

Syariah Criminal Code (II) Enactment 1993

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Introduction

The *Syariah Criminal Code (II) Enactment 1993* (*Hudud* Enactment) was passed by the State Legislative Assembly of Kelantan in 1993. The enactment specifies *hudud* offences, rules of evidence, punishments to be carried out for *hudud* offences and establishes the Special *Syariah* Trial Court and Special *Syariah* Court of Appeal to adjudicate *hudud* offences.

The *Hudud* Enactment is controversial because it introduces new forms of punishment which have not been practised in Malaysia in living memory. Additionally, this Enactment threatens to spark a constitutional crisis as the Kelantan State government has indicated that it will implement this Enactment even if the Private Members Bills which will be introduced to Parliament in June does not obtain the necessary consent. Although these bills have been the subject of much discussion, they have not been made public to date and the assumption made in this paper is that the contents of these bills are similar to the contents of the *Syariah* Criminal Code (II) Enactment 1993. The following discussions in this paper will be premised upon that Enactment.

This paper will discuss the contents of the *Hudud* Enactment which comprise the categories of crimes in the enactment and the evidence requirements. The discussion will also touch on practical implementation of the Enactment within a secular legal system with a large non-Muslim population. It will touch on the impact to the legal system if power is given the State of Kelantan to implement the statute. The paper will also discuss the response to *hudud* among Muslims and non-Muslims and contextualise this within political Islam which dominates public discourse in most Muslim majority countries. It will proceed to explain reasons for some of these responses and raise issues that should be resolved before the Enactment is implemented in Kelantan.

This paper will only touch on questions about whether the provisions of the enactment are based on injunctions within the Quran or whether the punishments imposed are fair and just or suited to modern times but will not address this in depth as this discussion is best left to experts in the Islamic religion. Nevertheless if a religious group's practices infringe upon the fundamental rights of others within and outside that religion the issue becomes a matter of public interest.

There are many questions about how *hudud* will be implemented in Malaysian society. The approach taken by the Kelantan State Government has been to defend the bill on the grounds that it is based on the *Quran* and *Sunnah* and cannot be challenged. Furthermore, the Kelantan state government states that the bill will only apply to Muslims although non-Muslims may elect that the Enactment apply to them. Nevertheless, if the bill is to result in major constitutional amendments or creates an impact that will affect the entire legal system and the basic structure of

the Constitution, then these explanations should be provided to the general public regardless of their faith as the Constitution is the supreme law in the land.¹

Hudud offences

The offences are divided into three categories comprising offences where the punishment has been ordained in the Quran and the Sunnah (*hudud* offences), offences to which *qisos* applies and which are also ordained in the Quran and Sunnah (*qisos* offences) and offences which do not fall in the preceding categories and are left to the discretion of the legislature or the Court (*ta'zir* offences). In circumstances where conditions required to punish *hudud* or *qisos* offences are not fulfilled, the offence shall become a *ta'zir* offence and be punished accordingly.²

The rules of evidence pertaining to *hudud* and *qisos* offences are rigorous. There are provisions that such offences shall become *ta'zir* offences to ensure that offenders do not escape due to the difficulty in proving some of the offences under *hudud*. However, it is unclear what is meant by 'offences which do not fall in the preceding categories and are left to the discretion of the legislature or, according to this Enactment left to the discretion of the Court'. This has to be clarified as it could mean that the Kelantan State Assembly is free to amend the enactment to include more offences as *ta'zir* at a later date.

The enactment criminalises theft (*sariqah*), robbery (*hirabah*), sexual intercourse outside of marriage (*zina*) including homosexual acts (*liwat*), unlawful accusations of *zina* (*qazaf*), consuming alcohol (*syurb*) and apostasy (*irtidad*).³

The punishment for theft ranges from amputation of the right hand for a first offence, amputation of the left foot for a subsequent offence, and punishment with imprisonment for such term as in the opinion of the Court may lead the offender to repentance for third and subsequent offences.⁴ Amputation of a hand means amputation at the wrist and amputation of the foot means amputation in the middle of the foot so that the heel may still be usable for walking and standing.⁵

The offender will not be punished for *hudud* where the value of the stolen property is less than the *nisab*, which is defined as 4.45 grams of gold,⁶ the offender is not *mukallaf* (below 18 years and of sound mind),⁷ the owner of the property has been careless in guarding it against theft or where the property has no value under *syariah* law such as intoxicating drink, instruments used for amusement.⁸ Similarly the offender will not be punished if the offence is committed by a

¹Article 4, Federal Constitution.

²Section 3 Syariah Criminal Code (II) Enactment 1993

³Section 4.

⁴Section 6.

⁵Section 52.

⁶Equivalent to about RM700 as at April 2014.

⁷Section 2.

⁸There is no definition of 'instrument used for amusement' which could encapsulate expensive home theatre systems and other equally expensive electronic gadgets.

creditor in respect of the property of his debtor provided that the value of the stolen property is equivalent to the value of the debt. It also excludes among other things, offences committed in circumstances of extreme difficulties, within the family unit, where the owner returns the stolen property before the execution of the *hudud* punishment, where the owner of the stolen property denies the theft notwithstanding a confession by the offender or where the objection against witnesses is accepted under *syariah* law.⁹

While some of these exceptions may be controversial, the enactment does not exonerate the offender completely as section 3 makes it a *ta'zir* offence which is punishable at the court's discretion.

Armed robbery is punishable by death and thereafter crucifixion (where the victim is killed and robbed), death (where the victim is robbed), amputation of the right hand and left foot (where the victim is robbed and injured but not killed) together with *diyat* and *irsy* (money payable as compensation for injury to the victim under the Schedules in the Enactment), imprisonment under similar terms as theft, where the victim has been threatened without being robbed or injured.¹⁰ There are no exceptions to this offence unlike the exceptions to theft.

The *Hudud* Enactment contain provisions on *zina* which is defined as sexual intercourse between a man and a woman who are not married to each other and such intercourse does not come within the recognised exceptions.¹¹ Married offenders who commit the offence of *zina* will be punished with stoning to death or punished with one hundred lashes and a year's imprisonment.¹² The punishment of whipping must be carried out in accordance with the Rules specified in Schedule V¹³ which provides for an officer specifically authorised by the prison authority at a place and time directed by the court and in the presence of a Muslim medical officer and at least four adult male Muslims as witnesses. There is a detailed description of the rattan used as a whip and that the whipping must be conducted with moderate force. The offender has to be clothed in thin clothing that covers his or her body. Under section 40(2) the number of witnesses required to prove *zina* shall be no less than four. Protection is afforded against false accusations of *zina* through the offence of *qazaf* which is where a person makes an accusation of *zina* being an accusation incapable of being proved by four witnesses against an adult Muslim who is known to be chaste.¹⁴

Al-li'an is an accusation of *zina* on oath made by a husband against his wife while the wife on oath rejects such accusation.¹⁵ If the wife has given birth to a child or she is pregnant, and both the birth and pregnancy is considered as the consequence of the *zina* alleged by the husband, he shall utter certain prescribed words and deny fathering the child.¹⁶ Where a married couple resorts to *al-li'an* to settle an accusation of *zina* between them, the husband will not be guilty of

⁹Section 7.

¹⁰Section 9.

¹¹Section 10.

¹²Section 11.

¹³Section 53.

¹⁴Section 12.

¹⁵Section 14.

¹⁶Section 14.

qazaf and the wife will not be guilty of *zina*. The marriage shall automatically be dissolved.¹⁷ It is unclear as to what happens if scientific evidence (DNA) later proves that he is the father of the child as the Enactment is silent on the possibility.

Section 46(2) of the Enactment states that pregnancy or delivery of a baby by an unmarried woman shall constitute evidence on which to find her guilty of *zina* and therefore the *hudud* punishment shall be passed on her unless she can prove to the contrary. This provision shifts the burden of proof from four witnesses to the woman herself. This provision is controversial because it does not accept that pregnancy could be due to rape. In addition to the trauma of rape, the woman has to discharge the burden of proof upon her to show that she is not guilty of *zina*. Furthermore it is controversial because it does not make the father of the child guilty of *zina*.

