any* sentence allowed by Islamic law. Given the present limitations imposed by the 1965 Act on Syariah court punishments, the amendment could pave the way for certain punishments prescribed in the Code to be implemented in Kelantan. In this regard, the victory of the *ulama* faction is significant, because in the lead up to the general assembly there were talks about a “unity government” or a cooperation of sorts between PAS and UMNO to advance policies favoring Islam and the Malays in the country, should the *ulama* faction emerge triumphant.

However, as discussed above, there are grave constitutional implications should the *hudud* law be implemented and there would be reverberating effects throughout Malaysian society for Muslims and non-Muslims. Implementing the *hudud* law would set Malaysia's multi-religious society on a dangerous trajectory of repression and fragmentation. It is hoped the politicians elected by Malaysians to represent their interests will rise above political expediency, and vindicate the rights of *all* Malaysians. This is crunch time for Malaysia.

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