AMENDMENT OF ACT 355: THE REAL EFFECT

By

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I admit that lying on my back in bed most of the time and all the time in pain, the difference being only more or less, I do not have the full information about what is happening regarding PAS’ proposal to amend Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355). From the invitation to attend a seminar which I am unable to attend due to my health condition and from press reports that I read occasionally, apparently heated discussion is going on about it.

Unfortunately, once again, I do not have the complete information about what is being discussed. From what I knew until June 2, 2016 when I wrote an article titled "PAS’ Private Bill: What Is It All About?" and from what I "heard" is that there are those who say that the amendment is merely to increase the jurisdiction of the Syariah Court and has nothing to do with the implementation of *hudud*. Another group says that the aim is to allow *hudud* punishment to be enacted and therefore they oppose it. Yet others say, "It's about Islam, why should the matter be brought to Parliament?" (I confess I do not understand what they mean by that.) Some may even see it from another angle which I do not know and cannot understand the reasons for it. However, it should be noted that this is a legal issue, let it be interpreted by lawyers.

What is the amendment all about?

We all know that PAS has filed a motion in Parliament to amend the Act. From my search, to this day there has been no bill made for that purpose. All we have is the motion which is very brief. So, all the discussions are only based on the motion. That, too, I believe, many people, including politicians who make statements about it, do not even read it.

The amendment seeks to replace section 2 of the Act with new sections 2 and 2A.

The new Section 2 provides:

*"2. Syariah Court shall have jurisdiction over persons professing the religion of Islam in respect of offences regarding matters listed in Item 1 of the State List of the Ninth Schedule of the Federal Constitution."* (My translation)

The new section 2A provides:

*"2A. In the exercise of the criminal law under Section 2 the Syariah Court is entitled to impose penalties allowed by the Syariah in relation to offences listed under the section mentioned above, other than the death penalty."* (I am translating the wording of the motion as closely as I can.)

Clearly the new section 2 does not provide anything new. It merely repeats the existing law.

What is more important is the proposed new section 2A. The most noticeable difference between the proposed section 2A and the existing law is that the existing law contains a proviso as follows:

*“Provided that such jurisdiction shall not be exercised 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.”*

The effect of the abolition of the proviso is that there are no more restrictions regarding the nature and extent of the punishment that the State Legislative Assembly may assign to the Syariah Court. The State Legislative Assembly may make laws empowering the Syariah Court to impose punishments permitted by Islamic law (*Syariah* and *fiqh*) including *hudud* and *qisas,* except the death penalty. That is the effect. But, how far the State Legislative Assembly may create offences punishable with such penalties is another matter.

PAS leaders are saying that the amendment is only to increase the jurisdiction of the Syariah Court and has nothing to do with its *hudud* agenda. Such statements could arise from two causes. First, PAS leaders themselves do not understand the effect of the amendment proposed by them. Second, they understand and know the real effect, but what they say (to non-members of PAS) is solely for political reasons: to confuse those who do not agree with the implementation of *hudud* (both Muslims and non-Muslims) and making it easier for UMNO to give its support. Certainly, they will tell PAS members the real intention of the amendment and its effect.

I am confident that PAS leaders actually understand and know the real effect of the amendment proposed by them. They are not stupid. Indeed, on the *hudud* issue, politically, PAS appears to be smarter than UMNO. So, I reject the first reason. Therefore, the reason for what PAS is saying publicly is the second reason.

It appears that UMNO leaders are also echoing what PAS leaders say. I believe they do so for the same reason or reasons mentioned above. I believe that UMNO leaders who do not understand the full effect of the amendment repeat what PAS leaders say because they do not want UMNO to be seen as "opposing *hudud*", another fallacy. They are falling into PAS’ trap again. There may be UMNO leaders who do understand the real effect of the amendment, but they too want to be in the mainstream. So, they echo the same statement with the hope that it will satisfy everyone, another mistake.

Some people are heard to say that the amendment will only involve the Kelantan state only. This is also incorrect. Act 355 is the Federal law. It applies throughout Malaysia. The proposal does not say it will only apply in Kelantan.

One more thing that is said is that it only effects Muslims. That is correct since offences under the State List of the Ninth Schedule of the Federal Constitution only apply to Muslims and the Syariah Court has jurisdiction over Muslims only.

What could PAS do if the amendment is passed? The answer is that the Kelantan PAS Government may move the Kelantan State Assembly to pass a law providing for *hudud* punishment for *hudud* offences under the State List of the Ninth Schedule of the Federal Constitution such as adultery, accusing a woman of committing adultery, drinking intoxicating drinks and apostasy. That law applies to Muslims only. (I do not want to argue whether those offences are *hudud* offences or not. For the purposes of this article, I accept that they are *hudud* offences). Any attempt to extend the punishment to criminal law offences under the Federal jurisdiction and to make it applicable to non-Muslims, would make the law unconstitutional, null and void. (Other states may do the same.)

I repeat that I do not wish to pass comments on the positions taken by PAS and UMNO on the amendment and on the implementation of *hudud.* That is a policy matter for them to decide. I only want to see the leaders of UMNO and PAS understand the real effect, make a decision based on a correct understanding, communicating to the public their true stand and not to get confused and mislead the public. Equally important is that the academics participating in the seminars must understand the legal and constitutional issues of the matter and not to cause the participants to get lost in the jungle of “knowledge”. Ultimately, it is up to the public to decide and to take their stand.

To learn more, please visit my websites.

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