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The Hudud Controversy in Contemporary Malaysia: A Study of Its Proposed Implementation in Kelantan and Terengganu

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Abstract- This paper explores and examines *Hudud* punishments in Islamic penal system, and is specifically purposed to analyse the proposed actualisation of the *Hudud* law in the two Malay-Muslim dominated states of Kelantan and Terengganu in the east coast of Peninsular Malaysia. This paper is legal normative with descriptive-qualitative approach on both primary and secondary resources in order to obtain a judicial view of the subject matter by employing legal-theoretical and comparative analysis. In Malaysia, the Syariah Criminal Enactment (II) 1993 of Kelantan and the Syariah Criminal Enactment 2003 of Terengganu (as proposed by PAS) allow the application of *Hudud* laws into the above mentioned states. However, the enforcement of the above in both these states have been suspended indefinitely as UMNO claims these laws are inconsistent with the Federal Constitution - the supreme law of the Federation. This is because the enactment of penal laws is within the jurisdiction of the federal authority and not the state. Furthermore, the criminal jurisdiction of the Syariah Court has been restricted by the Syariah Courts (Criminal Jurisdiction) Act 1965, a federal law. The arguments in relation to the implementation of *Hudud* laws in Malaysia are an ongoing political-dispute between PAS and UMNO even to the present moment. PAS had proposed and conceived the idea on the actualization of *Hudud* in the states of Kelantan and Terengganu without consultation or input from the federal government. If at all the *Hudud* were to be taken as a new model for the judiciary in Malaysia, it has to be re-evaluated and appraised on its limitations as well as to incorporate the Malaysian elements into it; taking the aspect of social make-up of the population and the various cultures that exist alongside the Muslim in order to make it more attuned to a Malaysian society. Equitably, it must be applied to all Muslims and non-Muslims alike.

Keywords: *Hudud*, Islam, Criminal Law, Punishment, Syariah, Society, Federal Constitution, Federation.

Islamic Penal System

This paper, confines its discussion to *Hudud* (the plural for *hadd*, meaning "restraint" or "prohibition") which is the capital offences in the Islamic criminal justice system. These are offences that are specified in the *Qur'an* and *Sunnah*. Hudud crimes are often seen as criminal behavior against Allah s.w.t, or public justice. Islamic courts do not have any discretionary power in the execution of *Hudud* penalties. Once a *prima facie* case is established with evidences, and the conditions for applying the punishments are fulfilled, the Islamic court is divested of discretionary powers. Rebellion against constituted authority either a political leader or economic order is categorized under "corruption on earth", and is punishable by death. The convicted person may be killed through a police, or military action, or through the sentence of a court of competent jurisdiction. Rejection of Islam (apostasy) is a criminal offence in Islamic penal system, and the punishment is a death penalty. It can be imposed against a Muslim who denies the existence of God or angels, or any of the prophets of Islam, or rejecting any section of the Qur'an. The punishment for *Hudud* crimes, are namely fornication, adultery, theft (*saraq*) and drinking of alcohol (*shrub al-khamr*). Fornication means sexual intercourse outside marriage, and the punishment in the Qur'an is 100 lashes. The punishment of flogging is ordered in the Qur'an, Surah 24.2. Adultery means extra-marital sex. Prophet Muhammad s.a.w prescribed stoning to death for people convicted of adultery. Islamic criminal jurisprudence stipulates two conditions that must be met before the judgment is executed. The first is that there must be confession by four eye witnesses; it must be a voluntary confession without any element of duress. The sentence can only be executed if it has been repeated four times, at different court sessions. Secondly, it is the duty of the court to establish the fact through examination of all confessions that there was actual penetration of the male's penis into the female's vagina. Islamic law insists that the four eye witnesses must confirm physical observation of the actual intercourse directly. In this respect, adultery and fornication are called *zina*. False accusations of charges of *zina* are punishable for the offence of defamation (*qadhf*). Defamation threatens the legitimacy of a women's child, the Qur'an prescribes eighty lashes for a free citizen and forty lashes for a slave. Public flogging is meant to protect the honour, dignity and credibility of the innocent.