Other offences covered under this part of the enactment are *liwat* which is carnal intercourse between a male and another male or between a male and female other than his wife, performed against the order of nature, that is through the anus,¹⁸ *musahaqah* which involves lesbian acts between females,¹⁹ *ittiyanalmaitah* which is the offence of performing carnal intercourse on a dead body²⁰, *ittiyanalbahimah* which is the offence of performing carnal intercourse with an animal²¹, *syurb* which is the offence of drinking liquor or any other intoxicating drinks,²² and *irtidad* which is any act done or any word uttered by a Muslim who is *mukallaf*, being act or word which according to *syariah* law, affects or which is against the belief in the Islamic religion.²³

The acts or words which affect belief are those which concern or deal with the fundamental aspects of the Islamic religion which are deemed to have been known and believed by every Muslims as part of his general knowledge and pertain to Rukun Islam, Rukun Iman and matters of *halal* or *haram*. Persons guilty of *irtidad* will be sentenced by the Court to repent within a period of three days. If he is reluctant to repent, the Court shall pronounce the death sentence on him and forfeit his property irrespective of whether the property is acquired before or after the commission of the offence. If he repents prior to his sentencing, he will not undergo the death sentence and his property will be restored but he will be imprisoned for a term not exceeding five years.

Qisos

Qisos and *diyat* apply to offences of homicide and causing bodily injuries.²⁴ Homicide is divided into *qatl-al-'amd* (wilful killing), *qatl-syibhi-al-'amd* (quasi-wilful killing) and *qatl-al-khata'* (killing without intention).²⁵ A person who does an act with the intention of causing death or bodily injury or with the knowledge that his act is so imminently dangerous that it will in all probability cause death is guilty of wilful killing. This extends to situations where the person has

¹⁷Section 15.

¹⁸Section 16.

¹⁹Section 19.

²⁰Section 20.

²¹Section 21.

²²Section 22.

²³Section 23.

²⁴Section 24.

²⁵Section 25.

the intention carry out an action which is likely to cause death, but unintentionally causes the death of someone else other than the intended victim. The punishment for wilful killing is death.²⁶

Qisos has the same rules of evidence as *hudud* which requires at least two witnesses who must be just adult Muslim males and the evidence given must be one of absolute certainty and free from any ambiguity or doubt.²⁷ However, even if there is overwhelming evidence, the *wali* may remit the *qisos*.²⁸ *Wali* is a relative of the victim of a crime who is entitled to remit the offence committed by an offender on the victim of the offence.²⁹ The *wali* may pardon the offender with or without *diyat*.³⁰ *Diyat* refers to a sum of money payable as compensation for death or loss of intelligence or injury to any organ which is complete or injury to any organ which is in pairs or the loss of function of any such organ caused to the victim of an offence. One *diyat* is equivalent to the prevailing price of 4,450 grams of gold or such sum as may be fixed by the Sultan from time to time in accordance with *syariah* law.³¹ If the offence is pardoned with *diyat*, the sum must be paid in a lump sum or by instalments not extending beyond three years. *Diyat* is recoverable from the estate of the offender even if the offender dies. Even if *diyat* is paid, the offender is liable to *ta'zir* punishment which is imprisonment for life or for as long as the court deems necessary to lead the offender to repentance.³²

A person who has the intention of causing injury to the body or mind of any person and causes death of that person or any other person by doing an act that is not in the ordinary course of nature, likely to cause death is said to be liable for quasi-wilful killing.³³ The perpetrator of the crime shall pay *diyat* to the victim's *wali* and in addition shall be punished with *ta'zir* punishment of a term not exceeding 14 years imprisonment.³⁴

A person who without the intention to cause death or injury nevertheless causes death by doing an act which is not anticipated to cause the death or any person by doing an unlawful act which later becomes the cause for death has committed killing without intention.³⁵ A person who is guilty of unlawful killing shall pay *diyat* to the victim's *wali* and in addition thereto may be liable to *ta'zir* punishment of imprisonment not exceeding ten years.³⁶ This provision in effect may cover areas which are traditionally covered by the law of torts except that it only covers personal injuries and death whereas the law of torts extends to property damage and pure economic loss.

The philosophy of 'an eye for an eye and a tooth for a tooth' underlies *qisos* punishments relating to bodily injury. Bodily injury is defined as causing pain, harm, disease, infirmity or

²⁶Section 26.

²⁷Sections 41 and 42.

²⁸Section 27.

²⁹Section 2.

³⁰Section 28.

³¹Section 2.

³²Section 29.

³³Section 30.

³⁴Section 31.

³⁵Section 32.

³⁶Section 33.

injury to any person, or impairing, destroying or causing loss of function of any organ of the body of any person.³⁷ The perpetrator will be punished with similar bodily injury which he inflicted on the victim. Where *qisos* punishment cannot be carried out because the conditions required by *syariah* cannot be fulfilled, the offender shall pay *irsy* to his victim and may be liable to *ta'zir* punishment.³⁸

Irsy amounts due to the victim are explained in detail in Schedule II of the Enactment. In cases of causing dismemberment of any organ of the body or injury to a part of an organ of the body (*itlaf-al-udhw*) and causing destruction or permanent impairment of the function or use of an organ of the body or permanently disfiguring such organ (*itlaf-so-lahiyyatu-al-udhw*), *irsy* ranges from payment of a *diyath* (4450 grams of gold)³⁹ for the loss of a single organ such as nose or tongue, both hands, feet, eyes, ears, lips and breast 1/20 of a *diyath* for loss of a tooth. Item 10 of the Schedule states that uprooting all the hairs of the head, beard, moustaches, eyebrows, eyelashes or any other part of the body entitles the victim to the payment of a *diyath*. The amount due for uprooting hairs is similar to the amount to be paid for the loss of the nose, tongue and other organs, but the reasons for this have not been explained.

Injuries to the head or face (*syajjah*)⁴⁰ which does not amount to any dismemberment, destruction or permanent impairment or disfigurement will attract payments ranging from 1/2 of a *diyath* for injury which involves a fracture of the skull and the wound tears the brain's membrane, to 3/20 of a *diyath* for fractures or dislocation of a bone. The punishment for some offences such as injury to the head or face which does not expose a bone will be determined by the Court.⁴¹

Injuries to any part of the body save the head and the face leaving marks or wounds whether permanent or temporary (*jurh*) attracts *irsy* amounting to 1/3 of a full *diyath* for wounds extending to body cavity of the trunk (*jaifah*). The punishment for causing other wounds which include tearing of the skin and bleeding, wounds which do not expose the bone, lacerations of the flesh, wounds exposing the bone, fractures without dislocation and fractures with dislocation is left up to the court.⁴²

The enactment does not define whether permanent impairment or disfigurement takes into account the fact that the victim may be able to reverse or reduce the effect of the injury through expensive medical treatment. It is unclear in such cases whether the victim will be entitled to the full entitlement of *irsy* to be paid or whether the disfigurement will be deemed to be non-permanent. Furthermore, where medical treatment exceeds the amount stipulated for *irsy*, it does not state whether the victim may claim a higher amount.

The provisions of section 32 (a person who unintentionally causes the death of another or who unintentionally causes death by doing an unlawful act) and section 34 (causing bodily injury) may cover areas that are currently covered by the tort of negligence. It should be noted that

³⁷Section 34.

³⁸Section 35.

³⁹This amounts to over RM500, 000 at current gold prices.

⁴⁰ Section 38(b).

⁴¹ Schedule III.

⁴² Schedule IV.

section 34 does not state clearly whether this covers intentional or unintentional acts. Does the *Hudud* Enactment intend to replace the law of tort?

There are many situations in the Enactment which are unclear and may lead to potential problems. For example, a reckless driver of a car may unintentionally cause the death of his victim or may cause him bodily injury. In the case of causing death the driver will have to pay a *diyat* to the victim's *wali* and serve a term of imprisonment not exceeding ten years. If the driver causes bodily injury to the victim, he will be inflicted with a similar injury to the injury he caused the victim. If this *qisos* punishment cannot be imposed or executed because the conditions required by *syariah* law are not fulfilled, the offender shall pay *irsy* to his victim for that injury and be liable to a *ta'zir* punishment.

Irsy is stipulated specifically for certain injuries. If the amount is insufficient to compensate the victim's medical costs, or his loss of earnings or loss of future earning, the victim may elect to claim from the driver's insurance company. Can he elect to pursue his remedy under civil law instead of the Enactment? He may not be able to do this as article 121(1A) states that the civil courts have no jurisdiction in respect of matters within the jurisdiction of the *syariah* courts. This may result in injustice to Muslim victims of unintentional death or bodily injury especially as Muslims in other states will be able to claim the full amount of their loss.

