

Amendment of Act 355: The real effect BY TUN ABDUL HAMID MOHAMAD - 29 SEPTEMBER 2016

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 full information about what is happening regarding Pas' proposal to amend Syariah Courts (Criminal Jurisdiction) Act 1965 (Act 355). From the invitation to a seminar which I am unable to attend due to my health 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, there are those who say 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 reason 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. I believe many people, including politicians who make statements about it, have not even read it.

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

The (proposed) new Section 2 provides: "2. The 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 (proposed) 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 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 (proposed) 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 latter 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. So, I reject the first reason. Therefore, the second reason explains what Pas is saying publicly. Some people are heard to say that the amendment will involve only Kelantan. This is also incorrect. **Act 355 is a federal law. It applies throughout Malaysia.** The proposal does not say it will apply only in Kelantan. One more thing said is that **it only affects 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 only over Muslims.

What could Pas do **if the amendment is passed? The answer is that the Kelantan Pas government may move the 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 only to Muslims. (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 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:

<http://www.tunabdulhamid.my>; <https://tunabdulhamid.me> Tun Abdul Hamid Mohamad is former chief justice of Malaysia

Read More : <http://www.nst.com.my/news/2016/09/176770/amendment-act-355-real-effect>

Memahami pindaan Akta 355 dan impaknya kepada rakyat Malaysia (17 Oktober 2016)

Soal jawab berkenaan Rang undang-undang 355, disediakan oleh Sisters in Islam.

1. Apakah peruntukan Akta Mahkamah Syariah (Bidang Kuasa Jenayah) 1965 (Akta 355) yang sedia ada?

Seksyen 2. Bidang kuasa Jenayah Mahkamah Syariah adalah seperti berikut:

Mahkamah Syariah yang ditubuhkan dengan sempurnanya di bawah mana-mana undang-undang dalam sesuatu Negeri dan diberi bidang kuasa ke atas orang-orang yang menganuti agama Islam dan berkenaan dengan mana-mana perkara yang disebut satu persatu dalam Senarai II bagi Senarai Negeri dalam Jadual Kesembilan kepada Perlembagaan Persekutuan adalah dengan ini diberi bidang kuasa berkenaan dengan kesalahan-kesalahan terhadap rukun-rukun agama Islam oleh orang-orang yang menganuti agama tersebut yang boleh ditetapkan di bawah mana-mana undang-undang bertulis:

Dengan syarat bahawa bidang kuasa sedemikian tidaklah boleh dijalankan berkenaan dengan apa-apa kesalahan yang boleh dihukum penjara selama tempoh melebihi tiga tahun atau denda melebihi lima ribu ringgit atau sebatan melebihi enam kali atau apa-apa gabungan hukuman-hukuman tersebut.

2. Apakah pindaan kepada Rang Undang-undang 355 yang dicadangkan?

Pindaan kepada Akta Mahkamah Syariah (Bidang Kuasa Jenayah) 1965 (Akta 355) adalah seperti berikut :

Seksyen 2A baru dimasukkan seperti berikut :

“Dalam menjalankan undang-undang jenayah di bawah Seksyen 2 Mahkamah Syariah berhak menjatuhkan hukuman yang dibenarkan oleh undang-undang Syariah berkaitan hal-hal kesalahan yang disenaraikan di bawah seksyen yang disebutkan di atas, selain daripada

hukuman mati.”

Ini adalah pindaan yang amat membimbangkan. Buat masa sekarang, Akta tersebut menetapkan had bidang kuasa Mahkamah Syariah di mana hukuman maksimum yang boleh dikenakan adalah penjara 3 tahun atau denda RM5000 atau 6 kali sebatan. Dengan pindaan ini, Mahkamah Syariah boleh mengenakan apa sahaja hukuman, kecuali hukuman mati.

Jenayah seperti zina, qazaf (memfitnah tentang perlakuan zina), syrub (minum arak) dan irtidad or riddah (keluar dari agama Islam) adalah jenayah hudud di bawah Kod Jenayah Syariah Kelantan dan dengan pindaan tersebut maka jenayah tersebut boleh dikenakan hukuman yang amat berat iaitu sebatan antara 40 ke 100 kali. Oleh itu, adalah tidak tepat sekiranya dikatakan bahawa Akta Pindaan ini tidak ada kena mengena dengan hudud.

