Law Speak - PAS bill – constitutional?

Posted on 6 June 2016 - 07:51pm
Gurdial Singh Nijar

Print

A SUSTAINED loud chorus of protestations has greeted the Dewan Rakyat speaker's unprecedented decision to leapfrog the so-called hudud bill at the last parliamentary session.

Even the mover of the motion appeared ill-prepared as he asked for the bill to be carried over to the next session.

The intense angst against the introduction of the bill has been from just about every section of our citizenry.

Members of the ruling coalition have complained that there was no prior consultation.

The issue threatens to tear apart all manner of constitutional and political arrangements – a Sabah minister has cautioned against upsetting the sensitivities of the state.

Some have attributed a hidden agenda – given the timing before the two impending by-elections.

The powers on high have sought to describe the bill as no more than an expansion of the existing syariah law in Kelantan.

This state law provides for the criminalisation of certain actions by Muslim offenders.

This revised stance is rather surprising – given that these same leaders have hitherto questioned the right of Kelantan to provide for criminal sanctions.

And they have been right in this regard.

This is because the states are not empowered to create hudud offences and provide for their punishment.

You see, under our Federal Constitution all matters relating to criminal offences is the sole right of the federal government.

Indeed, states are explicitly prohibited from dealing with the creation and punishment of offences by persons professing Islam against precepts of that religion: Federal Constitution, 9th Schedule, List II, item 1.

This makes clear that matters relating to criminal law and procedure are off limits to state legislatures.

The upshot is that states cannot enact such laws. Hence the Kelantan Syariah Criminal Code Enactment of 1993 and the Terengganu Syariah Criminal Enactment of 2003 which purport to create and punish hudud offences are clearly unconstitutional.

So to suggest that the PAS bill provides for an expansion of the Kelantan state enactment – is to condone an unconstitutional law.

As the power to enact such a law vests in the federal government, the next question that arises is whether the federal government can enact a law which will create such hudud offences and provide for their punishment?

Now the validity of any such law will be determined by reference to the provisions of the constitution.

The Federal Constitution makes clear that it is the supreme law of the land.

Any law enacted after Merdeka Day that runs counter to the provisions of the constitution will have no effect. It will be declared as "unconstitutional": Article 4.

Our constitution is founded on the Westminster model. Its fundamental construct provides for a democratic make-up and the enjoyment of fundamental liberties or rights.

So whenever it refers to "law" – and it does so in many articles – it refers to a system of law which incorporates the fundamental notions of a democracy and the values it enshrines as obtained in England on Merdeka Day.

It also includes the common law of England that existed in Malaysia at the time when the constitution came into force: Article 162.

The rationale for this was provided by the 1988 Privy Council case – Ong Ah Chuan v PP [1981] which dealt with almost identical provisions of the Singapore Constitution:

"It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules.
"If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by Article 5) of Articles 9(1) and 12(1) would be little better than a mockery".

This implies that you cannot violate the fundamental basis and values upon which the constitution was constructed.

Parliament, for example, cannot exercise its law-making powers to put a permanent end to Parliament; nor can it abolish the rule of law; nor can it disenfranchise its citizenry from voting.

This would fly in the face of the values that have been enshrined in the constitution on Merdeka Day. Our 1970 national ideology (the Rukunegara) further entrenched the cardinal twin principles of the rule of law within a democratic constitution.

Now on Merdeka Day, there was in existence a complete criminal justice system reflected in our laws.

This has been developed and enriched over the years by amendments and court decisions. This is perfectly consonant with the development of the system of laws that existed as at Merdeka Day.

It is within the power of Parliament or the courts to traverse new areas which were not thought about at the time the constitution was enacted. And get rid of archaic rules relating to the administration of justice.

So technical rules of evidence and procedure have been re-shaped by Parliament or clarified by the courts; and new areas introduced, such as Islamic banking.

So too personal laws – with regard to marriage and divorce and such like - have always been recognised in the jurisprudence of functioning democracies.

Critically, whether hudud involves precepts that would overhaul the criminal justice system of laws as at Merdeka Day?

If it is indeed antithetical to this established system, – as is contended – then Article 4 of the constitution renders it unconstitutional.

To conclude, it is respectfully submitted that neither the state legislature nor Parliament can enact this hudud law.

Worse is to seek to justify it by calling it a mere expansion of an existing constitutionally-flawed state law. Calling the hudud law by any other name does not render it any the less odious.

Gurdial Singh Nijar, a former law professor, is presently a legal consultant. Comments: letters@thesundaily.com

Related articles