The crime of theft is explicitly condemned in Islamic penal system. Theft is defined as 'stealing someone else's property. Conditions to establish the crime of theft is also given. The thief must be a matured person and the act of stealing must be intensive and deliberate. The thief must be aware that the property belongs to someone else. The property must have been kept in a secured place which the thief has forcefully broken. The punishment for theft is stated in the

Qur'an as follows: "As to the thief, male or female, cut off his/her hands". Amputation of the hands is based on strict conditions. The value of the stolen item must be considered, to determine whether it is in the public interest to prosecute the case. The minimum value (*nisab*) for the stolen good in Islamic criminal law must be at least a quarter of a dinar, or the equivalent. The stealing of government property is not punishable by amputation. Since the Islamic State has the duty to provide for the citizens, amputation cannot be carried out in a time of famine and starvation. On the procedure and sequence of punishment for the offence, the thief's right hand is cut off at the wrist, and the wound cauterized with boiling oil.

Prophet Muhammad s.a.w once described the offence of drinking alcohol as "the mother of all vices" (*ummal-Khaba'ith*), because alcoholic intoxication can lead to the commission of other offences. The punishment for alcoholism and public intoxication from the *Hadith* is 80 lashes. This punishment was not provided for in the Qur'an.

Equipped with the knowledge on the Hudud offences and the punishment prescribed, we shall now closely examine the proposed implementation of Hudud in both Kelantan and Terengganu by PAS. Prior to that, I would like to emphasize beforehand, that attention must be paid to the provisions of the Federal Constitution regarding the division of legislative powers between the Federation and the States. Under List 1 (Federal List), Ninth Schedule of the Federal Constitution, "criminal law" is a Federal matter and within the jurisdiction of the Civil Courts. On the other hand, "*offences relating to the precepts of Islam*" as provided in List II (State List), Ninth Schedule of the Federal Constitution are within the legislative powers of the States and the jurisdiction of the Syariah Courts.

It has been widely believed that the law would be made applicable to Muslims only. This is only partially right. The reasons are, first, criminal law is not personal law or "offences relating to precepts of Islam" as provided by List II (State List), Ninth Schedule of the Federal Constitution. Criminal law is a public law. The offences are offences against the State, not just against the victim. That is why it is the Public Prosecutor who prosecutes, on behalf of the State. Secondly, a law applying *Hudud* punishments for criminal offences under the Federal jurisdiction to Muslims only would be inconsistent with Article 8 of the Federal Constitution as it is a discrimination on ground only of religion and therefore, unconstitutional, null and void. Thirdly, is it fair that if a Muslim steals the property of a non-Muslim he is subject to *Hudud* punishment, while if a non-Muslim steals the property of a Muslim he is only subject to imprisonment and/or fine? To implement the Hudud punishments in respect of those offences to Muslim only is not only unconstitutional but also unfair and unwise.

Hudud in Kelantan

Ever since its ratification in November 1993 by the State Legislature of Kelantan, the *Hudud* Bill has been the focus of public debate in Malaysia. When the state legislature unanimously passed the Bill, the Menteri Besar of Kelantan made it clear that the Bill "*could not be implemented until the Federal Government of Malaysia made changes to the Federal Constitution*". This was evidently an acknowledgement on the part of the State Government that by passing the *Hudud* Bill, the state legislature had exceeded its jurisdiction under the Federal Constitution. The State Government also announced that the Bill "*was prepared by a committee and reviewed and approved by the State Islamic Religious Council and the state Mufti after considering it from all aspects of the Islamic Syariah*". The Kelantan Menteri Besar also went on record to add that by enacting the Bill, the State government was "*performing a duty required by Islam" and failure to act in this regard "would be a great sin*". As to the question whether the people had accepted the State Government's plan to implement the *Hudud* laws, the Timbalan Menteri Besar (Abdul Halim) at this time, made the remarkable announcement that "the question did not arise as Muslims in the State who rejected the laws would be considered *murtad* (apostate)."

In its section on theft (*sariqa*) the Bill penalizes the first offence of theft, when it fulfils all the prescribed conditions (15 such conditions provided under Clause Seven) – with amputation of the right hand from the wrist, and the second offence with amputation of the left foot (in the middle in such a way that the heel may still be usable for walking and standing). The third and subsequent offences of theft are punishable with imprisonment for such terms as in the opinion of the court are "likely to lead to repentance" (Clauses 6 and 52).