If the Special *Syariah* Trial Court orders *irsy* to be paid to the victim of the reckless driver mentioned above, will the amount be paid by the driver personally or his insurance company? The insurance company may refuse to comply with the court's order and under Para 1, List II of the Ninth Schedule, the *syariah* court only has power over Muslims. It does not have power over corporations. Furthermore, Para 8 of List 1 clearly gives the Federal government power to regulate corporations and the insurance industry. The case cannot be sent to the civil courts due to article 121(1A).⁴³ This may result in injustice towards Muslims in the state of Kelantan.

Another point that has to be clarified is the definition of *wali* which is traditionally understood to be a male guardian or custodian of a woman. If a man is unintentionally killed, will his spouse be able to claim *diyat* under section 33 or will the victim's close male relative claim this sum? If the male relative claims the *irsy* as *wali*, how does the enactment protect the wife and family of the deceased from *wali* who refuse to hand over the sum? The state legislators probably assume that just Muslim males will either hand the *irsy* amount over to the wife or manage the money for her. This is the ideal situation but in the event that the *wali* does not act with integrity, the enactment does not provide any protection for the woman against abuse by her husband's *wali*. Matters will be complicated if the *wali* moves to another state as the *syariah* courts in Kelantan will have no jurisdiction over the *wali* to compel him to pay the victim's family. Second, it removes the woman's right to manage her own finances. This must be highlighted to Muslim women in Kelantan in order for their views to be obtained on whether they are agreeable to this arrangement and if so, how their interests can be protected.

⁴³ It should be noted that when article 121(1A) was included in the Federal Constitution, the general impression was that it was meant to cover Muslim litigants in the areas generally covered by *syariah* courts. In the last decade, there have been jurisdictional conflicts between the civil and *syariah* courts pertaining to non-Muslims' rights. It is best therefore to assume that there may be future conflicts pertaining to the jurisdiction of the Special *Syariah* Trial Courts.

The argument by Muslims groups such as Islamic Renaissance Front and Sisters in Islam is that if *diyat* can be used to avoid the worst *qisas* punishment which is death, then the rich will be able to avoid this punishment while the poor will always be subject to it unless the victim's *wali* pardons the perpetrator of harm without *diyat* or based on a settlement (*solh*) between the victim and the perpetrator.⁴⁴ It is not clear whether the settlement must involve monetary terms or otherwise. There is no provision for the court to oversee the settlement and agreement to ensure that it is fair. Furthermore, it is unclear whether payment of *irsy* will reduce the term of imprisonment since the court appears to have discretion over the number of years of imprisonment that it imposes as long as it does not exceed the maximum stipulated in the schedule.

These are uncertainties about the provisions in the *Hudud* Enactment which require further clarification. If this statute is implemented, it may require other civil laws to be amended as well in order to accommodate the impact of the Enactment. This would be unfair to Muslims and non-Muslims in other states in Malaysia.

Punishment

The enactment establishes a Special *Syariah* Trial Court which has the jurisdiction to try offences under the enactment and also a Special *Syariah* Court of Appeal which has jurisdiction to hear appeals from the decisions of the Special *Syariah* Trial Court.⁴⁵ These courts are in addition to the courts already established by the State Legislative Assembly under the *Syariah* Court Enactment 1982 and the proceedings of the courts will be similar to the existing *syariah* courts.⁴⁶ The proposed jurisdiction of these Courts to impose sentences which includes amputation, death, whipping up to 100 lashes and unlimited prison sentences exceeds the power given in List II as the jurisdiction of *syariah* courts is limited to 3 years imprisonment, fines not exceeding RM5000 or whipping not exceeding 6 strokes under the *Syariah* Courts (Criminal Jurisdiction) Act 1965.

The punishment accorded to an offence is often a reflection of the seriousness with which it is regarded by society. The punishments meted out for crimes under *hudud* do not necessarily follow this principle. *Liwat* is proved by the same mode as that required to prove *zina* and attracts the same punishment which is death by stoning but *musahaqah* (lesbianism) is considered a *ta'zir* offence and punishment is left to the court's discretion. The difference in punishment may be due to the precepts in the Quran and *Sunnah* but there is no explanation about which provisions in the Quran and *Sunnah* have been used to support the different treatment in the Enactment. These explanations are important to Muslims to enable them to assess whether the enactment comprises correct interpretation of Islamic law.

How will these punishments be carried out? The enactment states that the *hudud* punishment cannot be suspended, substituted for any other punishment, reduced or pardoned or otherwise

⁴⁴Section 37.

⁴⁵ Section 63.

⁴⁶Sections 63 and 64

varied or altered.⁴⁷ Every sentence under *hudud* and every death sentence imposed under *qisas* or *ta'zir* will be referred by the Special *Syariah* Trial Court to the Special *Syariah* Court of Appeal for confirmation, and punishment will only be carried out after the confirmation is received.⁴⁸ *Hudud* punishment other than death and *rejam* will not be carried out unless the offender is medically examined by a Muslim medical officer and certified by that officer to be fit.

The punishment of whipping is described in detail in Schedule V. However the bill does not describe how and where the amputations, stoning and crucifixion will be carried out. It does not state whether amputations be performed in hospitals or in prison. If it is carried out in hospitals, Muslim surgeons may be compelled to carry out the amputation unless there is a designated surgeon selected by the Kelantan State government to carry out amputations. If Muslim surgeons refuse to carry out amputations, the religious enforcement officers may attempt to charge them. These officers are within the jurisdiction of the Health Ministry and they are remunerated from Federal funds yet they are subject to Islamic laws in the State that they reside in. Muslim surgeons may find themselves in a dilemma with no solution.

The Malaysian Medical Association (MMA) has registered its opposition to *hudud* stating that it is not the role of surgeons to perform amputations. According to the MMA, doctors have even been advised by the World Health Organisation (WHO) not to witness or certify caning or whipping of criminals by authorities. The MMA has threatened to lodge complaints to the Malaysian Medical Council (MMC) against surgeons who take part in amputations under *hudud* which may result in those surgeons being de-registered.⁴⁹

Section 29 of the Medical Act 1971 gives the MMC the power to exercise disciplinary jurisdiction over all persons registered under the Act. The grounds for removal from the register would be under section 29(2)(b) which is that he has been guilty of infamous conduct in any professional respect. 'Infamous conduct in a professional respect' was defined by the Court of Appeal in *Allinson v General Council of Medical Education and Registration*⁵⁰ as a medical professional doing something that will be regarded as disgraceful or dishonourable by his professional brethren of good repute and competency. The MMC has provided some guidelines of conduct that would amount to 'infamous conduct in a professional respect'.⁵¹ One of the guidelines relates to 'Conduct derogatory to the reputation of the medical profession'.⁵² Item 3.1 of the Code of Professional Conduct of MMC entitled 'Respect for Human Life' states that;

'The utmost respect for human life must be maintained even under threat, and no use shall be made of any medical knowledge contrary to the laws of humanity. The practitioner shall not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures, whatever the offence of which the victim of such procedures is suspected, accused or guilty, and whatever the victim's beliefs or motives, and in all situations, including armed conflict and civil strife. The

⁴⁷Section 48.

⁴⁸Section 49.

⁴⁹"MMA: We Will Not Perform Surgical Amputation, It's Unethical" The *STAR*, 25 April 2014.

⁵⁰[1894] 1 QB 750.

⁵¹Part II Forms of Infamous Conduct in Code of Professional Conduct adopted by the Malaysian Medical Council

⁵²Guideline 3 Part II Code of Professional Conduct.

practitioner shall not provide any premises, instruments, substances or knowledge to facilitate the practice of torture or other forms of cruel, inhumane or degrading treatment or to diminish the ability of the victim to resist such treatment.’

