

AMENDMENT OF ACT 355: FREQUENTLY ASKED QUESTIONS

By
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Q: Could you give a brief background of the Syariah Court (Criminal Jurisdiction) Act 1965 (Act 355)?

A: The act was legislated in 1965. The act limited the jurisdiction of the syariah court to imprisonment not exceeding six months, fine not exceeding one thousand Ringgit or with both.

The act was amended in 1984 by Muslim Courts (Criminal Jurisdiction) (Amendment) Act 1984 (Act A612). The amendment increased the jurisdiction of the syariah court to imprisonment not exceeding three years, fine not exceeding five thousand Ringgit or with whipping not exceeding six strokes or with any combination thereof.

The amendment was a non-issue. Most people did not know about it. Non-Muslims did not even care about it as it did not affect them. Barisan Nasional (BN) Members of Parliament from all component parties, Muslims and non-Muslims, voted for it in unison.

Now, there is a move to amend Act 355 again. The proposal has become a political issue giving rise to conflicting reactions that threatens to divide Muslims from non-Muslims, in Malaysia.

Even though I have not seen the bill, I assume that the bill will be finalised by the Attorney General's Chambers and that it will be constitutional. As regards the content, I will rely on the motion tabled by PAS in the federal Parliament which seeks to increase the jurisdiction of the syariah court to pass all sentences permitted by Islamic law except death on offences under the State List. This article is written on that assumption.

Q: What makes it different this time?

A: In one word, the answer is "politics". First, the proposer is an opposition political party, PAS. PAS has made *hudud* the main objective of its struggle. It is the best asset PAS has. It does not cost PAS anything. It brings in votes. PAS knows that *hudud* cannot be implemented due to constitutional and legal constraints. But, for that it can blame the Federal Government, especially UMNO, its main opponent.

In 1993, the PAS-controlled Kelantan SLA passed the Syariah Criminal Code (II) Enactment 1993 (Kelantan), containing, inter alia, criminal law offences under the federal jurisdiction. The enactment is unconstitutional for that reason besides infringing Act 355.

It lay dormant for twenty years. Then Brunei gazetted its Syari'ah Penal Code Order 2013 (the Order) with the view, in brief, to introduce the *hudud* and *qisas* punishments in the country. (However, until today, the part on *hudud* had not been

brought into force yet.) That was good news for PAS. PAS then dug up its old enactment and began to think of how to implement it. To cut the story short, it decided to move a private bill in Parliament to amend Act 355.

DAP, to win over the non-Muslim, especially Chinese, objected to it. MCA and Gerakan, not wanting to be left behind, followed suit. (Bear in mind that in 1984, both MCA and Gerakan had voted for a similar amendment.) UMNO is in a dilemma. If it does not support the bill, Malay/Muslim voters, especially in Peninsular Malaysia, would vote for PAS. On the other hand, if it supports the bill, the non-Muslim component parties in BN, including in Sabah and Sarawak, may turn their back on BN, something which UMNO cannot afford to happen. However, it now appears that UMNO is inclined to support the proposal while, at the same time, trying to win over its non-Muslim colleagues in the BN.

Q: Putting aside the emotion and the political considerations, what is the effect of the amendment, really?

A: It permits the State Legislative Assembly (SLA) to make law to increase the jurisdiction of the syariah court in the respective states, if the state government wants to. The state government may decide not to increase the jurisdiction of the syariah court, in which case, the existing limit remains. It is up to the state government, through the SLA to take advantage of the amendment, if it wants to. So, even if the amendment is passed by Parliament, DAP-led Government of Penang may just do nothing and the jurisdiction of the syariah court in the state will remain the same.

Q: Is it possible for the state introduce *hudud* punishments after the amendment?

A: Based on the proposal, limited *hudud* punishments may be introduced, for example, 100 lashes for adultery and 40 to 80 lashes for consumption of intoxicating drink. Punishment may also be increased, but not including death, for the offence of "wrongful worship". I submit that the offence of apostasy itself cannot be legislated by the SLA to be tried by the syariah court. This is because, the moment you say a person is an apostate he is no longer a Muslim and the syariah court ceases to have jurisdiction over him. Suppose it is argued that a person only becomes an apostate when the syariah court rules that he is an apostate, then, at the end of the trial but before the sentence is passed, the court will have to make a ruling whether he is an apostate or not. If the court rules that he is an apostate, at that point of time, the syariah court ceases to have jurisdiction over him. So, the court will not be able to pass the sentence against him.