The punishment for highway robbery is death and crucifixion if the robbery is accompanied by killing; and it is death only if the victim is killed but no property is taken away. In the event where the robber only takes the property without killing or injuring his victim the punishment is amputation of the right hand and the left foot (Clause 9).

Zina is punishable upon conviction by stoning (with stones of medium size) to death for a married person (i.e., *muhsan*) and whipping of 100 lashes plus one year imprisonment for the unmarried. Four eye-witnesses will be required to prove the act of *zina*. Each witness must be an adult male Muslim of just character. Witnesses shall be deemed to be just until the contrary is proven. The Bill also states that pregnancy on the part of an unmarried woman or when

she delivers a child shall be evidence of *zina* which would make her liable to the prescribed punishment (Clauses 1, 41 and 46).

Qadhf a slanderous accusation of *zina* which the accuser is unable to prove by four witnesses carries 80 lashes of the whip, and punishment for drinking liquor based on the oral testimony of two persons is whipping of not more than 80 lashes but not less than 40 (Clauses 13 and 22).

A Muslim (adult and sane) who is accused of apostasy is required to repent within three days and failure to do so makes him or her liable to the punishment of death as well as the forfeiture of his or her property. The offender will be free of the death sentence, even if it has been passed, if he or she repents; the property will be returned but the defendant would still be liable to imprisonment "not exceeding five years" (Clause 23).

The Bill provides for the establishment of a Special Syari'a Trial Court consisting of three judges, two of whom shall be ulama', and a Special Syariah Court of Appeal, consisting of five judges, including three ulama'. These courts are to be in addition to the Syariah courts that normally operate in Kelantan. All sentences can be appealed against and sentences are enforceable, in the case of had offences, only when confirmed by the special Appeal Court (Clause 49).

The most explicit response at this time came from the Prime Minister then, Tun Dr. Mahathir Mohamad who said on September 1994 that "*the Government would not sit back and allow PAS to commit cruel acts against the people in Kelantan, including chopping off the hands of criminals*". Tun Dr. Mahathir Mohamad added that the PAS version of the Hudud Law "*punishes victims while actual criminals were often let off with minimum punishment. For instance, he clarified that if two people, a Muslim and a non-Muslim, committed a crime, the Muslim offender will be punished severely like having his hands chopped off while the non-Muslim offender will escape with a light sentence like a fine or a month's imprisonment*". He also added that the Government was convinced that "*the law passed by the Kelantan State Assembly in November1993 was against the teachings of Islam*", adding that the punishment meted out must be fair. However, according to what he claimed, were PAS laws, criminals are let off and the victim is punished and this is "*against the true teachings of Islam*" and should therefore be rejected. Tun Dr. Mahathir further reiterated that PAS "*was only interested in gaining political mileage*" by using the issue in view of the upcoming general election at that time and that PAS leaders were aware of this and would continue to harp on the issue. He declared that "*the Government would take action against the PAS-led Kelantan Government if it implemented the PAS-created Hudud laws*". The proposed law could not be enforced because it was not in line with the Federal Constitution. The Federal Government cannot allow the PAS Government to enforce the laws which were against the Islamic spirit of justice.

The Syariah and *Hudud* Laws Committee at the Malaysian Bar Council announced in early October 1994 that the *Hudud* Bill was consistent with Islamic law, but that there was *"inconsistency in certain provisions between Hudud laws and the Federal Constitution which can be overcome by amending the constitution*". Following this, the State Government of Kelantan renewed its call and urged the Federal Government to review its decision over rejecting the *Hudud* Bill.

Hudud in Terengganu

In 2002 Terengganu joined Kelantan in passing the Syariah Criminal Offences (*Hudud* and *Qisas*) Enactment 2002. Civil society groups voiced strong concern and opposition to the blatant discrimination and non-conformity of the enactment to the constitution and internationally accepted standards and norms. These groups also questioned the appropriateness and desirability of such laws in a multi-cultural, multi-ethnic and multi-religious country. The provisions of the *Hudud* laws raise a number of serious concerns, including jurisdictional issues since some of the stated offences overlap with federal criminal laws.

