PAS' PRIVATE BILL: WHAT IS IT ALL ABOUT?

By
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I am not concerned about the political aspects of PAS' private bill to amend the Syariah Court (Criminal Jurisdiction) Act 1965 that its President is tabling in Parliament. Politicians have their own agenda in proposing, supporting or opposing a bill which may or may not be legally justifiable. What is important and what I am concerned about is that the politicians, as well as the public, should know what it is all about and its effects, if passed. Otherwise, the politicians will be making their decisions whether to propose, support or oppose it either out of ignorance or misunderstanding and will, in turn, confuse and mislead the public.

Let us begin from the beginning: the Federal Constitution. The constitution provides that criminal law is a federal matter, meaning that it is within the jurisdiction of the federal Parliament to made laws regarding it. What is "criminal law" is not defined. However, to make our discussion simple, the offences contained in the Penal Code are clearly "criminal law". If not, what else? Note that the Penal Code had been in existence since 1936 and was in force at the time the Constitution was drafted. So, murder, rape, sodomy by whatever name, theft, robbery, causing hurt, indeed all offences provided for in the Penal Code and other federal laws, are "criminal law". They are applicable to Muslims and non-Muslims alike, otherwise it would be unconstitutional on ground of discrimination contrary to Article 8. The law (criminal law) is administered by the civil court. Only the federal Parliament has power to make such laws.

The Constitution also makes provisions empowering the Legislative Assembly of a State to make laws in respect of:

".... Creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List;"

Note the conditions mentioned:

1. Offences committed by persons professing the religion of Islam,
2. Against precepts of that religion
3. Except in regard to matters included in the Federal List.

There is yet another condition: it must not contravene the provisions of the Syariah Court (Criminal Jurisdiction) Act 1965 which limits the type and extent of the punishments that the State law may provide.

So, the Legislative Assembly of a State may only make laws that satisfy all the four conditions. Otherwise, it is unconstitutional.

We now refer to the Syariah Criminal Code (II) Enactment 1993 (Kelantan) ("Kelantan Hudud Enactment). It is naïve not to take note that for decades PAS had been harping on the implementation of *hudud* as its main, if not the only objective.

As early as 1993, the PAS Sate Government of Kelantan had tried to implement *hudud* by passing the Syariah Criminal Code (II), 1993 (Kelantan) Enactment. I have said in no uncertain terms that that law is unconstitutional because it contravened the restrictions mentioned above. PAS seemed to accept my view and started talking about moving a private bill in the federal Parliament under Article 76A (1). One would have thought that the objective was to obtain the permission of Parliament for the State Legislative Assembly to make law regarding matters (offences) that fall under the federal List. But, that is not to be.

Instead, PAS is moving a private bill to amend the Syariah Court (Criminal Jurisdiction) Act 1965 to increase the punishments that the State Legislative Assembly may provide in a State law that it makes subsequently.

Now, let us look at the proposed amendment. Unfortunately I am unable to obtain the proposed bill. All I am able to obtain from Hansard is the proposed amendment which is in Malay. For the purpose of writing this article I have translated it into English. The amendment seeks to substitute section 2 of the act with two sections, namely, a new section 2 and 2A. The new section 2 gives the Syariah court jurisdiction over persons professing the religion of Islam and in respect of offences regarding matters listed in Item 1 of the State List under the Ninth Schedule of the federal Constitution.

The new section 2A provides:

“2A In the implementation of criminal law under Section 2, Syariah courts shall be entitled to impose sentences permitted by the Syariah in respect of offences listed in Item 1 of the State List under the Ninth Schedule of the Federal Constitution other than the death penalty."

Clearly, section 2 is nothing new. It reiterates the existing law. However, to those, including UMNO Ministers and leaders, who say that the bill is only to increase the jurisdiction of the Syariah Courts and, presumably, has nothing to do with PAS’ *hudud* agenda, let me remind them that they are in for a big mistake again. UMNO leaders had mistakenly supported PAS’ Hudud Bill 2015 in the Kelantan State Legislative Assembly, fearing that they would be condemned as “unbelievers” for “objecting to the laws of Allah”. Had they read my papers which were available on my website, they could have just said, **“We are unable to support the Bill (not objecting to *hudud* or God’s law) because it is unconstitutional.”**

The irony is that both PAS and UMNO had been wrongly advised, legally. In the case of PAS, they had made a mistake which lasted for 20 years (and continuing). Then they woke up after a PAS member of Parliament attended my talk on *hudud*. PAS leaders saw their mistake and searched for a solution. They almost got it right but fell into error again. Now they are trying to resume their journey, without saying so, and UMNO leaders seem to be interested to join their caravan!

Let it be clear, I am not concerned if UMNO, knowing the meaning and the effects of what they are doing, were to say: “UMNO has no objection to PAS wanting to implement *hudud* in Kelantan” or even “UMNO will support PAS’ move to implement

hudud in Kelantan." That is UMNO's prerogatives. But, I do not like to see UMNO leaders making another mistake either because they fail to understand the issue or because they have been wrongly advised.

