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Malaysia & the Rome Statute: Domestic Debate Over?

By Prashant Waikar

SYNOPSIS

In a span of a month, Malaysia first ratified the Rome Statute and then withdrew from the International Criminal Court that the treaty governs. This episode reveals how the Malaysian royalty and the opposition were able to pressure the Pakatan Harapan government, as well as the challenges the government continues to face one year into its tenure.

COMMENTARY

ON 5 APRIL 2019, the Malaysian government announced its withdrawal from the International Criminal Court (ICC). Only a month prior, Kuala Lumpur had acceded to the Rome Statute, the treaty which established and governs the ICC. This marked the second time the Pakatan Harapan (PH) government has abruptly walked back from a pledged commitment regarding an international agreement.

In September 2018, Prime Minister Mahathir Mohamad announced the government's intention to ratify all remaining core United Nations instruments, including the International Convention for the Elimination of all forms of Racial Discrimination (ICERD), related to the protection of human rights. In November 2018, after facing significant backlash from conservative Malay-Muslims in the opposition and civil society, the government backtracked on the announcement. The Johor royalty led the charge of pressuring the government into withdrawing from the Rome Statute by claiming that the treaty undermined the royal institutions as a whole.

The Rome Statute

The Rome Statute covers four major crimes – genocide, crimes against humanity, crimes of aggression, and war crimes. Johor Crown Prince Tunku Ismail Idris

(popularly known as TMJ) has claimed that ratifying the Rome Statute would allow those who are against the royalty to orchestrate war crimes in order to get the sultans arrested.

Given that the royals have symbolic rather than executive power, the TMJ's worries are out of place. What is more, the ICC is a court of last resort. Legal proceedings can only begin there after all domestic options have been exhausted.

The government has come out to refute the allegations. On 27 April 2019, Attorney-General Tommy Thomas explained that under the constitutional monarchy system practised in Malaysia, the government, not the King, would be held accountable for decisions relating to war. Referring to the four crimes, Thomas said that they were very far removed from the "reality" of a peaceful Malaysia.

Building upon this, a more plausible reason behind the concerns towards the Rome Statute could be that states which become party to the treaty are expected to subsequently pass domestic bills which are compatible with the legal principles of the Rome Statute. The central principle of the treaty is that no individual can be immune from prosecution.

Immunity for Royalty

On the issue of immunity for the royalty, Thomas reportedly said that this legal immunity was long lost since constitutional amendments during Mahathir's first tenure as prime minister three decades ago. However, some argue that this is somewhat debatable. The 1993 constitutional amendments may have curbed many of the immunities. Nevertheless, Articles 181 to 183 of the Malaysian constitution explicitly state that charges can only be brought against a sitting royal (king or sultan) through a special court for crimes he may have committed in his personal capacity.

Therefore, a king or sultan operating in his official capacity still receives prosecutorial immunity. To its detractors, ratifying the Rome Statute could provide the government an opportunity to completely remove the immunities. The fact that Mahathir's first tenure as prime minister saw confrontation between the royalty and the government serves as sufficient precedent for the detractors to now believe that he may be attempting to further reduce royal influence and power.

Since Mahathir grudgingly announced his intention to withdraw from the ICC, the opposition to the Rome Statute appeared to have gathered new life among certain quarters. Members of Parliament (MPs) from the opposition United Malays National Organisation (UMNO) stated that while the previous Barisan Nasional (BN) government studied the prospects of ratifying the Rome Statute since 2011, the then Attorney-General cautioned it against doing so as it may contravene the federal constitution and that the Council of Rulers would need to be consulted.

Thomas pointed out that the Najib administration decided Malaysia ought to accede to the Rome Statute, but simply never followed through with it. Therefore, he claimed that the PH government was merely continuing a policy decision undertaken by the previous government. Former Prime Minister Najib Razak responded by stating that

PH should have looked into why BN eventually refrained from bulldozing through the ratification of the treaty.

Civil Society Reaction

On 4 May 2019, a coalition of Muslim non-governmental organisations, the Gerakan Pembela Ummah (Ummah), organised a rally to protest the Rome Statute. Depending on whose estimates are to be believed, between 1,000 and 10,000 participants turned up. Most were members of Ummah-linked NGOs, UMNO grassroots members, and members of the opposition Parti Islam Se-Malaysia (PAS).

The detractors, which include pro-royalists, the political opposition, and some Muslim NGOs, have characterised the Rome Statute as an attack, not just against the royalty, but against Malay-Muslim rights. To beef up this narrative, Ummah used the 4 May rally to connect the Rome Statute with the death of the firefighter, Muhammad Adib Mohd Kassim, and reinforced the argument that PH has consistently undermined Malay-Muslim rights.

The latest protest was not quite the scale of the anti-ICERD rally, perhaps partly because counter-arguments from other quarters of civil society justifying the Rome Statute may have helped to deflect concerns. Nevertheless, PH inadvertently handed the opposition the initiative to, once again, criticise its policies towards the rights of Islam and Malays.

More Yet to Come?

To observers, the claims that PH's tenure has undermined Malay-Muslim rights are clearly driven by political motives but they have gained traction in some quarters. Similar rhetoric will likely be heard in the months ahead, especially since it seems to have been effective in forcing PH to backtrack on its reform agenda. Those opposed to PH would, however, have to be mindful not to allow the rhetoric to go out of control.

In retrospect, PH was perhaps a tad overzealous in its ratification of the Rome Statute. It would be prudent for PH to engage in deeper consultation with various stakeholders before proceeding with potentially divisive policies.

At the same time, consultations could also mean the policy-making will be slow and potentially held hostage to other issues. There is no easy solution but one thing for sure is that PH cannot afford too many backtracking episodes without losing its credibility.

Prashant Waikar is a research analyst with the Malaysia Programme at the S. Rajaratnam School of International Studies (RSIS), Nanyang Technological University (NTU), Singapore.
