IN THE FEDERAL COURT OF MALAYSIA
(ORIGINAL JURISDICTION)
CASE NO. BKA-3-11/2019 (W)

BETWEEN

... PETITIONER

AND

1. **KERAJAAN NEGERI SELANGOR**
2. **MAJLIS AGAMA ISLAM SELANGOR ... RESPONDENTS**

Coram: Tengku Maimun binti Tuan Mat, CJ
Rohana binti Yusuf, PCA
Azahar bin Mohamed, CJM
Abang Iskandar bin Abang Hashim, CJSS
Mohd Zawawi bin Salleh, FCJ
Nallini Pathmanathan, FCJ
Vernon Ong Lam Kiat, FCJ
Zabariah binti Mohd Yusof, FCJ
Hasnah binti Mohammed Hashim, FCJ

JUDGMENT OF AZAHAR BIN MOHAMED, CJM

Introduction

[1] This Petition that is moved pursuant to Clause (3) of Article 4 and Clause (1)(a) of Article 128 of the Federal Constitution ("FC") is important. In essence, we are asked to decide on who should

legislate the offence with respect to sexual intercourse against the order of nature? Is it Parliament or the State Legislatures that have powers to enact such a law? In the context of our unique federal system of government in which a dual legal system of Civil and Syariah operates in parallel to each other, this question has significant implication pertaining to the legislative competence of State Legislatures to enact on offences against the precepts of Islam, or commonly referred to as Syariah or Islamic criminal offences.

[2] I have had the benefit of reading the judgment of the learned Chief Justice in draft. With which I fully agree. I write this concurring judgment to clarify the important constitutional issues that were raised by the parties and to give my views why the remedies sought by the Petitioner should be granted.

Federal System Of Government

[3] First and foremost, it is relevant to reiterate that Malaysia is a federation of 13 States with a division of legislative power between the Parliament and the States Legislatures. In our federal system of government, only the FC is supreme; Parliament and the States Legislatures are subject to the FC. Under Part VI of the FC, the legislative competence of Parliament and the State Legislatures is clearly demarcated. There are certain subjects that can only be

legislated upon by Parliament, some subjects only by the State legislatures, and others by both Parliament and State legislatures. These are distinctly set out and regulate in the Ninth Schedule of the FC (List I for Federal matters, List II for State matters, and List 111 for Concurrent matters).

[4] Under List I (Federal List), "criminal law" is a Federal matter that is reserved for Parliament and therefore beyond the legislative competency of State Legislatures. On the other hand, "offences against the precepts of that religion (Islam)" are in List II (State List) with respect to which the State Legislatures have legislative powers to make law. It was pursuant to the State List, the Selangor State Legislature ("the State Legislature") enacted section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 ("1995 Enactment"), the subject matter before us, which created the offence of sexual intercourse against the order of nature ("the impugned provision"). It is also significant to note that almost all the States have criminalised sexual intercourse against the order of nature under their respective Syariah Criminal Offences Enactments.

[5] Parliament and the State Legislatures' legislative powers and authority to make laws are therefore derived explicitly from the FC. This means that both the Legislatures must not exceed their

constitutional authority to legislate. In **Liyanage v. The Queen [1967] 1 AC 259**, the Privy Council held that powers in countries with written constitutions must be exercised in accordance with the terms of the constitution from which the powers were derived. It cannot therefore promulgate laws, which are contrary to the constitution; otherwise, it is unconstitutional. This has been explained in **Mamat bin Daud & Ors v. Government of Malaysia [1988] 1 MLJ 119 ("Mamat bin Daud")** where Abdoolcader SCJ said (at p.128):

> *"In a federal structure which is based upon the distribution of legislative powers between the Central or Federal Legislature (Parliament) and Provincial or State Legislatures, the powers of the legislatures are limited by the Constitution. A legislative act would be unconstitutional and invalid if not warranted by the items of legislative power in the appropriate legislative list. When a controversy arises whether a particular legislature is not exceeding its own and encroaching on the other's constitutional power, the court has to consider the real nature of the legislation impugned, its pith and substance, to see whether the subject dealt with is in the one legislative list or in the other. When a legislature purports to enact legislation with reference to a particular head of legislative power, it has to comply with the conditions circumscribing that power."*