Coming now to the proposed section 2A, the most significant difference between the proposed amendment 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."

In other words, the effect of abolishing the proviso in the existing section 2 is that there is no more restriction regarding the type and the extent of the punishment that the State Legislative Assembly may provide for the Syariah court. The effect of the new section 2A is that the Syariah Court may be given the power to impose all the punishments prescribed by the Syariah including *hudud* and *qisas* punishments, except the death penalty. That is the effect. UMNO leaders should understand it before making their decision to support the proposed amendment or otherwise.

Of course, it goes without saying that, even after the amendment comes into force, the Syariah court may only impose those sentences in respect of the offences under the State List. This is because, cases which are not under the State List are federal matters, the State Legislative Assembly has no business to legislate on them and those cases will never be brought in the Syariah Court.

That is the law. But, will the PAS Government of Kelantan respect the federal jurisdiction? The State Legislative Assembly of Kelantan, whether out of ignorance, wrongly advised or disrespect for the provisions of the Federal Constitution, had chosen to ignore it twice, once in 1993 when it passed the Syari'ah Criminal Code (II) and again in 2015. Will it do it again? If it does, it does so at its own peril: such law will be unconstitutional. But UMNO members in the State Legislative Assembly of Kelantan will be repeating the same mistake that they had made in 2015 if they support PAS' fresh attempt to pass the same law again, the earlier two being unconstitutional.

Assuming that PAS is successful it its attempt to push through the private bill, is PAS free to implement the Syariah Criminal Code (II) in (1993) 2015? The answer is "No". That law was unconstitutional when it was made and it remains so forever. It was stillborn and cannot be revived.

The Kelantan Hudud Enactment is unconstitutional for the following reasons:

1. The State Legislative Assembly had encroached into the jurisdiction of the federal Parliament by legislating on "criminal law" which is under the jurisdiction of the federal Government.

2. It contravened the provisions of the Syariah Court (Criminal Jurisdiction) Act 1965.

The private bill seeks to remove the second restriction. Even then, it cannot retrospectively validate the Enactment simply because, at the time the State Legislative Assembly made that law, it had no power to do so. At one of my talks to Syariah scholars, including those from Kelantan, I posed the following question to them:

According to the Shafie madhhab, a woman may only be married off with the consent of the *wali*. Suppose a *Qadhi* were to marry her off first and then look for the *wali* to get his consent, would that marriage be valid when the *wali* (subsequently) gives his consent? The all laughed. They understood it.

The more serious restriction, which is more difficult to overcome and about which no attempt has been made to overcome, is the constitutional restriction mentioned above.

So, if the proposed amendment bill is passed by the federal Parliament, all that PAS may do is to get the Kelantan State Legislative Assembly to pass another law providing for offences which are not “criminal law” (which fall under the jurisdiction of the federal Parliament to make laws), for example, *zina* (adultery), accusing a woman of committing *zina*, *murtad* (apostate), consuming intoxicating drinks and the like. Other offences for which there are provisions in the federal laws is a federal matter and outside the jurisdiction of the State Legislative Assembly to legislate.

So, PAS should remember that even if the private bill is passed, the Kelantan State Legislative Assembly may only make law (a new one) in respect of those few offences mentioned above and provide *hudud* punishments for them, other than the death penalty. So, *rajm*, (stoning to death) and salib (cruxification) are out. One wonders why PAS is prepared to make an exception in respect of the last two. Do they also feel that they are “not suitable” anymore?

All other provisions in Syari’ah Criminal Code (II) in (1993) 2015 regarding *hudud, qisas and ta’zir* are outside the jurisdiction of the State Legislative Assembly to legislate. They are “criminal law”, a federal matter.

The new law made by the Kelantan State Legislative Assembly will only apply to Muslims in Kelantan and will be administered by the Syariah Court.

UMNO leaders should understand all these. Otherwise, they might be making yet another mistake.

What about the objections raised by the non-Muslim leaders of the Barisan Nasional component parties? Again, I am not concerned about their politics. If they think that it serves their party’s political interests, it is their prerogative to object. But, when they start giving such reason as “it will benefit the Muslims”, I have to respond. First, here again, they have “profit and loss” or the “fear of losing” (kiasu) in mind. They are afraid that the Muslims will benefit and that they will, therefore, lose. But how? The law, if at all it comes into force, will only apply to Muslims. So, if a non-Muslim commits adultery with a Muslim, the Muslim gets sentenced under the law and the non-Muslim goes free. Who benefits?

(For further details, please see my papers/talks on *hudud*, especially my keynote address “Implementation of the Islamic Criminal Law (*hudud, qisas, ta'zir*) in Malaysia - Prospects and Challenges delivered at the Sultan Mizan Zainal Abidin Mosque, Putrajaya on 1 April 2015” available on my website.)

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