

## SHOULD PARLIAMENT ALLOW KELANTAN STATE LEGISLATIVE ASSEMBLY TO LEGISLATE OVER CRIMINAL LAW?

By

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One of the mandates given by the Malayan freedom fighters to the drafters of the Federal Constitution was to create a strong Federal Government. For this reason, laws affecting security, peace and harmony of the country such as criminal law was made a federal law. The law applies to all throughout the country. To implement it effectively, the office of the Public Prosecutor, the Police, the Prison Department and the civil courts whose jurisdictions cover the whole country, were created.

Besides, international agreements on cooperation to curb crimes such as Interpol are agreements between nation states. International law does not recognize a state in a Federation like Kelantan. It recognizes countries like Malaysia to be a party to an international agreement. Extradition law also involves countries, not states within countries.

The power to make laws for the state contained in List II of the Ninth Schedule (State List) is only in respect of Muslim personal and family laws. That is all.

As far as I can remember, at the time the Federal Constitution was being drafted, there was no dispute regarding the division of legislative powers between the Federation and the states. However, after the shari'ah court was established, the shari'ah court judges and officers were rather dissatisfied. They compared the jurisdiction of shari'ah court with the jurisdictions of the civil court and their position with the position of the judges and officers of the civil court. They felt that the position of the syari'ah court should be elevated to the same level as the civil court and their own positions be elevated to the level of their civil counterparts and that the jurisdiction of the shari'ah court be expanded. In fact, there are those who, if possible, would want the shari'ah court to assume the role of the Judiciary and that the civil court be abolished, in the name of Islamisation!

The issue regarding the division of legislative powers between the Federation and the states became more serious when Kelantan wanted to implement *hudud*. In 1993, the Kelantan State Legislative Assemble passed the Syari'ah Criminal Code Enactment (II) 1993 (Hudud Enactment). Due to legal and constitutional constraints, to this day it has not been implemented.

Strangely, as far as I know, until I pointed it out in my talk organized by YADIM and MPM on 7<sup>th</sup> January 2014, no one, including academics, ever said that a large number of the offences in the Hudud Enactmet are, in fact, "criminal law" which are under the Federal jurisdiction and that the State Legislative Assembly has no jurisdiction to legislate on them. Examples of such offences are, causing death, causing hurt, rape, robbery and theft.

Academics, as far as I have come across, argue that because the offenses are "hudud offenses" which are syari'ah offences and since Islamic law is under the State jurisdiction, therefore the State Legislative Assembly has the jurisdiction to legislate on them. It is a very superficial argument indeed. In addition, they also try to

give a broader interpretation to the words "Islam" and "Islamic law" as used in the Federal Constitution to support their view.

However, after my talk (on January 7, 2014), the Kelantan Government, in its Exco Meeting on 2<sup>nd</sup> April, 2014, decided to move a private member's bill in Parliament to seek the approval of Parliament for the State Legislative Assembly to make laws on matters that lie within Federal jurisdiction, as provided by Article 76A (1) of the Constitution.

In his press statement the Kelantan Chief Minister, among others, reportedly said:

*"He said, most of the hudud and qisas offenses such as theft, robbery, rape, causing hurt and causing death lie within the jurisdiction of the Federal Government as provided in the Penal Code....."*

Apparently, the State Government has accepted my view and is finding ways to overcome the problem. This was confirmed by Dr. Fadzli Mohamed Bin Dato Haji Hassan, a member of the Kelantan State Exco in his paper titled *"Towards Implementation of the Syariah Criminal Code (II) Kelantan 1993"* presented at National Syari'ah Criminal Semir organised by YADIM on 29<sup>th</sup> May, 2014. Among other things, he said:

*"Also another private member's bill will be moved in parliament to extend the jurisdiction of the Kelantan State Legislative Assembly as the provided by 76A (1)."*

Actually, what Kelantan intends to do, in simple terms, is to assume Federal jurisdiction in criminal law. Now, let us suppose that it is the Federal Government that tries to assume the legislative power conferred by the Constitution to the state. How would the State Government of Kelantan and PAS react? I believe the Federal Government would be accused of "seizing" the rights of the state of Kelantan, "unjust" and so on.

But since Kelantan wants to implement *hudud*, it is seen as a religious act on the part of the Kelantan Government and the Federal Government is seen as "anti-Islam" if it does not allow Kelantan to do it. The issue about Kelantan wanting to have the jurisdiction over what constitutionally belongs to the Federal Government is forgotten.

However, at least Kelantan acknowledges that those offences lie within the jurisdiction of the Federal Government and tries to find a way to resolve the issue constitutionally. In other words, Kelantan is trying to overcome the obstacle it is facing within the framework of the Constitution and not outside it.

For that Kelantan relies on Article 76A (1). That provision empowers Parliament to allow the State Legislature, in this case Kelantan, to make laws on a Federal matter, in this case, criminal law. The following question arises here: Does the law remain "criminal law" or does it become a law made under the State List? In my view, it remains "criminal law". I say so because:

1. From the beginning, those offences were criminal law offences under the Federal List. They have not been transferred to the State List. Parliament only permits Kelantan to legislate on them. That is the effect of Article 76A (1).
2. Parliament does not amend the Constitution to place those offences under the State List. Parliament only allows The State Legislative Assembly to legislate on them. To amend the Constitution requires two thirds majority.

What is the effect of the law then? In my opinion:

1. It must be applicable to all Muslims and non-Muslims because it is a federal criminal law and not a law made under the State List. If not it is unconstitutional because it contravenes Article 8.
2. Which court has jurisdiction to try such cases? The answer is the civil court. The reason is, first, it is criminal law and not a law made under the State List. Secondly, the civil court has jurisdiction over Muslims and non-Muslims and Shari'ah courts only have jurisdiction over Muslims.

That is not what Kelantan wants. But that is the effect of getting the permission under Article 76A (1), even if Kelantan succeeds.

In the first and second paragraphs of this article I have given my reason why criminal law is placed under federal jurisdiction.

Other reasons which are not in favour of allowing the State Legislative Assembly to legislate over criminal law are:

1. If criminal law is made a state law, most likely there will be differences from state to state. Even in the existing laws there are such differences even though they are in regard to personal and family laws. We cannot afford to have such differences in criminal law.
2. If all states follow Kelantan's example, we will end up with 15 sets of criminal laws, one a federal law and fourteen state laws. I am concerned that it will create a chaotic situation.
3. If Parliament allows the Kelantan State Legislative Assembly to impose hudud punishments on federal criminal law and the Kelantan State Legislative Assembly also makes law imposing hudud punishments to offences under the State List, Kelantan will have two sets of "hudud law". The first set is the law made pursuant to Article 76A (1). The law applies to Muslims and non-Muslims, investigated by police, prosecuted by public prosecutors and tried by the civil court. The second set is a law made under the State List. These hudud offenses only apply to Muslims, investigated and prosecuted by the syari'ah officers and tried by the shari'ah court.

These problems arise not because of the faults of the drafters of the Constitution. The mandate given to them was clear that the Federation must be strong, that the general law affecting public order should be placed under federal jurisdiction,

together with the implementation machinery required like the Police Department, the Prison Department, the Prosecutors and the civil courts.

Things ran smoothly and effectively for 56 years. What creates the problem now is because Kelantan wants to assume federal jurisdiction over criminal law. That is the root cause of it.

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