

## **Explainer: What the Kelantan Shariah enactment challenge at the Apex Court is about**

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PUTRAJAYA, Feb 9 — The Federal Court has fixed today to deliver its long-awaited verdict in a constitutional challenge brought by two Muslim women to nullify 18 provisions in a Kelantan Shariah state law.

A Federal Court nine-member panel led by Chief Justice Tun Tengku Maimun Tuan Mat is set to deliver the court's decision at 9am sharp.

Other judges on the nine-member panel are President of the Court of Appeal Tan Sri Amar Abang Iskandar Abang Hashim, Chief Judge of Malaya Tan Sri Mohamad Zabidin Mohd Diah, Chief Judge of Sabah and Sarawak Tan Sri Abdul Rahman Sebli; Federal Court judges Tan Sri Nallini Pathmanathan, Datuk Mary Lim Thiam Suan, Datuk Harmindar Singh Dhaliwal, Datuk Nordin Hassan and Datuk Abu Bakar Jais.

Due to the constitutional challenge, the case was during the hearing stage subjected to objection and misinformation by those claiming that Islam is under threat by the review of Kelantan's provisions.

This has prompted Tengku Maimun to take the unusual step of making the observation that many remarks made about the case were a "distorted version" of the real issue being heard in court.

In fact, the country's top judge has had to re-emphasise that there is no dispute arising over Islam as the official religion of the Federation. but solely on the interpretation of words within the Federal Constitution.

With the crux of the matter now undisputed before the apex court's determination, what is the case all about?

Malay Mail has prepared a simple explainer of the case.

### **What is being challenged**

The court challenge was filed by Kelantan-born lawyer Nik Elin Zurina Nik Abdul Rashid and her daughter Tengku Yasmin Nastasha Tengku Abdul Rahman on May 25, 2022 directly at the Federal Court via Article 4(4) of the Federal Constitution (FC), with the Kelantan state government named as respondent.

Through the court challenge, the two women are seeking for the Federal Court to declare that 18 provisions of Kelantan's Shariah Criminal Code (I) Enactment 2019 are invalid, arguing that the Kelantan state legislative assembly had overstepped its powers or had no powers to make such laws.

Citing the FC, they argued that it is the federal government instead which holds the powers under the FC to make laws via Parliament on such crimes, and that the 18 provisions in the state law are already covered in federal laws made by Parliament.

Under the FC's Ninth Schedule, there are two different lists that say what the federal government — via Parliament — has powers to make laws on, and what the state governments — via their state legislative assemblies — have powers to make laws on.

List I is the Federal List which states what Parliament can make laws on, while List II or the State List provides a separate and shorter list of what state governments can make laws on.

The initial 20 provisions cover various Shariah offences listed by the Kelantan state legislature, including Sections 5 (false claim); 11 (destroying or defiling place of worship); 13 (selling or giving away child to non-Muslim or morally reprehensible Muslim); 14, 16 and 17 (sodomy, sexual intercourse with corpse, sexual intercourse with non-human); 30 (words capable of breaking peace); and 31 (sexual harassment).

The rest of the 20 provisions are Sections 34 (possessing false document, giving false evidence, information or statement), 36 (anything intoxicating), 37 (gambling), 39 (reducing scale, measurement and weight), 40 and 41 (executing transactions contrary to Shariah code and executing transactions via usury), 42 (abuse of halal label and connotation), 43, 44, 45, 48 (offering or providing vice services, preparatory act of offering or providing vice services, preparatory act of vice and “muncikari” otherwise known as a person acting as an intermediary between a woman and man or between the same gender for certain offences) and 47 (act of incest).

The 20 impugned provisions were later reduced to 18 provisions after Section 5 and Section 37(a) were dropped from the petition hearing as disclosed by lawyers representing Nik Elin.

### **What are the arguments by parties?**

As the petitioner, Nik Elin through her lawyer’s written and oral submissions argued that there is an apparent discrimination in the context of two parallel systems of criminal law.

They argued that a Muslim person would be subject to discrimination from two different sets of punishments and procedures for offences included in the Penal Code (as legislated on by Parliament) and Islamic law after the aforementioned 18 provisions came into force.

Thus, for the offences highlighted in the 18 provisions, they contended that a Muslim person would be deprived of constitutional safeguards afforded in civil

courts where the provisions have already been made the subject of Federal criminal legislation.

Notably, they asserted that inconsistencies between laws passed by Parliament and the respective state legislative assembly (SLA) were to be resolved in favour of federal law, as stipulated under Article 75 of the FC.

Article 75 reads, “If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void”.

Moreover, they argued that the constitutional framework also explicitly recognises that Parliament is to maintain a supervisory role over the SLAs power to enact offences against the precepts of Islam.

This was cited in the recent Federal Court judgment in 2021 where a nine-judge panel had unanimously ruled that a Selangor state law’s provision which made unnatural sex a Shariah offence is invalid and having gone against the FC.

As for the respondents, the Kelantan state government argued that Nik Elin and her daughter had no locus standi to challenge the provisions since their challenge were purely motivated by self-interest.

They argued that the matters raised by the petitioners were premature and mere assumptions after the latter previously deposed that there is a real risk that the respondent might invoke their investigative powers against them in relation to the 18 impugned provisions.

The state government also contended that the impugned provisions were legislated in order to protect all Muslims residing in the state to ensure they remain true to the Islamic faith.

Moreover, the state government pointed out that both petitioners did not reside in the state even though they had family, properties and assets in Kelantan, therefore failed in demonstrating genuine private interest to protect.

They also noted that the impugned provisions cannot be construed as invalid since the state legislative assembly does in fact have the authority to legislate laws on Shariah offences, as recognised under the Shariah Courts (Criminal Jurisdiction) Act.

From a historic point of view, the respondent cited the Reid Commission report where the original Constitution drafters had intended for matters relating to the Muslim religion or the custom of the Malays to be reserved within the respective states' scope of power.

The Reid Commission was an independent commission responsible for drafting the Constitution of the Federation of Malaya prior to Malaya's independence from the British colonial power.

TLDR Summary: The women's court challenge is not about religion or going against any religious authority.

Instead, it is about whether the federal government or state government has powers, under the FC, to make laws on those offences covered in the 18 provisions.

The question in this court case is whether the Kelantan state legislative assembly overstepped its limited scope of powers under the FC to make laws, and which means such laws would be invalid or have no legal effect.

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