The Medical Regulations 1974 authorises the President of the MMC to form a Preliminary Investigation Committee to conduct an inquiry against a medical practitioner.⁵³ If the practitioner is found guilty, the MMC may take action and remove the person from the register.⁵⁴

It is a moot point whether a practitioner claiming to act in accordance with the dictates of his religion can be de-registered on the grounds of ‘infamous’ conduct unless the MMA and the MMC are unanimously against practitioners assisting in carrying out amputations. A few Muslim practitioners from Pertubuhan Ikram Malaysia have expressed that it is their religious duty to carry out amputations without anaesthetic. These practitioners claim that Muslims are subservient to a higher law and are not doing any harm to criminals who had transgressed boundaries of Islamic law.⁵⁵ Even if the MMC were to take such action the practitioner may appeal to the High Court to have his name restored to the register.⁵⁶ The differing views may lead to conflicts between members of the MMA which has thus far been free of formal religious influences. Such conflicts are already present in legal profession.⁵⁷

The Enactment does not describe whether stoning, *rejam* and crucifixion will be carried out by prison officers or religious leaders, and whether it should be in the presence of four male witnesses who gave testimony about the crime, or the general public. Will it be carried out in prisons as is the case for punishments under the penal code or in public places? In some countries like Saudi Arabia and Iran, *hudud* punishments are sometimes carried out in public to serve as a deterrent to others.⁵⁸ It is not clear whether this is part of Islamic law or a practice instituted in these countries without any specific reference to Islamic law. The *hudud* enactment does not provide any guidance. Furthermore if the Kelantan State government is of the view that it should be carried out in public, how will it protect the rights of Muslims and non-Muslims who do not wish to be part of the process?

Evidence

The evidential requirements stipulated in the enactment are controversial as it only permits direct evidence by just adult male Muslims. A ‘just’ male Muslim is defined as a person who does whatever is required of him by Islam, avoids committing great sins, does not continuously commit lesser sins and also has a sense of honour.⁵⁹

⁵³Regulations 28 – 31.

⁵⁴Section 30 Medical Act 1971.

⁵⁵The *STAR* 29 April 2014.

⁵⁶Sections 31 and 31A Medical Act 1971.

⁵⁷The Muslim Lawyers’ Association and Syarie Lawyers’ Association often issues contradictory statements to those issued by the Bar Council on matters pertaining to the conflicting jurisdiction of the Syariah and Civil courts although they are united on most other issues pertaining to fundamental rights. See A Whiting, ‘Secularism, The Islamic State and the Malaysian Legal Profession’ [2010] *Asian Journal of Comparative Law* 1.

⁵⁸<http://www.amnestyinternational.org>

⁵⁹Section 41.

There must be two male witnesses to a *hudud* offence except in cases of *zina*, where four male witnesses to the actual act are required. These witnesses must give consistent evidence before the accused can be convicted and their testimony may be withdrawn anytime before punishment is imposed on the accused. If they withdraw their statements in cases of *zina*, they may be guilty of *qazaf* which is giving false testimony. The enactment makes it clear that conviction under *hudud* or *qisos* is only possible when the evidence leaves no room for ambiguity or doubt making it difficult to obtain convictions. In cases where there is doubt, the matter has to be treated as *ta'zir* which is where the state and the courts impose punishments as it deems necessary.

The Enactment states that circumstantial evidence though relevant shall not be a valid method of proving a *hudud* offence. However circumstantial evidence is a valid method of proving *zina* and *syurb*.⁶⁰ The reason for the different treatment accorded to *zina* has not been explained. Sisters in Islam (SIS) pointed out the misuse of *zina* in other Islamic societies to oppress women with impunity and the assumption that an unmarried pregnant woman is guilty of *zina*, without the need for witnesses is not just and equitable. Furthermore the enactment has applied the strictest interpretation of unmarried pregnancy which is not part of the Shafie *mahzab* which is adhered to by most Malay Muslims.⁶¹

The Enactment purports to exclude the evidence of non-Muslims, Muslim women and Muslim men who are not deemed to be just. The definition of 'just' Muslim male who is a person who does whatever is required of him by Islam, avoids committing great sins, does not continuously commit lesser sins and also has a sense of honour is extremely subjective. A person who does not adhere to the Kelantan State government's views of Islam may not be regarded as a just male although he may be regarded as such outside the state. An example is the ex-Mufti of Perlis who was charged for preaching without approval in Selangor.⁶² Will there be protection in place for people who do not follow the State's version of Islam?

Furthermore, the Enactment states that where an offence cannot be proven as a *hudud* offence, the courts may apply *ta'zir*. Section 39(2) states that all offences under this Enactment, whether *hudud* offences or *qisos* offences or *ta'zir* offences shall be proved by oral testimonies or by confession made by the accused. Section 40(1) states that the number of witnesses requires to prove *all offences* under this Enactment except *zina* shall be at least two. This means that crimes which fail to meet the strict evidential requirements of *hudud* and *qisos* will also fail under *ta'zir*. How will the offender be punished under circumstances where circumstantial evidence points to him or her as the perpetrator of the crime but there is no direct evidence or two just male witnesses to provide direct evidence, and the offender refuses to confess to the crime?

There is no option of trying the offender under the Penal Code as Article 7 of the Federal Constitution states that 'A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.' Since an offender

⁶⁰Section 46.

⁶¹Rose Ismail 'The Practice of Hudud in Other Countries' in Rose Ismail (ed) *Hudud in Malaysia: The Issues at Stake*, (Kuala Lumpur, Ilmiah Publishers, 2002) 23

⁶²Find source

would have been tried by the Special *Syariah* Trial Court and found not guilty due to lack of evidence, he cannot be tried for the same offence in the civil courts.

The *Hudud* Enactment does not take into account offences which are committed by Muslims against non-Muslims. As the *syariah* courts under List II have no jurisdiction over non-Muslims, and they are not considered reliable witnesses, they cannot give evidence against Muslim criminals. The enactment is silent on whether such cases will be tried under the Penal Code.

Muslims and non-Muslim may appear before the civil courts and it is natural that such courts try these offences especially where non-Muslims are involved. Nevertheless the unresolved jurisdictional conflict due to varied interpretations of article 121(1A) may continue to be used and exploited by Muslim criminals in Kelantan who do not want to be tried in the civil courts where circumstantial evidence may be used to prove their guilt. Non-Muslim criminals on the other hand, will most certainly be subject to ‘lighter’ penalties compared to Muslim criminals.

Section 56(2) of the *Hudud* Enactment states that non-Muslims may elect for the Enactment to apply to them but this does not mean that their evidence is admissible as the Enactment clearly states that it is witnesses to a crime must be just male Muslims. Furthermore, there is no provision for *syariah* Courts to exercise jurisdiction over non-Muslims even if they voluntarily submit to its jurisdiction. Section 56(2) is unconstitutional and should be declared invalid.

In cases involving rape of a Muslim woman, the crime may be treated as *zina* which may depend on circumstantial evidence. If a Muslim woman is raped and there are no eye-witnesses, the crime cannot be treated as *ta’zir* which also requires just Muslim males to have witnessed it. The court is not able to accept scientific evidence such as rape kits, the evidence of non-Muslims doctors who have examined the woman and DNA evidence. Even if accepted, it may have to be subject to the ‘test’ of Islamic law before it is accepted? Who will provide such expertise? If a Muslim woman was raped in another state and there is sufficient scientific evidence to prove it or the perpetrator has been convicted, will the Special *Syariah* Trial court in Kelantan accept this proof ‘to the contrary?’⁶³

If armed robbery is committed without two just Muslim male witnesses, but the perpetrators are captured on camera, will this be considered an offence? The enactment does not deal with these crucial issues. These are some of the many questions that have not been addressed by the *Hudud* Enactment.

Impact of the *Hudud* Enactment on the Federal Constitution

A common misperception is that implementing the *Hudud* Enactment will require a constitutional amendment. The Federal Constitution may only be amended if two-thirds of representatives in Parliament approve the amendment.⁶⁴ However this is inaccurate as the Enactment could be implemented under Article 76A of the Federal Constitution. Article 76A gives Parliament power to authorise the Legislatures of the States to make laws with respect to a matter in the Federal List subject to conditions and restrictions that Parliament may impose.

⁶³ Section 46(2).

⁶⁴ Article 159(3)

Once this is done, the State may to the extent that the Act so provides, amend or repeal any federal law in relation to that Act which was passed before power was given to that State.

Article 80(4) provides that federal law may provide that the executive authority of a State shall extend to the administration of any specified provisions of federal law and may for that purpose confer powers and impose duties on any authority of the State. A simple majority in Parliament is required to enact legislation giving the State of Kelantan power to enact the *Hudud* Enactment and to carry out the necessary administration under the Act.

