DISTINCTION BETWEEN CRIMES AND STATE OFFENCES UNDER OUR FEDERAL CONSTITUTION

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(UPDATED 2/3/2021) CRIMINAL OFFENCES are public law offences thus triable for muslims and non-muslims equally under the Federal List. Those criminal offences are also against the precepts of Islam, unless proven otherwise.
On the other hand, those precepts of Islam fall within the jurisdiction of Syariah Courts are personal law.

Islamic Personal law is state jurisdiction either before or after Merdeka Day, or even before the formation of Persekutuan Tanah Melayu in 1948.

Offences against the precepts of Islam that fall under personal law are only applicable for muslim. Therefore they are not Criminal law under Item 4, List II, the 9th Schedule.

Prior to 1948, the State legislated both criminal law and offences in the manner deemed fit during the period.

The above interpretation is developed from the position of Islam as the law of the Federation read together with Article 74(2) and the following authorities: [49] Abdul Hamid Mohamad, sitting as Chief Justice in Sulaiman Takrib appeared to hold the same view as his Lordship did in Latifah. Indeed, in Sulaiman Takrib, his Lordship observed as follows:

"CRIMINAL LAW [69] It was also argued that the offences are 'criminal law' and therefore within the federal jurisdiction to legislate. I admit that it is not easy to draw the dividing line between 'criminal law' and the offences that may be created by the State Legislature. Every offence has a punishment attached to it. In that sense, it is 'criminal law'. However, if every offence is 'criminal law' then, no offence may be created by the State Legislatures pursuant to item 1, List II of the Ninth Schedule. To give effect to the provision of the Constitution a distinction has to be made between the two categories of offences and a line has to be drawn somewhere. The dividing line seems to be that if the offence is an offence against the precept of Islam, then it should not be treated as 'criminal law'. That too seems to be the approach taken by the Supreme Court judgment in Mamat bin Daud & Ors v Government of Malaysia [1988] 1 MLJ 119. In that case the issue was whether s 298A of the Penal Code was invalid on the ground that it made provisions with respect to a matter with respect to which Parliament had no power to make. It was argued that the section was ultra vires the Constitution because, having regard to the pith and substance of the section, it was a law which ought to be passed NOT by Parliament but by the State Legislative Assemblies, it being a legislation on Islamic religion, according to art 11(4) and item 1 of List II, Ninth Schedule of the Federal Constitution. On the other hand, it was contended by the respondent that the section was valid because it was a law passed by Parliament on the basis of public order, internal security and also criminal law according to art 11(5) and items (3) and (4) of List I of the Ninth Schedule of the Federal Constitution.". [50] His Lordship further observed that:

"[72] Considering the difficulty to draw the line between the two categories of offences and the fact that the Supreme Court in Mamat bin Daud too did not attempt to lay down the principles for the distinctions to be made, I too shall refrain from attempting to do it as I fear that it might do more harm than good. I would prefer that the issue be decided on a case to case basis. However, if, for example, a similar offence has been created and is found, in the federal law, since even prior to the Merdeka Day, that must be accepted as 'criminal law'. But, where no similar 'criminal law' offence has been created, then, as in the case of Mamat bin Daud, the court would have decide on it.

"[73] In the instant case, as the offences are offences against the precept of Islam, as there are no similar offences in the federal law and the impugned offences specifically cover muslims only and pertaining to Islam only, clearly it cannot be argued that they are 'criminal law' as envisage by the Constitution.". [Emphasis added]

The Federal Court in Iki Putra bin Mubarrak has taken a bit diffierent approach as follows:
[51] With respect, we are unable to agree with his Lordship's observations as regards his categorisation of which legislature (Federal or State) is empowered to make law within the context of item 1 of the State List. The words employed by item 1 since Merdeka Day has always been 'except in regard to matters included in the Federal List'. The words are not: 'except in regard to matters included in the Federal Law'. There is a critical distinction between the two categorisations and his Lordship appears to favour the latter approach over the former. Analysing the constitutional validity of State-legislated law on the basis of whether the same subject matter has already been included in the Federal Law, again would render the words 'Federal List' in the preclusion clause to item 1 nugatory.

The Federal Court ruled that:
"[86] For the avoidance of doubt, the State Legislatures throughout Malaysia have the power to enact offences against the precepts of Islam. As decided by this Court in Sulaiman Takrib (supra) and other related judgments, the definition of "precepts of Islam" is wide and is not merely limited to the five pillars of Islam. Thus the range of offences that may be enacted are wide. Having said that, the power to enact such range of offences is subject to a constitutional limit".
For the avoidance of doubt, the Chief Judge of Malaya in Iki Putra has further elaborated as follows:

"[32] …..In the main, there are three distinct categories of offences that shapes Syariah Criminal offences in Malaysia. These are;
(i) Offences relating to aqidah. ….
(ii) Offences relating to sanctity of religion and its institution. ….
(iii) Offences against morality. For example consuming intoxicating drinks, sexual intercourse out of wedlock (zina) and close (khalwat).

"[33] As can been seen, these are offences in relation to Islamic religion practiced in this country that conform to the doctrine, tenets and practice of the religion of Islam. In short, I refer to these offences as religious offences. The list of offences enumerated at [32] is undoubtedly not exhaustive, and there may be other religious Offences that possibly be validly enacted by the State Legislatures that may energe from the facts and circumstances of each case. ….. Any attempt to regulate the right of persons professing the religion of Islam to a particular belief, tenets, precepts and practices by way of creation of offences can only be done by legislation passed by State Legislatures pursuant to Clause 2 of Article 74 of the FC. As stated by Mohamed Azmi SCJ in Mamat bin Daud (at p. 125) "…to create an offence for making an imputation concerning such subject matter is well within the legislative competence of the State Legislatures and not that of Parliament". When the true test is applied, the inevitable conclusion is that these religious offences have nothing to do with 'criminal law'. I find it hard to think that the religious offence is a law with respect to 'criminal law' as envisaged by the Federal List. As Hashim Yeop Sani SCJ said in Mamat bin Daud (at p. 27) ….. , these are religious offences under the Syariah Court's jurisdiction and applicable only to persons professing the religion of Islam and ought to be passed not by the Federal Parliament but by the State Legislatures on the basis of the State List. Surely, in my opinion, a legislation pertaining to such

prohibited acts or omissions amounts to a legislation upon Islamic religion, on which only states have legislative competence".

The above interpretation defines that offences relating to commission and omission against the precepts of Islam that not included in the catagory of criminal law as envisaged under the Federal List. The jurisdiction of the state legislatures must be read together with Article 77 of the Federal Constitution, being the provision on residual powers.

In conclusion, those offences against the precepts of Islam that fall under the category of personal law are the State List, and not criminal Offences as envisaged in the Federal List.

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