

Hudud Has No Place In Present Constitutional Structure, Say Legal Experts Malaysian Insider

May 1, 2014

By V. Anbalagan, Assistant News Editor

Legal experts say Malaysia is a secular state and Islamic [criminal law](#) cannot co-exist with other federal penal legislation. Hudud can be enforced in Malaysia only after a new constitution is drawn up to make the nation an Islamic state, constitutional law experts said.

They said the 1957 Merdeka constitution declared that Malaysia was a secular state and Islamic [criminal](#) law cannot co-exist with other federal penal legislation.

The lawyers said a legal challenge could be mounted even if the constitution was amended to implement hudud as this would amount to causing irreparable damage to the basic structure of the supreme law.

Furthermore, they said any attempt to introduce a private member's bill to implement hudud in Kelantan could be legally challenged for going against the constitution.

They were referring to the move to table the bill in Parliament to allow Kelantan to enforce its shariah penal code in the state which has been controlled by the Islamist party PAS since 1990.

If passed by a simple majority vote, the bill will give effect to the Kelantan Shariah Criminal Code Enactment II of 1993.

The Malaysian Insider understands that the bill seeks power from Parliament for Kelantan to make laws in respect of criminal matters which come under federal jurisdiction.

It further wants the Shariah Courts (Criminal Jurisdiction) Act 1988 which limits sentencing power of religious courts to three years [jail](#), RM5,000 fine and six strokes of the rotan, to be replaced.

Instead, the bill wants Kelantan to be given the power to enforce punishment like death, flogging and amputation of limbs for crimes under hudud.

Lawyer Malik Imtiaz Sarwar said the constitution, in letter and spirit, was secular and any attempt to introduce hudud ran contrary to the supreme law as stated under Article 4 (1).

"All actions by all organs of the state, including the legislature and the executive, at the federal and state levels, must act consistently with that supreme law," he said.

Terengganu which was ruled by the Islamist party PAS between 1999 and 2004 also passed its Shariah Criminal Enactment of 2003, which additionally introduced Qisas (retaliatory) offences and punishment.

Malik said both the Kelantan and the Terengganu enactments did not come into force because of challenges to their constitutionality as well as public outcry.

He described the attempt to introduce the bill in Parliament as a "back door" effort to amend the constitution to facilitate the implementation of hudud in Kelantan.

The late Karpal Singh, who had strongly opposed the implementation of hudud, had articulated similar views on the immutable structure of the constitution.

"There are certain provisions which [form](#) the basic structure of the constitution. Any attempt made to change that basic structure will be working towards the destruction of the constitution, which we can't do.

"The matter of hudud has been questioned in court in 1988. In that instance, the federal court unanimously ruled that the country operates by secular law, which means that Malaysia is not an Islamic state. You can't have an Islamic state where secular law is the order of the day," Karpal had told the DAP mouthpiece The Rocket in an interview.

"The basic structure of the constitution has to be completely changed. It will be destroying the document upon which all Malaysians abide by. It's a social contract and the terms of the contract must be adhered to," Karpal had said.

Meanwhile, lawyer Shukor Ahmad noted that Kelantan and Terengganu passed the enactments to appease the public despite knowing the secular constitution did not allow it.

"Hudud cannot be enforced under the present constitutional scheme, even if the two-thirds majority requirement is satisfied as the basic structure of the constitution will be affected," he said.

He also said it must be remembered that in Malaysia it was the constitution that was supreme, not Parliament.

"An affected party can always turn to the judiciary to test the validity of a law against the constitution," he said.

Shukor cited the recent case of the Court of Appeal striking out a provision in the Peaceful Assembly Act 2012 as unconstitutional as it violated the right to assemble peacefully.

"So Parliament can use its brute majority to pass a law or amend the constitution but its validity can only be determined once tested in the court," he said.

Shukor said hudud could be implemented only if a new unitary constitution was approved to set up an Islamic state.

Lawyer Shahredzan Johan said Kelantan wanted to impose punishment under hudud for serious crimes like rape, murder, theft and robbery but such crimes were already provided for under the Penal Code which also spelt out the appropriate punishment.

He said Muslims in Kelantan would be subjected to different laws and punishment compared with non-Muslims and this would amount to inequality and discrimination.

Another lawyer, Fahri Azzat, while saying that an aggrieved party could go to the court to obtain solutions to matters that affected everyone, questioned if that was the better option.

Citing the controversy over the use of the word Allah, he said: "Instead of settling it politically, the matter has been passed to the court to rule."

Fahri said a court ruling was no guarantee that it would satisfy all parties as a binding precedent has to be followed.

He also said the people's representatives to Parliament should always place the welfare of the people and country above partisan politics.

Most importantly, they must act to defend, preserve and protect the constitution, he said. – May 1, 2014.

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Source: <http://www.themalaysianinsider.com/malaysia/article/hudud-has-no-place-in-present-constitutional-structure-say-legal-experts>