Any legislation that permits Kelantan to implement the *Hudud* Enactment should be examined carefully. The parameters of the *Hudud* Enactment are not clear. General understanding is that when a crime which should be punished under *hudud* or qisos cannot be proven clearly, it should be treated as a *ta'zir* offence. However, the term 'left to the discretion of the legislature' in section 3 of the Enactment permits the Kelantan Legislative Assembly to classify any offence as '*ta'zir*' which would bring it within the jurisdiction of this Enactment. This may extend it not only to theft, robbery, crimes of a sexual nature, consuming alcohol or apostasy but also criminal breach of trust, fraud, criminal destruction of property and a wide range of other crimes. Currently, these crimes are covered by Federal Law but due to the provision on *ta'zir*, any statute enacted by Parliament giving effect to the Enactment may inadvertently permit such laws to be enacted by the State Legislative Assembly of Kelantan.

The *Hudud* Enactment reveals the anomalies that exist in the Malaysian Federal Constitution in relation to Islamic law which is depicted in the powers granted to the state and federal government.⁶⁵ Para 1 List II of the Ninth Schedule of the Federal Constitution gives the states power to enact Islamic laws. This includes the creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List. The current wording in Para 1 of List II of the Ninth Schedule states that '...creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, **except in regard to matters included in the Federal List;..**'The states also have power over the constitution, organisation and procedure of *Syariah* courts, which shall have jurisdiction only over persons professing the religion of Islam.

Para 4 of List 1 of the Ninth Schedule gives the Federal government jurisdiction over criminal law and procedure. If Parliament enacts a statute to give power to the State of Kelantan to implement the *Hudud* Enactment, it will have to ensure that the wording in that statute is precise states the clear parameters within which the *Syariah Criminal Code (II) Enactment 1993* would operate. Anything less than this would mean that any future amendments to the *Hudud* enactment by the State Legislative Assembly of Kelantan will be effective over any federal law.

Para 4 of List I of the Ninth Schedule also refers to the administration of justice including the constitution and organisation of all courts except *Syariah* courts,⁶⁶ the jurisdiction and power of

⁶⁵Shad SaleemFaruqi, 'The Malaysian Constitution, the Islamic State and *Hudud* Laws in K.S. Nathan and M.H. Kamali (eds) *Islam in Southeast Asia; Political, Social and Strategic Challenges for the 21st Century* (Singapore, Institute of Southeast Asian Studies, 2005) 256.

⁶⁶Para 4(a).

all such courts⁶⁷ and creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law.⁶⁸ An anomaly created under the Federal Constitution is that while the constitution and organisation of the *Syariah* courts is in the State List, the jurisdiction and power of *all* such courts is in the Federal List. Clearly, the Federal Constitution has placed the decision on jurisdiction and power of all courts with Parliament. This was clearly exercised by Parliament in enacting the *Syariah* Courts (Criminal Jurisdiction) Act 1965 which states that the jurisdiction of *syariah* Courts in Peninsular Malaysia extends to imposing a term of imprisonment not exceeding three years, a fine not exceeding five thousand ringgit and whipping not exceeding six strokes or any combination thereof.⁶⁹ In order for the Special *Syariah* Trial Court or Special *Syariah* Court of Appeal in Kelantan to impose *hudud* and *qisos* punishments, the Statute that is enacted by Parliament under article 76A and 80(4) will have to permit this and the *Syariah* Courts (Criminal Jurisdiction) Act 1965 will be no longer apply in the State of Kelantan. It is presumed that that Parliament may repeal this statute at any time by a simple majority but does this mean that the *Syariah* Courts (Criminal Jurisdiction) Act 1965 will re-apply to Kelantan or will further steps have to be taken for it to re-apply.

Article 8 of the Federal Constitution states that all persons are equal before the law and entitled to equal protection before the law. Article 8(2) states, ‘Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law...’ The exception to this is in Clause (5) which states that it will not invalidate any prohibition regulating personal law. The provisions of the *Hudud* enactment do not fall under these exceptions as criminal law does not fall within the definition of personal law.⁷⁰ The result of the implementation of the *Hudud* Enactment will be two different criminal legal systems applying vastly differing punishments on different individuals based on their religion and domicile.

Is Parliament authorised under Article 76A to permit the state of Kelantan to treat Muslims differently from non-Muslims for the purpose of apply criminal laws? The term used in Article 8(2) is ‘Except as expressly authorised by this *Constitution*’ and not ‘except as expressly authorised by Parliament’ as found elsewhere in the Constitution. The implication is that article 8 does not permit different treatment on the grounds of religion except for the purposes of applying personal law. This view receives some support from the Federal List in the Ninth Schedule which has jurisdiction over laws of evidence⁷¹ except in matters which include Islamic personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession, testate or intestate.⁷² In other words, article 8 cannot be subsumed by Parliament under article 76A.

Is the proposed implementation of hudud in Kelantan an ‘Islamic’ issue or a national issue?

⁶⁷Para 4(b).

⁶⁸Para 4(h).

⁶⁹Section 2 *Syariah* Courts (Criminal Jurisdiction) Act 1965.

⁷⁰Shad SaleemFaruqi, ‘Hudud – The Test for the Constitution’ *TheSTAR*, 1 May 2014.

⁷¹Para 4(e)(i).

⁷²Para 4(e)(ii).

Muslims agree that *hudud* is God's law but they are split into two groups; those who oppose *hudud* and those who support it. The first group opposes *hudud* on the grounds that not all the provisions in the *Hudud* Enactment are to be found in the Quran, the authorities should refer to the principles on which *hudud* are based and not the actual punishments, the focus of the Enactment is on punishment and not on forgiveness and mercy, Muslims should focus first on economic and social justice, and that there has been no explanation or public debate around the enactment. The second group comprising largely *ulama* in PAS and orthodox religious leaders within the State religious administration, and a segment of right-wing Muslim political leaders support *hudud* on the grounds that it is in the Quran and therefore mandatory for all Muslims. Furthermore, in their view, it would be blasphemous to claim that *hudud* must be modified to suit modern society or that the principles should be re-interpreted as *hudud* is based on God's law which is eternal. The response of Muslims that do not fall within these two groups has been muted.

The complexities within the Muslim community

The existence of various groups within a single Muslim society is not unusual. Esposito categorizes modern Islamic movements into various groups ranging from progressives on the far left to radical revisionists on the far right.⁷³ In between these groups lie traditionalists and neo-traditionalists. Progressives are not against Islamic values in states where Muslims form the majority of the population but are in favour of separation of Islamic law from the state. While some progressives may advocate an Islamic state, they call for a re-interpretation of Islamic texts to distinguish between eternal values, and time and context specific rules. This means that rules that were specific to 7th century Arabia must be re-interpreted to be applicable to modern times. *Syariah* should be used to advance knowledge with less emphasis on rules and sanctions.

Neo-traditionalists are another modern Islamic movement which is closer to the centre than the far left. They are willing to engage in democracy to achieve an Islamic state but hold conservative views on the role of Islamic laws. They are unwilling acknowledge that the Quran can be re-interpreted, are cautious about any re-interpretation of the *hadith*, but open to fresh interpretations in the area of financial or commercial law which do not conflict with their views about the personal duties of Muslims. They share similar views with traditionalists except that the latter holds closely to the view that the purpose of Islam is to retrieve its past glory.

Traditionalists have a greater tendency to refer closely to models of government and legal systems from the Prophet's time and to replicate it in modern states. This model includes government by the elite who are committed to implementing Islamic laws in the state. Some traditionalist movements are difficult to distinguish from radical movements which believe that the government must be formed by jurists and persons qualified to apply Islamic laws. There is an overlap between the neo-traditionalist, traditionalist and radical groups pertaining to their views about women, minorities and the position of Islamic laws in the state. However unlike radical revisionists, they do not believe that using violence to achieve their ends is justified.⁷⁴

⁷³ John Esposito, 'Islam: The Straight Path' (Oxford, OUP, 2010) 192

⁷⁴ John Esposito, 'Islam: The Straight Path' (Oxford, OUP, 2010) 192.

The key differences between progressives and traditionalists lie in Islamic epistemology which pits rationalism against legalism. Jurists declared the door to reasoning (*ijtihad*) closed when Asharites (*al-Ashari*) came into power in the 10th century. Asharites applied strict legalism and preached that God was to be obeyed and it was not for man to comprehend God's laws but to apply it.⁷⁵ They were opposed to Mu'tazilites (*mu'tazila*) who were influenced by Greek rationalism and whom they accused of intellectualising the Quran by elevating reason over revelation. The debates and discussions of the four orthodox imams in the 8th century were crystallised into a body of rules known as *Syariah* by the Asharites.⁷⁶ Progressives believe that the debates between these orthodox imams made it clear that differences in opinion were encouraged and the imams did not intend their views to become immutable laws.