3. Apakah kesan pindaan tersebut?

a) Ia akan membolehkan sebahagian dari undang-undang hudud dikuatkuasakan. Di negara-negara yang memperkasakan undang-undang hudud, tidak semestinya ia dapat mengurangkan kadar jenayah. Sebaliknya, yang dilihat adalah hukuman yang tidak berperikemanusiaan dikenakan ke atas orang yang didapati bersalah.

b) Pindaan ini membolehkan hukuman yang lebih berat daripada undang-undang Persekutuan, iaitu Kanun Keseksaan (Akta 574), kecuali hukuman mati. Pada dasarnya, pindaan ini membenarkan Dewan Undangan Negeri menjatuhkan hukuman ke arah pelaksanaan hudud seperti memotong tangan dan merejam, asalkan ia bukan hukuman mati.

c) Sekiranya undang-undang hudud Kelantan dikuatkuasakan, ia akan membawa banyak keburukan kepada wanita. Sebagai contoh, wanita atau orang bukan Islam dibatalkan daripada menjadi saksi dalam kes zina, keterangan daripada wanita dituduh tidak diambil oleh mahkamah dan seterusnya, wanita tidak boleh menuduh suaminya melakukan zina, dan sebagainya. Di negara-negara di mana hudud dipraktikkan, kajian telah menunjukkan

yang suami membuat penuduhan zina terhadap isterinya bagi memalukan isterinya dan memaksanya tinggal dalam perkahwinan paksa. Di Aceh, terdapat wanita mangsa rogol dituduh melakukan zina. Oleh kerana ketidakadilan undang-undang, wanita tersebut telah disabitkan dan hukuman sebat dikenakan.

d) Undang-undang Islam adalah undang-undang negeri. Oleh itu, hukuman yang dikenakan tidak selaras dan berbeza mengikut negeri walaupun bagi jenayah yang sama.

4. Adakah Mahkamah Syariah berkesan dalam memberikan keadilan dan kesaksamaan?

Setakat peningkatan bidang kuasa untuk menjatuhkan hukuman jenayah Syariah tidak akan menjamin Mahkamah Syariah akan menjadi lebih perkasa dan dihormati. Dalam pemerksaan Mahkamah Syariah, terdapat lebih banyak perkara yang wajib ditingkatkan dan akan lebih menjaminkan pemerksaan Mahkamah Syariah, seperti:

a) Mahkamah Syariah perlulah menyelesaikan dengan lebih baik, kes-kes berkaitan dengan Undang-undang Keluarga Islam dengan mengambil berat tentang memberi penyelesaian dalam jangkamasa yang pendek bagi wanita dan anak-anak. Ini termasuk pengendalian kes-kes cerai, hadhanah, nafkah dan seterusnya yang buat masa sekarang banyak mengeneipkan kebajikan keluarga dan hak-hak wanita.

b) Mahkamah Syariah perlulah lebih efisien bekerjasama untuk menguatkuasakan penghakiman di antara negeri-negeri.

c) Mahkamah Syariah perlulah prihatin apabila melibatkan kes yang mempunyai impak ke atas kaum bukan Islam melalui penghakimannya, seperti dalam kes-kes penukaran anak-anak ke ugama Islam oleh ibu atau ayah tanpa persetujuan kedua belah pihak. Ini dengan mengambil kira segala kesan terhadap anak-anak tersebut dan juga ibu atau ayah bukan Islam yang tidak mempunyai akses ke mahkamah syariah.

5. Apakah realiti pelaksanaan undang-undang di mahkamah Syariah?

Mengikut statistik bagi tahun 2015 yang dikumpulkan oleh SIS Forum Malaysia melalui Klinik Bantuan Telenisa, kes-kes di dalam kategori perkahwinan adalah kes-kes poligami (32) – di mana poligami dilakukan tanpa pengetahuan atau persetujuan isteri, suami tidak memberikan nafkah kepada isteri dan anak-anak, pembahagian masa yang tidak adil di antara keluarga berpoligami, suami melarikan did atau kahwin gantung, perkahwinan poligami yang tidak didaftarkan dan sebagainya.

Bagi bantuan bagi kes-kes penceraian, cerai secara fasakh merupakan jenis penceraian yang paling tinggi (27), diikuti dengan penceraian ta'liq (17). Bagi pihak isteri, nafkah isteri termasuk nafkah tertunggak, mutaah dan iddah merupakan kes-kes yang paling banyak (58). Berkenaan masalah penjagaan anak-anak selepas bercerai, nafkah anak yang tidak dibayar merupakan kes yang paling banyak (62). Hak jagaan anak juga ada dalam 78 kes. 152 kes yang diterima membabitkan keganasan rumah tangga. 5 wanita menghadapi kes berpanjangan antara 1-5 tahun dan 1 kes antara 6-10 tahun. Hampir kesemua kes-kes ini adalah disebabkan suami tidak bekerjasama contohnya tidak hadir ke mahkamah. Mahkamah sering menangguhkan kes tersebut berkali-kali tanpa mengambil berat kesusahan wanita tersebut. Wanita tersebut terpaksa datang ke mahkamah berkali-kali dan ini membebankan wanita tersebut kerana ia memerlukan bayaran kepada peguam yang tinggi dan penjagaan anak-anak serta pekerjaannya terganggu. Sekiranya ini terjadi terlalu sering, mahkamah sepatutnya membuat keputusan tanpa suami hadir atau menolong pihak perempuan untuk mencari pihak suami atau sebagainya.

Sisters in Islam

17 Oktober 2016



Empowering Voices for Change

MEMAHAMI RANG UNDANG-UNDANG 355 & IMPAKNYA

RUU 355

2

Apakah cadangan pindaan RUU355?

