

AMENDMENT OF ACT 355: SUMMARY OF MY VIEWS¹

By
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Background

Malaysia is a federation. Thus, legislative powers are divided between the federation and the states.

“Criminal law” is under the jurisdiction of the federation (List I (Federal List), Ninth Schedule of the Federal Constitution.). Federal Parliament has power to make law to create criminal law offences and provide punishments for such offences. There is no limit to such power. The civil court (Judiciary) is also under the federal jurisdiction.

Federal Constitution also provides that the State Legislative Assembly (SLA) i.e. state parliament, may make law to create the sharia court *“which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph (i.e State List e.g. personal law - added), but shall not have jurisdiction in respect of offences except in so far as conferred by federal law.”*

Note that:

1. The sharia court does not have jurisdiction over non-Muslims;
2. In respect of offences, the sharia court’s jurisdiction is limited *“in so far as”* what is conferred by federal law. The Syariah Court (Criminal Jurisdiction) Act 1965 (Act 355) is the federal law that limits the jurisdiction of the sharia court.

The Constitution also empowers the SLA to make law for the *“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 that the power of the SLA to create offences and provide punishments thereto in the respective state is limited to:

1. persons professing the religion of Islam;
2. offences against the precepts of Islam;
3. except in regard to matters included in the Federal List;

Act 355 was legislated in 1965. The act limited the jurisdiction of the sharia court to imprisonment not exceeding six months, fine not exceeding one thousand Ringgit or with both.

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The act was amended in 1984 by Muslim Courts (Criminal Jurisdiction) (Amendment) Act 1984 (Act A612). The amendment increased the jurisdiction of the sharia 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.

Now, there is a move to further amend Act 355. 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 sharia court to try all offences under the State List, except those punishable with death. This article is written on that premise.

Note again that:

1. the amendment is to increase the jurisdiction of the sharia court.
2. the offences are those under the State List, which are not applicable to non-Muslims.
3. the sharia court's jurisdiction, though increased, is limited to Muslims only.

We see straight away that the amendment is not going to change the position of the non-Muslims vis-a-vis the jurisdiction of the sharia court over them or vis-à-vis the offences under the State List affecting them. The sharia court continues NOT to have jurisdiction over them and the offences under the State List continue NOT to be applicable to them. Non-Muslims cannot be charged for those offences and they cannot be tried by the sharia court.

Why are the non-Muslims so concerned about it this time? What are they objecting to? What makes this amendment different from the previous amendment?

In one word, the answer is "politics". Previously, the amendment was proposed by the BN government with the agreement of all its component parties. This time the proposer is PAS.

PAS has made *hudud* its main political objective. 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 PAS is able to 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. (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.

So, PAS cannot deny that its motive is to implement *hudud*. At first PAS wanted to implement the “full *hudud*”, including the “criminal law” offences i.e. murder, theft, robbery, rape, sodomy, which are under the federal jurisdiction. After I pointed out that that would be unconstitutional, PAS settled for the few “lesser” *hudud* offences under the State List i.e. adultery, accusing someone of adultery, drinking intoxicating liquor. Even in the case of adultery, PAS seems satisfied to forgo the punishment of death by stoning.

It is not difficult to understand why PAS is prepared to compromise. Again, the answer is politics. PAS has just split from its “non-ulama” group led by Mat Sabu. PAS has also broken away from the Opposition Pact. PAS knows it cannot now expect non-Muslim, especially Chinese, votes from the DAP. Going alone in the next General Election, PAS might be reverted to its old position, i.e. confined to Kelantan, Terengganu and, may be, a few seats in Kedah. So, it is prepared to befriend UMNO, its sworn enemy for decades. PAS also realized that no matter how “un-Islamic” UMNO is, UMNO is the best hope to support PAS in the implementation of *hudud*. Indeed, UMNO has demonstrated it by wrongly supporting the Syariah Criminal Code (II) (1993) (Amendment) Bill 2015. (I say “wrongly” because the bill is unconstitutional). Even in the amendment of Act 355 under discussion, UMNO is supporting it.

It is also not difficult to understand why UMNO is prepared to work with PAS. UMNO is at its weakest since Independence. For the first time BN may lose the next General Election. Chinese voters who previously supported BN through MCA and Gerakan have gone over to DAP, believing they can get more from DAP (and the Opposition Pact) than through MCA, Gerakan and BN. Component parties in Sabah and Sarawak, the solid provider of seats in the previous elections, are not very reliable now. They too might switch to the Opposition Pact, believing that they too can get more from it. So, UMNO has to befriend PAS, in the name of Malay/Muslim unity. By not supporting the bill, UMNO is afraid that it may lose the Malay/Muslim votes to PAS.

Besides, PAS has clarified that even if the bill is passed, PAS will only amend the law to provide *hudud* punishments for the offences under the State List only and, even then, not including the death penalty and only applicable to Muslims. (Actually, PAS has no choice in this as otherwise the law that the SLA will pass subsequently, will be unconstitutional), So, the constitutional issue is removed and the road is clear for UMNO to support the bill or even to take over from PAS to move the bill in Parliament, again to gain political mileage.

To win over the non-Muslim, especially Chinese, voters the DAP objected to the bill. 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.)

What about Anwar's Parti Keadilan Rakyat? It is playing safe by keeping quiet, hoping that, in that way, it will not offend the Malay/Muslim and non-Muslim member and supporters.

So, we see that a pure legal amendment which in the past had not attracted anybody's attention had become a full-blown political issue, attracting the attention of international bodies, because of the wrong reasons given by politicians to suit their interests, arising partly from a misunderstanding of the provision of the Constitution and the law and partly from the manipulation of the issues to suit their political interest.

The following are some of the questions that have been asked. I have also added my own questions which I think are relevant. I am answering them one by one.

Q: Putting aside the emotion and the political considerations, what is the effect of the amendment, really? (This is my own question).

A: It permits the SLA to make law to increase the jurisdiction of the sharia court in the respective states, if the state government wants to. The state government may decide not to increase the jurisdiction of the sharia 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 sharia court in the state will remain the same.

Q: Is it possible for the state introduce *hudud* 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 sharia court. This is because, the moment you say a person is an apostate he is no longer a Muslim and the sharia court ceases to have jurisdiction over him. Suppose it is argued that a person only becomes an apostate when the sharia court rules that he is an apostate, my answer is, 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 sharia 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 sharia and the 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 (sharia court) jurisdiction. Criminal law is under the federal (civil court) jurisdiction. Offences under the state (sharia 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 has the power to determine whether it is constitutional or not? (This is my own question).

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. To the Muslims, it is their religious law. Besides, the Constitution provides for it. If they choose to be bound by it, why should non-Muslims be concerned about it?

Q: Is it possible for the Federal Parliament to introduce *hudud* punishments? (This is my own question)

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" for 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 sharia court.

Let me pause here to ask you. Does the Parliament in your own country not have the power to provide punishments similar to the *hudud* punishments for those offences, without even mentioning the word *hudud*? Whether you want to do it or not is a different matter. Similarly, Malaysian Parliament has the power to do it. Whether the

people or the government wants to do it, is a different matter. But, in Malaysia, the SLA cannot make such a law because those offences are a federal matter.

But, remember that if the federal 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 create offences with *hudud* punishments applicable to Muslims only? (This is my own question).

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 the 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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