Traditionalists and radical revisionists are influenced by Abu al-Ala al-Mawdudi's views that Islam is superior to other religions and Muslims should assert their superiority and subjugate other religions. As Islam is the ultimate revelation by God in the Quran, it is universal, valid for all human beings and must be imposed on all. Sayyid Qutb, who also strongly influenced traditionalists, ridiculed the concept of the nation state as a creation by the West to serve man and not God. He stated that the Prophet modelled the perfect government on earth with the sole intention of serving God and organising society in accordance with God's will. This must be replicated in modern states which are to be established for the same purpose. According to Qutb, Muslims have two choices which are to withdraw from public life as far as they are able and create their own religious community (*hijrah*) or to engage in revolutionary action against society to root out unIslamic practices and enforce the true purpose of Islam (*jihad*). *Jihad* was advocated by Ibn Taymiyya in the 13th century against infidels and Islamic governments who engaged in unIslamic practices. Qutb believes that all Muslims must engage in *jihad* to achieve an Islamic society modelled on the Prophet's government.⁷⁷

Traditionalists argue that it is imperative for them to establish an Islamic state with an Islamic government in charge in order for the Muslim community (*ummah*) to live as true Muslims. This involves establishing a welfare state which will look after widows, orphans and the poor, an economy which will be in line with Islamic principles such as interest free banking, Islamic governance standards and practices to promote ethical behaviour, introduction of *hudud*, the superiority of Muslims and Islam to other religions and relegation of non-Muslims to the status of *dhimmi*.⁷⁸ The only way of achieving these outcomes is through political supremacy but traditionalists differ in their method of achieving it with some committed to the path of democracy and others to militancy which brings them closer to the world view held by radicals.⁷⁹ Tibi notes that it is unclear whether traditionalists who obtain power through the democratic process will relinquish it to groups they perceive to be unIslamic'.⁸⁰

⁷⁵ Peter R Demant, *Islam vs Islamism*, 'The Dilemma of the Muslim World' (Connecticut, Praeger, 2006) 14.

⁷⁶ Clinton Bennett, *Muslims and Modernity; An Introduction to the Issues and Debates* (London, Continuum, 2005) 122.

⁷⁷ Abdullah An-Na'im, 'Religion, the State and Constitutionalism in Islamic and Comparative Perspectives' (2009) 57 *Drake Law Review* 829

⁷⁸ *Dhimmi* are non-Muslims in an Islamic state who have the right to protection by the state in return for tax known as *jizya*. Certain jurists dictate that they should be given similar rights to Muslims while other jurists dictate that they do not have equal rights to Muslims.

⁷⁹ Peter R Demant, *Islam vs Islamism*, 'The Dilemma of the Muslim World' (Connecticut, Praeger, 2006) 178.

⁸⁰ Bassam Tibi, 'Why They Can't Be Democratic' *Journal of Democracy* 19 No 3 (2008) 43 - 48.

Progressives view Islam as having universal rules which were revealed during the Prophet's sojourn in Mecca. The Medinan period is categorised by compromises of these universal rules to meet the requirements of the time but the true meaning of Islam and its universal rules are found in the earlier verses of the Quran.⁸¹ Secular states are not anti-religious because Islam would thrive under any environment. Secularists are of the opinion that it would be difficult to implement Islamic laws in a state as they do not form a coherent body of laws but are dynamic and respond to change.⁸² Progressives feel that traditionalists and neo-traditionalists are doing a great disservice to Islam in enacting legislation to enforce *Syariah* because it implies that *Syariah* is unable to respond to change and is static. In their view, the four imams engaged in debates and discussions because Islam was dynamic and the imams had to find interpretations that were suited to different social conditions. The difficulty with categorising Muslims as progressives or traditionalists is that sometimes they fall into the progressive category over some issues and traditionalist category on other issues.

Muslims in Malaysia fall into the various categories mentioned above but the dominant groups comprise neo-traditionalists and traditionalists while less dominant groups fall within the far left. Traditionalist pressure groups have refused to engage with other Muslims and non-Muslims on the impact of authoritarian and orthodox versions of Islamic laws which permits the states to wield enormous power which increasingly remains immune to challenge.⁸³ They have driven policies and legislation ensuring that Muslims are subjected to a state-endorsed version of Islam often to be accepted without question. Islamic Affairs Departments in each state have been given powers to arrest and charge individuals who do not adhere to the state sanctioned Sunni version of Islam,⁸⁴ dictate that Muslims must have a permit issued by the state to preach about Islam⁸⁵ and vet sermons in mosques⁸⁶ on the grounds that this will prevent deviation from Islam. The state-endorsed version of Islam in Malaysia permits the state mufti and the fatwa committee to issue edicts (fatwas) which in some States cannot be challenged. Islamic enforcement authorities are armed with sweeping powers of arrest and prosecution against purported deviants. Unlike civil servants and the police, the Islamic authorities' powers are amorphous and they operate in an undefined sphere between Islamic law and common law without accountability either as religious leaders or public servants.

Muslim and non-Muslim responses to hudud

⁸¹ Clinton Bennett, *Muslims and Modernity: An Introduction to the Issues and Debates* (London, Continuum, 2005) 56.

⁸² Abdolkarim Soroush, *Reason, Freedom and Democracy in Islam*, (OUP, Oxford, 2000) 126; Fatima Mernissi, *Islam and Democracy: Fear of the Modern World*, (Virago, London, 1994) 65.

⁸³ Kedah Makes Fatwa Absolute: Edicts Cannot Be Challenged At All' *Star* Wednesday 18 April 2012.

⁸⁴ Mohamed A Bakar, 'Islamic Revivalism and the Political Process in Malaysia' *Asian Survey* 21 No 1(1981) 1040 – 1059.

⁸⁵ Zieman, 'Former Perlis Mufti Detained' *Star*, November 2, 2009.

⁸⁶ Bureau of Democracy, Human Rights and Labor, '2010 International Religious Freedom Report' http://www.state.gov/j/drl/rls/irf/2010_5/168363.htm

Why are there Muslims who have criticised the *Hudud* Enactment if it is mandated in the Quran and why are non-Muslims vocal in their opposition when it is clear that the Enactment will not apply to them?

The problem lies with the reluctance or refusal of traditionalists to engage with those who hold different views. This reflects the age-old debate between the Asharites who preached strict legalism and Mu'tazilites who believe that logic and reason must be used when interpreting the Quran. Progressives who air their views publicly are subjected to harassment and legal action.

Sisters in Islam (SIS) and the Islamic Renaissance Front (IRF) perceive the *Hudud* Enactment as an attempt by traditionalists to implement their interpretation of *hudud* without regard for its implications on society and without considering differing views by Muslim scholars. SIS points out that Muslims are divided in their views on the implementation of hudud with traditionalists claiming that it is God's law which must be enforced without any amendments, while others claim that it depends on the pre-existence of a just society where violations are such an affront to the community that it warrants harsh punishment. Other Muslims claim that *hudud* punishments are specific and contextual and no longer applicable in modern society.⁸⁷ SIS is against *hudud* on the grounds that it has been misused in other Islamic societies to oppress women with impunity especially in the area of *zina*,⁸⁸ would disqualify the majority of the population as witnesses, has selected the most unforgiving and severe juristic opinions (*fiqh*), focus on the fixed penalties and not on the text in the Quran as a whole, include crimes which are not prescribed in the Quran (consumption of alcohol and apostasy) and treat the process of interpretation, codification and implementation of hudud law as divinely inspired when it is actually carried out by human beings who have their own flaws.⁸⁹

Traditionalists view resistance to the Enactment as a threat to Islam and their interests on the grounds that *hudud* is mentioned in the Quran which is perceived to be applicable for all time and must be implemented or they will be held accountable to God.⁹⁰ They have attempted to silence progressives through intimidation by attempting to ban their publications and organisations.⁹¹ Islamic law is clearly capable of different interpretations within the Muslim polity but progressives are permitted limited public space to espouse their views. Clearly one of the basic questions that progressives (and non-Muslims) have is why do the authorities advocating *hudud* refuse to engage in public discussions and debates in order to convince the public and allay their fears? There has been no response to this question thus far.