[6] The FC has vested the Federal Court with the exclusive power to strike down laws made without legislative power under Clause (3) of Article 4 and Clause (1)(a) of Article 128 of the FC. The learned Chief Justice has explained in the judgment that with the exception of the Federal Court, no other Court in the land has this distinct and exclusive jurisdiction. In this regard, it has to be noted that it is well settled principle of law that there is always a presumption in favour of the constitutionality of a legislation enacted by the Legislatures and the burden is upon him who attacks it to establish the contrary. That is to say, in this Petition we are concerned with the question of whether the Petitioner has in any way displaced the presumption of the constitutional legitimacy of the impugned provision. And it is to his case that I now turn.

The Petitioner's Case

[7] The learned Chief Justice has set out the background facts and the contentions of the Petitioner as well as the Respondents. I shall not repeat them here, save to emphasis that the Petitioner's principal contention is that the State Legislature competence to legislate offences against precepts of Islam pursuant to the State List is qualified by the phrase 'except in regard to matters included in the Federal List' ("Preclusion clause"). There is also no necessity for me

to quote the impugned provision and the relevant provisions of the FC as they are fully set out in the learned CJ's judgment.

[8] Suffice for me to say that for the present purpose, the validity of the impugned provision depends upon its fulfilling the stipulations as found in item 1 of the State List, and they are:

(i) The offence provided therein is against the precepts of the religion of Islam ("Precepts of Religion Point"); and

(ii) The offence is not in respect of the matters included in the Federal List ("Preclusion Clause Point")

Precepts Of Religion Point

[9] The phrase "precepts of Islam" is significant. It should be the starting point in the analysis to determine whether or not the impugned provision is within the legislative competency of the State Legislature. The judgments of this Court in **Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications [2009] 6 MLJ 354 ("Sulaiman Takrib")** and **Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors [2012] 4 MLJ 281 ("Fathul Bari")** represent the law on the subject matter as we apply today. Based on the two authorities, the law as it stands is this. The phrase "precepts of Islam"

is wide and that would include every single rule, conduct, principle, commandment, and teaching of Islam prescribed in the Syariah, including Islamic criminal law. Precepts of Islam should not be confined to the five basic pillars of Islam only. Islamic criminal law is therefore, included within the phrase 'the creation and punishment of offences against the precepts of Islam'.

[10] This, of course, raises an important question whether the impugned provision is an offence against the precepts of Islam. Before addressing this issue, it is relevant to consider the legislative history of the impugned provision. The state of Selangor had a specific legislation on Islamic criminal law, that is, the Administration of Muslim Law Enactment 1952 (Selangor) ("the 1952 Enactment"). This Enactment contained 27 provisions under Part IX, titled "Offences" which included, among others, offences on intoxicating liquor, *'kheluat',* illicit intercourse between divorce persons, religious teaching, false doctrines and attempts and abetment. The unnatural sex offence as in the impugned provision was not made as an offence in the 1952 Enactment. Four decades later, the State Legislature enacted the 1995 Enactment. The 1995 Enactment was granted Royal Assent on 10.1.1996 and came into force from 22.11.1996. The preamble encapsulates that it is an enactment to provide for

Syariah criminal offences and matters relating thereto, whereby the commission or omission of such acts are against the precepts of Islam. The impugned provision was enacted with the passing of the 1995 Enactment, which governs on the offence and punishment of sexual intercourse against the order of nature for Muslims in the state of Selangor.