The enactment outlines what it terms *Hudud* punishment for the crimes of theft (*sariqah*), robbery (*hirabah*) and sodomy (*liwat*); it also criminalises illicit sex (*zina*), slanderous accusations of *zina* which cannot be proved by four witnesses (*qazaf*) and consumption of alcohol or intoxicating drinks (*syurb*). The enactment also criminalises the renunciation of Islam. Muslims who want to renounce the religion can be charged for *irtidad* or *riddah* (apostasy). The *Hudud* enactment also provides for capital and corporal punishment: death by stoning or zina committed by married persons, death plus crucifixion for armed robbery which results in the death of the victim and death for apostasy. Those found guilty of theft would have their right hand amputated for the first offence, their left foot amputated for the second offence and face a jail term, deemed fit by the court, for the third offence. Whippings feature as punishment for many offences, notably *qazaf*, *syurb* and *zina* committed by unmarried persons. The punishment for sodomy is similar to that for *zina*.

In the final bill that was passed, the scope covers all Muslims in Terengganu and was further extended to cover non-Muslims who elect to be tried under these laws. In a talk in July 2002, PAS acting leader and Chief Minister of Terengganu at that time, Abdul Hadi Awang said that the victims of the crime could also

elect for the crime to be tried under *Hudud* laws even if he accused is a non-Muslim. The state government had also announced that after the passing of the bill in the state assembly, in time, once non-Muslims understood and were fully informed of the laws, it would be extended to cover them. In September 2002, former Lord President and Chairperson of the Terengganu Hisbah and Special Committee Salleh Abas said that *Hudud* laws would not be applicable to non-Muslims unless they specifically wanted them to be. He further added that non-Muslims could still present their case under syariah laws if both the complainant and defendant agreed to the arrangement.

Due to strong objections by civil society groups regarding the unreasonable burden of proof required by the laws, amendments were made to the bill to allow for *qarinah* (circumstantial evidence) to support a claim of rape if the victim is unable to provide the required witnesses. However, these amendments have done little to address the glaring violations against women.

This circumstantial evidence for rape is not sufficient to convict the accused to the level of hudud punishment but only to *takzir* (punishment at the judge's discretion). This relies heavily on the judges' gender sensitivity and understanding of rape. Without sufficient circumstantial evidence to prove that there was forceful intercourse, the rape victim would still be guilty of *qazaf* and likewise would be exonerated if there is sufficient evidence to the contrary. It is widely documented that not all rapes are accompanied by forceful intercourse, as a victim may "comply" or not resist in threatening circumstances. In cases of incest, levels of "compliance" are very high and there may be very few, if any, signs of force.

The provisions for witnesses' testimonies are also of great concern, not only in that they violate Article 8(2) of the constitution, which stipulates that there should be equality and no discrimination on the grounds of religion, race or gender and also requires an unreasonable high level of standard of testimony.

The *Hudud* enactment explicitly accepts only testimonies from witnesses who are "just" male Muslims. A person shall be considered just if he does what is required by Islam and avoids committing great sins and does not continuously commit lesser sins and further has a sense of honour." There is a presumption that a person is "just" until the contrary is proven. The actual scope and quality of the testimonies of Muslim women and non-Muslims are not provided for in the enactment; although PAS leaders have gone on to say that in "special" circumstances their testimonies would be accepted. The testimonies of these non-male Muslims, if accepted, are likely to be thought of as carrying less weight than that of a male Muslim, as otherwise the explicit provisions in the *Hudud* enactment would be redundant or useless.

Witnesses as well as complainants of zina (and rape) can be guilty of *qazaf*. The testimonies of the witnesses must be clear, unequivocal and not contradict each other. If one witness refuses to testify, gives exculpatory evidence or withdraws an incriminating testimony, the witnesses that have testified positively shall be deemed to have committed *qazaf*. Similarly the complainant (including victims of rape who have no circumstantial evidence) will also be deemed to have committed *qazaf* if there is a failure of conviction. This means that not only do instances of rape without witnesses never come to court, but even if there are witnesses, it is highly unlikely that they will come forward for fear that if their testimonies are not sufficient to convict, they themselves will end up being punished.

For other offences besides *zina*, for example *sariqah* (theft) or *hirabah* (robbery), in order to convict, the crime must be witnessed by at least two "just" male Muslims and their testimonies must be clear, unequivocal and not contradictory. The court must be convinced of the guilt of an accused person 100 percent and there must not remain any shred of doubt.