The views of the general Muslim population are unclear although there are indications that Muslims are in favour of implementing Islamic laws in Malaysia because they are uncertain

⁸⁷ Mohammad Hashim Kamali, 'Punishment in Islamic Law: An Enquiry Into the Hudud Bill of Kelantan' (Kuala Lumpur, Institut Kajian Dasar, 1995) 33.

⁸⁸ Rose Ismail 'The Practice of Hudud in Other Countries' in Rose Ismail (ed) *Hudud in Malaysia: The Issues at Stake*, (Kuala Lumpur, Ilmiah Publishers, 2002) 23

⁸⁹ Zainah Anwar, 'Let us not be hoodwinked into hudud' *The Star* 4 May, 2014.

⁹⁰ Rose Ismail 'The practice of hudud in other countries' in Rose Ismail (ed) *Hudud in Malaysia: The Issues at Stake*, Kuala Lumpur, Ilmiah Publishers, 2002) 51.

⁹¹ *Dewan Pemuda Masjid Malaysia v SIS (Forum) Malaysia* [2011] 4 Current Law Journal 630.

about their duties under Islam and feel that implementing these laws will force them to be good Muslims.⁹²

Progressives may resist *hudud* on the grounds that it is not in line with the spirit of the Quran but what grounds do non-Muslims resist the *Hudud* Enactment when it clearly does not apply to them?

The main reason for their resistance is that non-Muslims do not believe that the Enactment will not apply to them especially in light of earlier statements by PAS to this effect.⁹³ Non-Muslims have been increasingly subjected to state-endorsed action under the New Economic Policy which promotes affirmative action in favour of the Malay-Muslim majority. They are also subject to policies which increasingly remove all non-Muslim religions from the public sphere in education and media while increasing the presence of Islam.⁹⁴ They find it difficult to build places of worship due to requirements that there must be a higher ratio of non-Muslim worshippers to obtain building permits compared to Muslims and difficulty in obtaining burial grounds compared to Muslims.⁹⁵ The UMNO-led government has not addressed their concerns and prevented public discourse about the consequences of UMNO's practices by permitting extreme right wing Malay-Muslim groups such as PEMBELA, ACCIN and *Pertubuhan Pribumi Perkasa Malaysia* (PERKASA) to threaten non-Muslims with violence for 'affecting the sensitivities of Muslims' whenever they raise their concerns.⁹⁶

Muslims and non-Muslims are deeply concerned about PAS reluctance to publicise the two bills which it intends to present before Parliament in June 2014. PAS' repeated assurance that it will explain and educate the public about *hudud* rings hollow as the *Hudud* Enactment has been in existence since 1993 and PAS has made no attempt to engage the public about the contents of the bill. PAS' website has no information about the proposed bill and the standard response is to resort to name-calling of Muslims who question the Enactment. PAS has had ample opportunity of explaining to Muslims how the reasons for the provisions in the Enactment and which school of thought has been adhered but it has avoided such discussions.

Another reason for resistance to the *Hudud* Enactment is that non-Muslims perceive *hudud* as a threat to Malaysia's status as a secular nation and they are wary of any laws which grant more powers to the Islamic authorities or the *Syariah* courts whom they perceive as having jurisdiction over their affairs due to the decisions of Muslim judges in civil courts. In recent years, the civil courts have refused to adjudicate on cases of infant conversions to Islam by a recently converted

⁹² Patricia Martinez, 'Is It Always Islam Versus Civil Society' in K. S. Nathan and Mohammad Hashim Kamali (eds) *Islam in Southeast Asia, 'Political, Social and Strategic Challenges for the 21st Century'* Institute of Southeast Asian Studies, Singapore, 2005).

⁹³ Mustafa Kamal Basri, 'Terengganu says Islamic laws will eventually cover non-Muslims', *National Human Rights Society*, 9 July 2002, [_www.hakam.org/news090702.htm_](http://www.hakam.org/news090702.htm), visited on 25 November 2005.

⁹⁴ Ahmad Fauzi Abdul Hamid, 'Implementing Islamic Law Within a Modern Constitutional Framework: Challenges and Problems in Contemporary Malaysia', *Islamic Studies* 48 No 2 (2009) 157 - 187.

⁹⁵ Patricia Martinez, 'The Islamic State or the State of Islam in Malaysia' *Contemporary Southeast Asia* 23 No 3 (2001) 474 - 503.

⁹⁶ Ahmad Fauzi Abdul Hamid, 'Islamist Realignments and the Rebranding of the Muslim Youth Movement of Malaysia', *Contemporary Southeast Asia* 30 No 2 (2008) 215 - 240.

parent without the approval of the non-Muslim parent.⁹⁷ In *Subashini Rajasingam's* case, Suriyadi JCA quoted Quranic verses in his decision at the Court of Appeal and chided the Hindu mother for bringing her petition for custody of her child to the civil courts claiming that it was an attempt to undermine the jurisdiction of the *syariah* courts. The judge went on to suggest that she should obtain a remedy from the *syariah* court although the *syariah* court has no jurisdiction over non-Muslims and there is no provision in the Federal Constitution permitting a non-Muslim to submit himself to the jurisdiction of the court. In other cases such as *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak*⁹⁸ a non-Muslim judge in the High Court reversed the conversion of the applicant's children to Islam by their father on the grounds that the children were not present at the time of conversion. His Lordship also did not follow earlier decisions of the Court of Appeal on the conversion of infant children by one parent without the permission of the non-Muslim parent. While non-Muslims welcome the decision in this case, Muslims view it with dismay on the grounds that the High Court challenged the jurisdiction of the *Syariah* Court.

The decisions of judges in cases pertaining to infant conversions,⁹⁹ apostasy,¹⁰⁰ the validity of conversions by persons who died without informing their families about their earlier conversion¹⁰¹ and the use of the term 'Allah' by the Catholic Herald¹⁰² has almost always been decided along the lines of the religious persuasions of the judges¹⁰³ until recently when a Muslim judge Datuk Zabariah Mohd Yusof J, reversed the conversion of two infant children by their father and granted custody to their mother. The police were unable to take action against the father who forcefully took away his son on the grounds that he had been given custody by the *syariah* court and both courts had equal jurisdiction. Nevertheless the father is believed to have breached an interim protection order by the civil court which is actionable under civil law. The lack of police action is perceived by non-Muslims as an indication that they will not be protected by the police even in clear breaches of the law. The potential for jurisdictional conflict between the *syariah* and civil courts will continue under the *Hudud* Enactment as illustrated earlier in this paper. As there is no resolution in sight by the government or the judiciary, non-Muslims will continue to resist the application of the *Hudud* Enactment because of the perception that it will erode their rights and the secular legal system.

Recent verbal attacks against non-Muslims have not resulted in any action by the police and attorney general's chambers to institute action against the perpetrators. Among the many recent

⁹⁷ *ShamalaSathiyaseelan v Dr Jeganesh C Moganarajah* [2004] 2 Malayan Law Journal 648; *Subashini Rajasingam v SaravananThangathoray*[2008] 2 Malayan Law Journal 147.

⁹⁸ [2013] 7 Current Law Journal 82.

⁹⁹ *ShamalaSathiyaseelan v Dr Jeganesh C Moganarajah* [2004] 2 Malayan Law Journal 648; *Subashini Rajasingam v SaravananThangathoray*[2008] 2 Malayan Law Journal 147; *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak* [2013] 7 Current Law Journal 82.

¹⁰⁰ *Lina Joy v Majlis Agama Islam Wilayah Persekutuan* [2004] 2 Malayan Law Journal 119; [2005] 6 Malayan Law Journal 193; [2007] 4 Malayan Law Journal 585; *Priyathaseni v Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak* [2003] 2 Current Law Journal 221.

¹⁰¹ *KaliammalSinnasamy v PengarahJabatan Agama Islam Wilayah Persekutuan*[2006] 1 CLJ 753

¹⁰² *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri* [2010] 2 Malayan Law Journal 278; *Menteri Dalam Negeri v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 8 Current Law Journal 590.