[11] The Second Respondent has tendered two opinions of experts to support the contention that the impugned provision is an offence against the precepts of Islam. The first is Professor Emeritus Tan Sri Dr. Mohd Kamal bin Hassan who is the Advisor for Centre for Islamisation (CENTRIS) at International Islamic University Malaysia (IHUM). And secondly, Professor Emeritus Dato' Paduka Dr. Mahmood Zuhdi bin Haji Abd Majid who is an Associate Research Fellow in Syariah at University of Malaya (UM). The reference made to the expert opinion of qualified and eminent Islamic scholar is permissible as it is in tandem with the position made by this Court in **Sulaiman Takrib** and **Fathul Bari**, which have referred to the opinions of expert in understanding the concept of precepts of Islam.

[12] Professor Emeritus Tan Sri Dr. Mohd Kamal bin Hassan who also previously gives an opinion in **Sulaiman Takrib**, inter alia, states as follows:

"2.2 In the context of the religion of Islam, the expression 'precepts of Islam' has a broad meaning to include commandments, rules, principles, injunctions — all derived from the Qur'an, the Sunnah of the Prophet, the consensus of the religious scholars ('Ijma") and the authoritative rulings (fatwas) of legitimate religious authorities, for the purpose of ensuring, preserving and/or promoting right beliefs, right attitudes, right actions and right conduct amongst the followers of Islam.

2.3 With regard to the scope of applicability of the precepts of Islam, human actions and behavior fall into three major and interrelated domains, namely creed (aqidah), law (shari'ah) and ethics (akhlaq). The creed is concerned with right beliefs and right attitudes (deemed as actions of the heart), the law with right actions and ethics with right conduct, right behavior and right manners.

2.4 Therefore the precepts of Islam possess the force of enjoining or commanding or prohibiting actions or behavior which Islam considers good (ma'ruf) or bad (munkar), correct or deviant, obligatory (wajib), recommendatory (sunnah), undesirable (makruh), permissible (halal), prohibited (haram), allowable (mubah).

8. Dalam Konteks Petisyen ini, precepts of Islam turut merangkumi kesemua jenis kesalahan dalam Hukum Syarak dan perbuatan/kelakuan jenayah yang melanggar Hukum Syarak, termasuk persetubuhan bertentangan dengan hukum tab'i."

[13] Professor Emeritus Dato' Paduka Dr. Mahmood Zuhdi bin Haji Abd Majid produced an opinion with regards to the "Hukum Melakukan Hubungan Seks Diluar Tabi'i" according to Islamic law. Among others he said that "Pengharaman liwat adalah jelas menunjukkan liwat adalah satu kesalahan di bawah undang-undang Syariah dan ianya terpakai kepada semua orang yang beragama Islam tanpa sebarang pengecualian."

[14] In my opinion, applying the meaning of the phrase 'precepts of law' as stated earlier and based on the two expert opinions, the impugned provision that relates to unnatural offence namely 'seks luar tabi'i' or 'liwat' is undeniably an offence against the precepts of Islam. It is considered haram (prohibited).

[15] That being the case, I find that the impugned provision enacted by the State Legislature clearly falls within the scope of precepts of Islam enumerated in the State List. In other words, the impugned provision falls within the precept of Islam legislative field. Whether the impugned provision was validly enacted by the State Legislature, and not *ultra vires* the FC, is a question that must be dealt with separately. This leads me to the preclusion clause point.

Preclusion Clause Point

[16] The central question that we must ask here is whether or not the impugned provision is precluded by the preclusion clause as it is being under the Federal List. In other words, whether the impugned provision intrudes into area where it does not belong. The Petition turns principally upon this question. This is the first time this Court addresses this point directly.

