

Hudud Cannot Be Implemented Within The Current Constitutional And Legislative Framework
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The Malaysian Bar views with concern the recent political posturing in reviving the possibility of implementation of hudud, the class of crimes prescribed under Islamic law, in Malaysia.

The law, as it stands, does not allow for the implementation of hudud by the States. The Federal Constitution only allows the States to enact laws creating offences by persons professing the religion of Islam, against the precepts of Islam, and the respective punishments for such offences.

With respect to the nature of such offences, these offences cannot include matters within the legislative powers of the Federal Government. Therefore, there can be no replication of any of the offences within any Federal law with a different degree of punishment only for Muslims. Further, these laws, if enacted, must themselves be consistent with fundamental liberties guaranteed to all citizens, including Muslims, under Part II of the Federal Constitution.

As to the scope of the punishments for offences against the precepts of Islam, the extent must be conferred by Federal law. The Syariah Courts (Criminal Jurisdiction) Act 1965 provides that the Syariah Courts in all States shall not exercise jurisdiction "in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof." Hence, the penalties that Syariah Courts can mete out are clearly circumscribed, and do not include the punishments provided under hudud.

Hudud, being essentially penal laws, comes under the jurisdiction of the Federal Parliament. The Ninth Schedule of the Federal Constitution lists criminal laws and procedure, as well as internal security and public order, under the Federal list. Such matters thus fall under the jurisdiction of the Federal Parliament, and not the individual State Legislative Assemblies.

In *Che Omar Bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55, the then-Supreme Court held that laws in Malaysia do not have to conform to Islamic principles, and confirmed that Malaysia is a secular state. Taking this principle, if hudud were brought into the criminal justice system, it would result in the importation of Islamic penal laws into laws that are secular, which is wrong in law.

Based on media reports, it would appear that hudud, if implemented in Malaysia, would only apply to Muslims and not to non-Muslims. This would run counter to the equality provision of Article 8 of the Federal Constitution, as it would result in divergent procedures, evidential rules, and punishment relating to criminal offences being applicable to Muslims, as compared to non-Muslims. A Muslim offender would face the possibility of stricter punishment under hudud for the same offence, in contrast to a non-Muslim offender. A Muslim person would also be exposed to two separate prosecutions or convictions: one under hudud and one under the Penal Code, contrary to the prohibition against repeated trials in Article 7(2) of the Federal Constitution.

Hudud cannot be implemented within the current constitutional and legislative framework. The Malaysian Bar calls upon all parties to uphold the Federal Constitution as the supreme law of the land and to cease all rhetoric regarding the implementation of hudud, which has inevitably caused confusion and divisions within society. The Malaysian Bar urges all parties to focus instead on the strengthening of the rule of law and democratic process for a better Malaysia.

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