¹⁰³ Elsa Satkunasingam, 'Discordant Voices on the Status of Islam under the Malaysian Constitution' in John Gillespie and Pip Nicholson (eds.) *Law and Development and the Global Discourses of Legal Transfers* (2012, Cambridge University Press, Cambridge) 333.

statements are statements from a retired Court of Appeal judge who stated that deities of non-Muslim religions should not be permitted to be in the open but should be in an enclosed area. He was referring to a huge statute representing a Hindu god built in Batu Caves and a statue of Kuan Yin, the goddess of mercy in a temple in Penang. He claimed that the statue was built to send the message that the religion was all mighty and powerful and that when non-Muslims built such big idols, it 'hurts people's feelings'. He also stated that under the Federal Constitution, Islam is above all other faiths and that Islam forbids images but it could be allowed if it were covered up.¹⁰⁴ Ikatan Muslimin Malaysia (Isma) has issued several statements against non-Muslims based either on their race or religion¹⁰⁵ while politicians and non-governmental organisations have made un-substantiated statements claiming that Christians were proselytising to Malays without any evidence to support their claims.¹⁰⁶ Forums demonising other religions have been supported by state religious departments¹⁰⁷ which have also seized religious books belonging to Christians¹⁰⁸ claiming that they unanswerable to no one except a higher power. Bibles seized by JAIS have not been returned to the Bible Society of Malaysia as no politician dares to order JAIS to do this. The lack of action against persons who deliberately issue unsubstantiated statements against non-Muslims indicates that traditionalists who control public discourse on *hudud* subscribe to the view that non-Muslims' religious beliefs must be severely restricted. It is not inconceivable that the implementation of the *Hudud* Enactment which brings with it attendant problems such as jurisdictional conflicts, and the concept of non-Muslims as *dhimmi*, is being resisted on an unprecedented level.

The crux of the problem is due to mistrust between Muslims and non-Muslims. Muslims feel that their desire to live under Islamic laws is being thwarted by non-Muslims who are interfering in Islamic affairs. They feel that non-Muslims have overstepped their boundaries. Furthermore, the Kelantan State government is only seeking to implement *hudud* in the state of Kelantan where there is an overwhelming Muslim majority. Therefore non-Muslims' resistance is viewed as extremely unreasonable as *hudud* will not affect Muslims from other states and non-Muslims in Kelantan and elsewhere in Malaysia as the enactment clearly states that non-Muslims are not subject to the Enactment unless they voluntarily surrender themselves to the courts' jurisdiction. Some traditionalists and neo-traditionalists who have no interest in power for its own sake but genuinely envisage an Islamic state symbolised by *hudud* which will help Muslims live in accordance with *syariah*, are taken aback and puzzled by the resistance to *hudud* and have become angry at what they perceive as Muslims resisting God's law and non-Muslims insulting Islam and interfering in Islamic matters by questioning the implementation of *hudud*.

Moving forward

¹⁰⁴ Boo Su-Lyn, 'Huge Hindu-Buddhist statues against Islam, ex-judge says' Malaymailonline April 16, 2014 at <http://www.themalaymailonline.com/malaysia/article/huge-hindu-buddhist-statues-against-islam-ex-judge-says>

¹⁰⁵ Looi Su-Chern, 'Chinese brought to Tanah Melayu are trespassers' Malaysian Insider, May 7, 2014.

¹⁰⁶ Christian groups; Elizabeth Zachariah, 'Books warning Muslims about 'Christian agenda' distributed at Allah forum in university' Malaysian Insider, May 7 2014; V. Anbalagan, 'Christians have ulterior motive for wanting to use the word 'Allah' says Mahathir, Malaysian Insider, January 24, 2014.

¹⁰⁷ Elizabeth Zachariah, 'Books warning Muslims about 'Christian agenda' distributed at Allah forum in university' Malaysian Insider, May 7 2014.

¹⁰⁸ Jennifer Gomez, 'Selangor Islamic Authorities raid bible society of Malaysia, 300 copies of AlKitab seized', Malaysian Insider, January 2, 2014;

It is clear that Muslims want Islam to play a bigger role in their lives. It is within the right of Muslims to be subject to their religious laws but this should not be equated with domination in the public sphere as article 3 states clearly that other religions may be practised in peace and harmony. The 'privatisation' of other religions is the result of pressure applied by traditionalists and since there was little resistance in the past by non-Muslims, many Muslims equate Islam's public presence to mean that it is superior to other religions. This is a claim that Muslims are entitled to make but not to enforce by driving out other religions from the public sphere.

The implementation of the *Hudud* Enactment will exacerbate the jurisdictional conflicts between the civil and *syariah* courts. It will also result in many questions about the scope of its application. These issues must be resolved and discussed openly so that all Malaysians regardless of their religious persuasion fully understand the purpose of the Enactment. Currently, it is insufficient for Parliament under Article 76A to pass a statute which will permit Kelantan to implement the Statute as the different treatment accorded to Muslim women and non-Muslims is against article 8 of the Federal Constitution.

Regardless of the decisions of the courts and statements by politicians, there is clear indication even after Merdeka, that Islam is the official religion of the Federation but the Constitution does not place it above other religions. In Emeritus Professor Shad Faruqi's words, 'There is a silent re-writing of the Constitution'¹⁰⁹ which has taken place. J. M. Fernando, in his book titled 'The Making of the Malayan Constitution',¹¹⁰ clearly depicts the historical evidence behind article 3 which shows that it was intended to be an 'innocuous' provision and that the rights of non-Muslims should be protected. Contrary to popular belief, the Constitution was not drafted by the British and handed over to the Malaysian government. It was the result of many discussions with the Rulers and the Alliance as well as groups such from all over Malaya.

Post-independence, the Malaysian government reiterated status as a secular nation to Sabah and Sarawak during the Malaysia Solidarity Consultative Committee's discussions with these states.¹¹¹ This was supported by the Cobbold Commission¹¹² and the Inter-Governmental Committee's recommendations for constitutional arrangements for religious liberty in Sabah and Sarawak.¹¹³ There were extensive protections in place to maintain freedom of religion in Sabah and Sarawak which have since been dismantled.¹¹⁴ Judicial decisions such as *Che Omar bin Che Soh v Public Prosecutor*¹¹⁵ and *Minister for Home Affairs, Malaysia v Jamaluddin bin Othman*¹¹⁶ show that this was clearly understood by the courts until recently.

¹⁰⁹ Shad Saleem Faruqi, *Document of Destiny: The Constitution of the Federation of Malaysia* (Star Publications, Selangor, 2008) p 147

¹¹⁰ The Malaysian Branch of the Royal Asiatic Society, Kuala Lumpur, 2002

¹¹¹ Report of the Malayan Solidarity Consultative Committee 3 February 1962 para 13.

¹¹² Cobbold Report 1962 'Recommendations' Section A para 148 (b).

¹¹³ Report of the Inter-Governmental Committee 1962.

¹¹⁴ Articles 161C, D and E of the Federal Constitution.

¹¹⁵ [1988] 2 Malayan Law Journal 55.

¹¹⁶ [1989] 1 Malayan Law Journal 418.

Traditionalists and non-traditionalists have tried to change the status quo to reflect their current understanding of Islam as a way of life and *syariah* as perfect laws. This is their *right* as Malaysian citizens as the Constitution is meant to reflect the aspirations of the people of a nation and not to remain as a static document. However, these changes should be discussed openly with all and constitutional guarantees have to be firmly in place to protect all citizens from discrimination, authoritarianism and unjust laws. Muslims who want to change the secular nature of the Constitution must be prepared to answer difficult questions such as why nations that have implemented *syariah* laws have poor human rights records and why corruption remains major a problem in those societies as it is in societies which do not have *syariah* laws as its source? They also have to provide answers as to why in the post-Arab spring period, some Muslim majority nations have chosen a secular as opposed to a *syariah* based Constitution.

They have to be willing to engage with all Malaysians on their interpretation of *syariah* and how it will benefit society as a whole. Perhaps more importantly, State religious officers have to be seen to act in a just manner towards all Malaysians regardless of their faith and they should embody principles of justice in their decisions to the point where they build trust with all Malaysians. State religious officers and religious leaders have to stop issuing threats and acting with impunity. They must be answerable for their actions and there should be processes in place to chastise them when they act outside of their authority as they are after all flawed human beings. In other words, implementing *hudud* is placing the cart before the horse. If the religious officers, Muslim non-governmental organisations claiming to represent Islam and *syariah* courts were to act in a just, responsible and honourable manner, it is likely that there will not be so much resistance to Islamic laws. It may even cause a re-think of the *Hudud* Enactment from focusing on such severe punishment and exclusiveness to a just system of forgiveness and rehabilitation which includes all Malaysians regardless of their religious persuasion.