These offences are offences under Para. 1, List II (State List) Ninth Schedule, Federal Constitution. In fact they are existing offences in the state law. All that the state has to do is for the SLA to amend the existing law to provide *hudud* punishment for the offences, subject to the limit set by the amended Act 355.

It must also be remembered that the above-mentioned offences and punishments are only applicable to Muslims. In other words, non-Muslims cannot be charged for the offences.

Q: Would there be an overlapping of jurisdictions of the syariah and civil courts?

A: No, there will not be any overlapping of jurisdiction of the two courts. This is so because the Constitution clearly divides what lies under the federal (civil court) jurisdiction and what lies under the state (syariah court) jurisdiction. Criminal law is under the federal (civil court) jurisdiction. Offences under the state (syariah court) jurisdiction are offences against the precepts of Islam "*except in regard to matters included in the Federal List;*"

Let us say that the SLA of a state makes the offence of theft (an offence in the Penal Code) an offence in the state law and providing *hudud* punishment for it,. That provision is unconstitutional because that offence is criminal law that lies within the federal (civil court) jurisdiction.

Q: If such a law is made, which court shall have power to determine whether it is constitutional or not?

A: Civil court. This is provided for by Article 128 of the constitution. For example see Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) & Other Cases [2009] 2 CLJ 54 FC and Fathul Bari Mat Jahaya & Anor v. Majlis Agama Islam Negeri Sembilan & Ors (2012) 1 CLJ (Sya).

Q: It is said that "any amendment to Act 355 will create an unfair situation because there will be two sets of law to which a person is subjected to". What is your comment?

A: This is what I call a "mistaken fear". You wrongly perceive something and you are afraid of it. Non-Muslims are not subjected to offences under the State List. So, they cannot be said to be subjected to two sets of law. That situation only applies to Muslims. It is not caused by an amendment to Act 355. It is because they are subjected to offences under the State List, whether Act 355 is amended or not.

Q: Is it possible for the Federal Parliament introduce *hudud* punishments?

A: Yes, only by a simple majority, applicable to both Muslims and non-Muslims and the law is criminal law administered by the civil court. Surprised? Let me explain. Criminal law is a Federal matter. Parliament has power to create criminal law offences. The major *hudud* offences e.g. murder, rape, theft, robbery are criminal law offences in the Penal Code. Parliament has power to provide any punishment, including punishments similar to the "*hudud* punishments" to those offences. Parliament only needs to amend the Penal Code to do so, by a simple majority. Act 355 cannot prevent Parliament from doing so. One act of Parliament cannot prevent another act of Parliament being passed. Otherwise you cannot amend a law, once made. In any event, Act 355 only applies to syariah court.

But, remember that if Parliament makes such a law, it will be applicable to both Muslims and non-Muslims alike. In other words, in that case, even non-Muslims will be subjected to the punishments (by whatever name you call them), because the offences are criminal law offences, no matter what the punishments are.

So, if the non-Muslims do not want *hudud* punishments to apply to them, they should watch out for what Parliament does, whether it will introduce a *Hudud* Act as in Pakistan or amend the Penal Code to provide for punishments similar to the *hudud* punishments, without even mentioning the word *hudud*. This is what they should be watching for, not an amendment to Act 355.

Q: Is it possible for Parliament to create offences with *hudud* punishments applicable to Muslims only?

A: No. Criminal law is a general law applicable to all, Muslims and non-Muslims alike. Parliament cannot create criminal law offences applicable to Muslims only because it will be discriminatory on ground only of religion, contrary to Article 8.

Offences under the State List are different. The Constitution specifically provides that those offences are applicable only to Muslims. In other words, they are an exception to the general rule and Article 8 does not apply in respect of those offences.

Q: Will amendment of Act 355 affect non-Muslims.

A: No. The amendment is only to increase the jurisdiction of the syariah court and syariah court has no jurisdiction over non-Muslims.

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