Parti politik PAS mencadangkan untuk meminda Akta 355 bagi meningkatkan hukuman yang dikenakan oleh mahkamah syariah, kecuali hukuman mati. Jumlah hukuman yang dikenakan akan ditentukan oleh Dewan Undangan Negeri.

1

Apakah Akta 355?

Akta 355 merupakan akta berkaitan bidang kuasa jenayah mahkamah syariah.

Seksyen 2 di bawah Akta 355 menjelaskan batas bidang kuasa mahkamah syariah di mana hukuman maksimum yang boleh dikenakan adalah penjara 3 tahun atau denda RM5000 atau 6 kali sebatan atau apa-apa gabungan hukuman tersebut.

3

Apakah impak pindaan ini, jika ia diluluskan?

Ia akan memberi kuasa yang lebih luas kepada mahkamah syariah untuk mengenakan hukuman kepada pesalah jenayah syariah tanpa batasan, kecuali hukuman mati.

Hukuman yang dikenakan oleh mahkamah syariah selamanya tidak akan selaras kerana ia tertakluk mengikut negeri.

Kelemahan pelaksanaan hukuman akan memberi nama yang buruk kepada mahkamah syariah dan agama Islam.

4

Benarkah pindaan ini akan memartabatkan status mahkamah syariah di Malaysia?

Tidak benar, kerana pindaan ini hanya tertumpu kepada aspek hukuman, tanpa menyelesaikankan masalah sistemik di mahkamah syariah, contohnya pelaksanaan Undang-undang Keluarga Islam yang masih bermasalah.

5

Cara-cara lain untuk memperkasakan mahkamah syariah:

Menyelaraskan sistem undang-undang keluarga Islam di antara negeri-negeri di Malaysia supaya sama.

Memudahkan proses tuntutan nafkah bagi ibu-ibu tunggal supaya lebih efisien.

Mempercepatkan proses perceraian, hak penjagaan anak dan lain-lain supaya tidak berlanjutan sehingga bertahun-tahun.

Memastikan setiap daerah di Malaysia mempunyai hakim syarie yang mencukupi dan adil gender.

6

Bolehkah orang Islam membantah RUU355?

Rakyat Malaysia tanpa mengira latar belakang agama berhak menyuarakan bantahan kerana RUU355 adalah pindaan kepada prosedur yang akan memberi kesan kepada kepentingan awam.



Why RUU355 is not a law with feminist ideals

Contrary to what Deputy Minister in the Prime Minister's Department, Asyraf Wajdi Dusuki [claims](#), feminists should not and will not support the proposed amendments to Act 355 or better known by its Malay abbreviation, RUU355.

Feminism does not aim to achieve justice and equality through imposing higher punishments. It instead, aims to achieve substantive equality by addressing systemic barriers women face daily such as unjust laws, poor implementation of laws and limited access to the justice system due to strained economic conditions, to mention a few. These systemic barriers unfortunately, are not at all addressed in RUU355.

If PAS and Putrajaya were really concerned about women's rights, they would have supported Sisters in Islam's (SIS) call to amend the present Islamic Family Law Act 1984 (IFL) – a call which SIS and our supporters have made loud and clear since the inception of this organisation.

Simply increasing punishments for ex-husbands who do not pay maintenance fails to tackle the root of the problems in Syariah courts, such as the provisions in the existing IFL that discriminate against women, poor implementation of the law and the absence of gender sensitivity amongst Syariah court staff. In addition, what evidence have PAS and Putrajaya provided to show that higher punishments will lead to better conditions for women seeking justice in Syariah courts?

If PAS and Putrajaya were really concerned about feminism, they would have supported SIS and other women's rights groups' call to review the present Syariah Criminal Offences Enactment (SCOE), which have mostly been applied to women, transpeople and individuals who are of lower economic status. If the existing fine amount of RM5000 under Act 355 is already affecting the livelihood of most transwomen, the passing of RUU355 which proposes a RM100 000 fine, will definitely cause more discrimination against them.

What we urgently need is a complete review of the Syariah legal system, because if we allow RUU355 to be passed without reviewing the existing IFL and SCOE, we will be leaving the doors to potential abuse of power and discrimination wide open.

As the scholar Ibn Qayyim al-Jawziyyah said, "The foundation of Islamic Syariah lies in its practical and egalitarian social ideas which include justice, welfare, mercy and wisdom for all without regards for gender race of nationality, and anything that departs from this is not a part of the Syariah." Therefore SIS, as a Muslim feminist organisation, reiterate our objection to RUU355 for it is a law that is unfeminist, unjust and most importantly, un-Islamic.

Sisters in Islam

23 January 2017

Media coverage:

<http://www.themalaymailonline.com/malaysia/article/feminism-not-about-harsher-punishments-sis-tells-asyraf-wajdi>

<http://www.thestar.com.my/news/nation/2017/01/23/sis-syariah-amendments-unjust-and-unfeminist/>

<http://www.freemalaysiatoday.com/category/nation/2017/01/23/shariah-changes-are-not-feminist-declares-sis/>

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