[17] The preclusion clause is an important constitutional provision that I must look at carefully. I begin the task of interpretation of the clause by carefully considering the language used. Indeed, the meaning and scope of the preclusion clause is one of construction, and the ultimate resort must be determined upon the actual words used, read not in *vacuo* but as occurring in a single complex instrument, in which one part may throw light on another (see **James v Commonwealth of Australia [1936] AC 578** (at p. 613)). As can be seen, the FC deliberately used specific language in describing the nature of the preclusion clause. In my opinion, the wordings of the preclusion clause are compellingly clear and unequivocal and admit of no other interpretation. The clause is as plain and clear as language can express it. It is an established canon of constitutional construction that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate

the great purpose of the instrument and effect should be given to every part and every word of a Constitution (see **Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, Intervener) [2010] 2 MLJ 285**). This clause is expressed in wide-ranging phraseology and I have no doubt that according to the terms the power of the State Legislature to legislate on offences against the precepts of Islam is regulated by the words "except in regard to matters included in the Federal List". The preclusion clause functions as a limitation imposed by the FC on the State Legislatures to make laws on Islamic criminal law An important point to note is that the State List itself expressly recognises that certain areas of Islamic criminal law are admittedly part of the jurisdiction of Parliament and as a result any matter assigned to Parliament is outside the legislative competence of the State Legislature. Although the range of the State legislature to enact "offences against the precepts of Islam" appears to be so extensive as to comprise almost "every single rule, conduct, principle, commandment, and teaching of Islam prescribed in the Syariah", in reality there is constitutional limitation upon the subject matter of the legislation enforced by the preclusion clause. So construed, there could be no doubt, to my mind, that the State Legislature cannot create offence already dealt with in the Federal List. In this context,

on the preclusion clause, Abdoolcader SCJ had this to say in **Mamat bin Daud** as follows (at p. 130-131):

> *"Item 1 in the State List provides specifically for matters relating to the religion of Islam including, inter alia, the creation and punishment of offences by persons professing the religion of Islam against the precepts of that religion, except in regard to matters included in the Federal List. The preclusion clause must clearly envisage and give effect to the power of Parliament under items 3 and 4 in the Federal List to legislate in regard to public order and criminal law and procedure and under paragraph (h) of item 4 for the creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law, unlike the specific exception made in relation to Islamic personal law in paragraph (e)(ii) of item 4 and the matters specified in subparagraph (i) thereof."*

[18] It is for this reason that I conclude the State legislature's competence to legislate over Islamic criminal offences is neither exclusive nor comprehensive. Viewed in this perspective, I agree with the views of Dr Constance Chevallier-Govers in his IAIS Malaysian Monograph Series No. 2 entitled **Shari'ah and Legal Pluralism in Malaysia**, (at p. 20) that the preclusion clause "clearly imply that the State power over Islamic law offences is subordinated to federal power and is residual and not inherent". There is an important point

to make about all of this: the State Legislature is not a legislative body with the sole right to legislate on Islamic criminal offences. For this reason, I reject the main contention of both the Respondents to the effect that if the offence is an offence against the precepts of Islam, then it should not be treated as 'criminal law' under Item 4 of the Federal List. Such an argument needs to be clearly justified by reference to the constitutional language of the terms of the FC. I see nothing in the State List, or elsewhere in the FC that is capable of such a construction. Both the Respondents' arguments tend to miss the point that without any express provision to the contrary, the clear wordings of the preclusion clause must be given full effect. The Respondents failed to accord this clause the importance it deserved.

[19] It is at this point that it is imperative to consider the extent of the Federal's legislative power through Parliament to make laws with respect to 'criminal law' enumerated in the Federal List. Clause 1 of Article 74 of the FC provides the Parliament power to make laws with respect to any matters enumerated in Item 4 of the Federal List.

[20] Two things can be said of the above constitutional provision. First, the words "with respect to" in Article 74 must be interpreted with extensive amplitude. The widest possible construction, according to the ordinary meaning of the words in the entry, must be put upon

them. I have discussed this area of the law in **Letitia Bosman v Public Prosecutor and other appeals (No 1) [2020] 5 MLJ 277**. And secondly, it is one of the canons of constitutional interpretation that a constitution can be interpreted in the light of its historical records during the drafting stage. The FC was the work of the Reid Commission. In its report, among others, the Reid Commission stated as follows (at para 3):

> *"To make recommendations for a federal form of constitution for the whole country as a single, self-governing unit within the Commonwealth based on Parliamentary democracy with a bicameral legislature, which would include provision for:*
> *(i) The establishment of a strong central government with the States and Settlements enjoying a measure of autonomy (the Question of the residual legislative power to be examined by, and to be the subject of recommendations by the Commission and with machinery for consultation between the central Government and the States and Settlements on certain financial matters to be specified in the Constitution."*

[21] Undeniably, the federal-state relationship and allocation of powers reveal a FC with a central bias. The structure created in 1957 clearly bestows a preponderance of power on the centre (see **50 years of Malaysia, Federalism Revisited**, Edited by Andrew J.