It is common knowledge that, barring exceptional circumstances, crimes are not committed in full view of the public. With such heavy burdens of proof falling on the victims of crimes, it is likely that, under *Hudud* laws, offences such as rape and theft, except on unusual circumstances, will go unpunished.

The constitution states that laws of a criminal nature fall within the purview of the federal government. On the other hand, the constitution also states that Islamic legal matters come under the jurisdiction of the state government, hence the argument by the Terengganu State government and the state assembly is competent to legislate on such matters. The central government has persistently said that it will challenge the legality and implementation of the laws. Zaid Ibrahim, a private citizen and lawyer at this time, has initiated legal action to challenge the constitutionality of the *Hudud* enactment, but the matter has yet to be heard.

The Terengganu state police has also refused to extend their cooperation in the enforcement of the *Hudud* laws. To date, no one has been arrested or charged under these laws. Hadi Awang, PAS's acting leader and Chief Minister of Terengganu, has gone on to say that the police are not needed to enforce the *Hudud* as it is the task of the State Religious Department. He said the Islamic laws would create "willingness for offenders to surrender," as Muslims believe that punishment under Islamic laws will cleanse them of their sins. In December 2002, Hadi Awang said that the state government had appointed 274 volunteer syariah enforcement officers.

In August 2002, Chairman of the Terengganu Education, Religious and Syariah Implementation Committee Harun Taib said that the state government would build lockups if the federal government refused to cooperate and detain offenders in existing prisons. He added that they were in the midst of identifying suitable locations. Deputy Prime Minister at this time, Abdullah Badawi replied that the Terengganu government cannot lawfully build prisons, as it does not have the authority pertaining to criminal law and punishment. Meanwhile, Harun Taib in the December 2002 sitting of the state assembly further said that the *Hudud* enactment would be implemented, although no deadline was set. He added that the state government was waiting for a "suitable" time to gazette the laws, after which implementation would take place. This "suitable" time, however, remains unknown, as Hadi Awang has gone to say that the state government has no plans to implement the *Hudud* enactment in the near future. The state government will instead send delegates to Saudi Arabia, Iran and Sudan to study the implementation of the *Hudud* laws in those countries and provide state leaders with a "better idea" as to how to implement them. According to Hadi Awang, the state government had appointed officials with "deep knowledge about Islamic laws" to implement the *Hudud* enactment, but they needed "more exposure and observation" of the experiences of the other countries. This change of plan after the initial desire to push through the *Hudud* laws without timelines and necessary mechanisms or implementation raises questions as to whether there was a severe lack of foresight or whether the whole *Hudud* issue was one of political expediency.

Conclusion

The goal of criminal law is not to punish, including with any particular punishment. The goal of criminal law is to prevent the prohibited acts, to establish public order and to administer justice in the event of contravention. Punishment is a tool to achieve that goal. A tool is not a goal. So, how it is used should be taken into account. The result will be the measure of its success or otherwise.

The non-enforcement of the *Hudud* enactment in Terengganu is reminiscent of the situation in Kelantan, where after the *Hudud* bill was passed and assent given by the Sultan of Kelantan in 1994, the state government said it was unable to enforce the laws as they contravened the constitution.

The *Hudud* Bill has been the continued focus of public debate in Malaysia. The Bill has come under criticism both on specific points as well as generally as being eager to inflict punishment and pain. This approach, although a necessary ingredient of a penal policy, needs to be moderated by such other influences that are felt to be equally important in the formulation of a comprehensive philosophy of punishment. To show care and compassion and to provide an opportunity for those who might be ready to repent and reform are among the considerations that have received greater attention in the formulation of a comprehensive penal policy in modern times. Apart from the essential merit of the harmonious approach, the added emphasis on rehabilitation and reform is an acknowledgement on the part of the society at large that crime is not a totally isolated phenomenon. The Qur'anic outlook on punishment may be characterized by its dual emphasis on retribution and reformation. It is my submission that the *Hudud* Bill in both Kelantan and Terengganu has failed to be reflective either of the balanced outlook of the Qur'an or of the social conditions and realities of contemporary Malaysian society.

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