

At variance with the Constitution
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REFLECTING ON THE LAW
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The clear intention of the 1957 Constitution was to allocate penal powers to the Federal Government and to confer on the states residual powers over minor syariah offences.

WHENEVER a general election appears to be around the corner, some people find it politically profitable to stoke the embers of controversy about the need for an Islamic state and its accompanying requisite – hudud laws – ie, laws relating to crimes, punishments and rights and duties that are mentioned in the Holy Quran.

Such a season of polemic is with us again and a few observations are in order.

First, it is a fact that since the 80s, many Muslims have been aspiring to give centrality to the Syariah in our legal system.

While this religious quest is understandable, its realisation requires massive legal reconstruction of the basic legal edifice.

We must be open-eyed about these changes and must accomplish them in accordance with, and not in disregard of, the constitutional charter.

Second, respecting the sensitivities and rights of other religious communities and living in peace and harmony with them under a system of just, fair and compassionate governance is also an important requirement of the Syariah.

Example of other Muslim countries where the hudud has been enforced and how hudud's implementation has impacted on war, peace or social harmony needs to be thoroughly studied.

Third, most acts deemed criminal under the hudud are also prohibited under our penal laws.

Whether it is murder, rape, theft, robbery, unnatural sex or incest, the prohibitions of the Syariah are replicated in our law. Supporters of the hudud should note that the major difference is in the severity of punishments, the rules of evidence and of proof.

In some cases, Syariah penalties are less severe. For example, drug offences under the Syariah do not attract mandatory death sentences. The life of a murderer can be spared if the victim's family accepts blood money in compensation.

In Islamic jurisprudence, the law of evidence, the right of the accused to retract a confession and the inadmissibility of the evidence of an agent provocateur grant better protection to the accused than under ordinary law.

On the other side, the severe Syariah punishments of severing of limbs and stoning to death are practised neither in our legal system nor in the vast majority of Muslim-majority nations.

Fourth, the religious and political debate about the hudud in this country seems to be proceeding in blissful disregard of the constitutional scheme of things.

Actually, the Federal Constitution has provided clear guidance about who may legislate for crimes, who may prosecute criminal offences, which courts may try offenders, who is the subject of the law and what penalties may be imposed.

The Constitution is supreme and its imperatives cannot be lightly disregarded.

Who may legislate crimes?

In Schedule 9 List I Paragraph 4, criminal law and procedure, the administration of justice, official secrets, corrupt practices, creation of offences in respect of any of the matters included in the federal list or dealt with by federal law are in the hands of Parliament.

Under Schedule 9, List II, Para 1 the states have a power to create and punish Islamic offences subject to a number of significant limitations.

First, State legislative authority in respect of "creation and punishment of offences by persons professing the religion of Islam against precepts of that religion" is limited by the words "except in regard to matters included in the Federal List". Among matters included in the federal list are civil and criminal law and procedure.

Second, State authority to legislate on Islamic crimes is further qualified by the words "or dealt with by federal law" in Schedule 9 List I Paragraph 4(h).

Betting and lotteries, murder, theft, robbery, rape, incest and unnatural sex are all offences in Islamic law but they are clearly in federal hands because of Schedule 9 List I Item 4(l) and 4(h) and the federal Penal Code.

The clear intention of the 1957 Constitution was to allocate almost all penal powers to the federation and to confer on the states only residual powers over Syariah offences like *khalwat*, *zina*, skipping of Friday prayers and failure to observe the compulsory fasts during Ramadan.

Who may be tried before Syariah Courts?

Under Schedule 9 List II Paragraph 1, Syariah Courts are permitted to exercise jurisdiction only over persons professing the religion of Islam.

A non-Muslim cannot be subjected to the Syariah or compelled to appear before the Syariah Courts. Even if he consents, the Syariah Court has no jurisdiction over him because jurisdiction is a matter of law, not of consent or acquiescence.

If my understanding is correct, in an Islamic state, Islamic criminal laws including hudud apply to all citizens. That would pose a great challenge to our existing constitutional jurisprudence and our provisions on freedom of religion.

Is Islam in the State List? Islamic law covers the whole range of civil, criminal, personal and commercial matters.

Islamic law encompasses environmental and international matters. A popular legal myth in Malaysia is that all Islamic matters are within state jurisdiction!

If this were so, then why the explicit limitations on the penal powers of the State Assemblies?

Why the need for detailed exposition in Schedule 9, List II Para 1 (the State List) of family and personal law matters? Why not just have the generic words "All matters covered by the Syariah" in the State List?

If all matters of Islam are in State hands, as some experts are arguing, then whether it is crime, tort, contract, banking, or commercial law, if it involves Muslims, the matter should be in State Assembly hands and triable by the Syariah Courts.

Malaysia would then become "one country, with two systems" – one for Muslims and the other for non-Muslims. This is not what the forefathers envisioned.

To underline the point that in the original scheme of things, Islamic law was shared between federal and state jurisdictions and not everything connected with Islam is in the hands of State Assemblies, one can note Paragraph 4(k) of the Federal List which specifically mentions that "ascertainment of Islamic law and other personal laws for purposes of federal law" are in federal hands.

What punishments may be imposed?

Schedule 9 List II Paragraph 1 states that Syariah Courts "shall not have jurisdiction in respect of offences except in so far as conferred by federal law".

The relevant federal law is the Syariah Courts (Criminal Jurisdiction) Act 1965. It confines Syariah Court jurisdiction to such offences as are punishable with maximum three years' jail, RM5,000 fine and six lashes. Any state law, including a hudud law, imposing larger penalties would be ultra vires the Act of 1965 and unconstitutional.

In sum, attempts by some States to legislate hudud laws and to impose hudud penalties will bring forth embarrassing constitutional law issues pitting the Constitution against religion.

Two prominent arguments in favour of the implementation of hudud need to be scrutinised.

First, the assertion that application of hudud in Malaya is not new because the Syariah was applied in Malaya in pre-British days.

With all due respect, "syariah" and "hudud" are not interchangeable.

In Malay history, there is centuries of tradition of Muslim personal law but I have difficulty documenting widespread application of hudud in Malaya.

Likewise the assertion is not convincing that because of the *vox populi* in some parts of the country, we must accept the change.

The Constitution cannot be overthrown by disputed historical assertions or by popular opinion.

Its procedures for amendments are elaborate and must be invoked.

Law must grow and change in accordance with the law and not by the opinion of the people or of self-anointed elites.

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