Harding and James Chin (at p. 26). And as submitted by learned counsel for the Petitioner "...The Preclusion Clause reinforces Parliament's exclusivity over the criminal justice system (which encompasses offences created under paragraph 9, State List". In the context of our case, this is reflected in Item 4 of the Federal List, particularly Item 4(h) which authorises Parliament to make laws for criminal law and procedure and the administration of justice, including the "Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law". The FC recognises Parliament's primacy over the administration of criminal justice system in our country. In **Mamat bin Daud**, Hashim Yeop A Sani SCJ observed as follows (at p. 127):

> *"The words used in Item 4 of the Federal List are 'civil and criminal law and procedure'. The power conferred by Item 4 of the Federal List is wide and is subject only to creation of offences in respect of matters included in the State List as stated in Item 9 of the State List in the Ninth Schedule to the Federal Constitution. Article 74(4) of the Constitution provides that where general as well as specific expressions are used in the List, the generality of the former shall not be taken to be limited by the latter. The words 'civil and criminal law and procedure' when read with art 74(4) of the Constitution would thus clearly vest Parliament with the power to enact the law."*

[22] Criminal law is a matter within the domain of Parliament. Laws with respect to "criminal law" and criminal justice system are provided for in Item 4 of the Federal List in broad terms. Parliament is only precluded from creating offences in respect of matters in the State List. What is "criminal law" is not defined in FC or any other statutes.

[23] To take the argument further, the term 'criminal law' traditionally refers to acts and omissions that are prohibited by penal provisions (see for instance, **Proprietary Articles Trade Association and others v Attorney-General for Canada and others [1931] AC 310 (PC)** (at p 314). In our jurisdiction, most of the penal provisions are contained in the legislations enacted by Parliament. The Penal Code, for example, declares what acts or omissions are offences and also provides for their punishment. This includes act or omission done intentionally, knowingly, voluntarily, fraudulently or dishonestly. It classifies offences such as those affecting the human body (e.g., murder, causing hurt, carnal intercourse against the order of nature), affecting property (e.g., theft, robbery), affecting reputation (e.g., criminal defamation, insult), affecting public peace (e.g., unlawful assembly, rioting) and those affecting public health and safety (e.g., adulteration of food). Importantly, it also determines the nature and quantum of punishment to be given for specific offences.

[24] Coming back to the impugned provision, I fully agree with the views of the learned CJ "that we are dealing with criminal law on the facts of this Petition". When viewed in light of "criminal law", I have no doubt in my mind that the true nature of the impugned provision is a legislation upon criminal matter. I conclude that the offence of sexual intercourse against the order of nature is a matter that obviously falls within the ambit of "Criminal law" pursuant to the Federal List which confers upon Parliament the power to enact laws relating to that. By that I mean, in practical terms, that even if Parliament has yet to make legislation with respect to an offence of sexual intercourse against the order of nature, still the State Legislature is precluded from legislating on this subject matter.

[25] But what's more conspicuous, the impugned provision is in effect reflected in specific provisions of the Penal Code, which was enacted much earlier in time. The Penal Code, which is applicable to all (including both Muslims or non-Muslims) and administered by the Civil Courts, is a law that codifies most criminal offences and punishments in our country. It was first introduced through Straits Settlement Penal Code (Ordinance No IV of 1871). The Ordinance developed through passage of time: from Straits Settlement to the Federated Malay States by the Penal Code of the Federated Malay

States (FMS Penal Code) ('FMS Cap 45'). In 1948, the Federation of Malaya was formed which amalgamated the States of Penang, Malacca, the Federated Malay States and the Unfederated Malay States, which consist of the States of Johor, Kedah, Perlis and Kelantan. The FMS Cap 45 was then extended to the Federation of Malaya by the Penal Code (Amendment and Extended Application) Ordinance (No 3, 1948). The Code was extended throughout Malaysia through the Penal Code (Amendment and Extension) Act 1976 (Act A327). The Code was completely revised as Act 574 under the Laws of Malaysia series in 1997. The revised edition came into operation on 7th August 1997. The Penal Code of the Federated Malay States (FMS Penal Code) 1936 consisted of 511 sections and 23 chapters, which included section 377 governing on unnatural offences.

[26] It is worth noting that section 377 of the FMS Penal Code is almost similar to the impugned provision. On 22.3.1989, Parliament amended the Penal Code to break down section 377 into various sections, which are sections 377 (Buggery with an animal), 377A (Carnal intercourse against the order of nature), 377B (Punishment for committing carnal intercourse against the order of nature) and 377C (Committing carnal intercourse against the order of nature

without consent, etc.). Apart from that, offence governed on outrage on decency was renumbered to section 377D (Outrage of decency) and the word male in the provision was deleted. Further, section 377E was introduced to provide for the punishment of inciting a child to an act of gross indecency.

[27] Evidently, Parliament had made provision for the offence of sexual intercourse against the order of nature in two provisions of the Penal Code i.e. Section 377 and section 377A of the Penal Code. Hence, the offence of sexual intercourse against the order of nature that is prescribed as an offence under the impugned provision has equivalent in the Penal Code. It cannot be disputed that offences contained in the Penal Code are clearly within the term "criminal law".

[28] In determining whether the impugned provision, in pith and substance, falls within the subject matter of "Criminal law", it is the substance and not the form or outward appearance of the provision that must be considered. On the principle of pith and substance, I consider the analysis by Mohamed Azmi S.C.J in **Mamat bin Daud** (at p.123) to be pertinent and directly to the point. It cannot be disputed that in pith and substance, the impugned provision falls within the entry "Criminal Law" under the Federal List.

[29] Based on all the foregoing reasons, on this constitutional issue I conclude by saying that even though the impugned provision falls within the precepts of Islam legislative field, the preclusion clause catches it. The true character and substance of the impugned provision in reality belongs to the subject matter "Criminal law". The term "criminal law" in Federal List would include within it "offences against precepts of religion of Islam" as assigned to the State Legislature. Put another way, only Parliament has power to make such laws with respect to the offence of sexual intercourse against the order of nature.

[30] But there's still one important constitutional question that remains, and this requires clarification, as it was claimed by the Second Respondent that if every offence is Criminal Law then no offence may be created by the State Legislature pursuant to Item 1 of the State List, rendering the State Legislature's power to legislate redundant. At [17] and [18], I have expressed my views that the State Legislature's power to legislate on offences against the precepts of Islam is limited. It is neither exclusive nor comprehensive and is residual and not inherent. Does that render Item 1 of the State List completely otiose and denuded of all meaning?

[31] I do not agree with this contention. It cannot stand in law. According to our concept of Federalism, the FC guarantees (as is clear from its terms) the States with legislative power over offences and punishments against the precepts of Islam with the exception of matters included in the Federal List. That itself refutes the contention of the Second Respondent.

[32] What is important then is to determine the parameter of the real nature of the offence that is within the ambit of the phrase "offences and punishments against the precepts of Islam except in regard to matters included in the Federal List". This raises the question of how to formulate a test to demarcate the boundary that defines the extent of the legislative competence of the State Legislatures over this matter. In the main, there are three distinct categories of offences that shaped Syariah Criminal offences in Malaysia. These are:

(i) Offences relating to *aqidah.* For example wrongful worship, deviating from Islamic belief or contrary to *hukum syarak* and teaching false doctrines;

(ii) Offences relating to sanctity of religion and its institution. For example insulting the Qur'an and Hadith, religious teaching without *tauliah,* failure to perform *Jumaat*

prayers, disrespecting the holy month of *Ramadan* and non-payment of *zakat or fitrah;* and

(iii) Offences against morality. For example consuming intoxicating drinks, sexual intercourse out of wedlock *(zina)* and close proximity *(khalwat)*.

[33] As can be seen, these are offences in relation to Islamic religion practiced in this country that must 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] above is undoubtedly not exhaustive, and there may be other religious offences that possibly be validly enacted by the State Legislatures that may emerge from the facts and circumstances of each case. In my opinion, all these offences are purely religious in nature that is directly concerned with religious matters or religious affairs. 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 S.C.J 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 A. Sani S.C.J. said in **Mamat bin Daud** (at p. 27) (citing **Attorney-General for Ontario & Ors. v. Canada Temperance Federation & Ors. [1946] A.C 193 and Canadian Federation of Agriculture v. Attorney-General for Quebec & Ors. [1951] A.C.179**), "....The true test is always to see the real subject matter of the legislation". These are *ta'zir* offences punishable with imprisonment and/or fine in accordance with Syariah Courts (Criminal Jurisdiction) Act 1965. Ta'zir, according to established Islamic law principle are offences and punishment that are not divinely prescribed and therefore, are left for the authority to formulate. Another point is that, 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. In its applicability to the religion of Islam, the religious offences must be

within the competence of the State Legislatures. It is the States alone that can say what should be the religious offences, which are reserved expressly for legislation by the State Legislatures.

Demarcation of Legislative Powers On Offences Against Precepts of Islam And Criminal law

[34] What I have discussed thus far, underlined an important point: "Criminal law" is a Federal matter within the legislative competence of Parliament. On the other hand, Islamic criminal law that is not caught by the preclusion clause is within the legislative competence of the State Legislatures.

[35] Why are the jurisdictions divided or arranged in such a complicated and problematic manner? To answer this, we must look closely at our legal history that can be traced back to the beginning of the Malay States and the period of colonial rule. There are many connected reasons for this. In this regard, I think it is important that I repeat here what Tun Abdul Hamid Mohamed, the former Chief Justice, said on this in an article entitled "**Implementation Of *Hudud* In Brunei and Malaysia With Particular Reference To Kelantan *Hudud* Enactment**" in **ISLAMIC LAW IN MALAYSIA Issues, Development and Challenges** (2018 Edition) (at p. 352-353). I have summarised the article as follows:

(a) Throughout the history of the Malay States, the Sultan is the head of the Religion of Islam in his State and matters concerning Islam have always been within the State jurisdiction. Since the establishment of the Malayan Union and the Federation of Malaya, "criminal law" came under the jurisdiction of the Federal Government.

(b) One of the Terms of Reference given to the Reid Commission was for the creation of a strong Federal Government. For this reason, amongst others, general laws that apply to everyone and involving public order and national security were made Federal law; the application of which is not limited to Muslims only or within the borders of any of the States.

(c) No state or group had sent any memorandum to the Reid Commission to make a representation that "criminal law" be placed under the jurisdiction of the State Governments.

(d) That time too, religious matters, which were under the State jurisdiction, were limited to family law. In most States, there were no Syariah Courts yet. Almost all Muslims were Malays. They lived in villages or in the

interior. There was no movement of people across the State border as it is now.

(e) If criminal law were placed under the State jurisdiction, most likely, there will be differences between the law of one State and another. This situation could lead to legal uncertainty and might undermine law and order of the country.

(f) Implementation and enforcement of criminal law would be less effective, because the law is confined to the borders of each State only.

Implication of Co-existence Of The Impugned Provision And Section 377 etc. Of the Penal Code

[36] Lastly, I need to consider one additional argument advanced by both the Respondents. They argued to the effect that the Federal and State legislations on the same subject matter can co-exist and that as a result, the impugned provision is constitutionally valid. The learned Chief Justice has explained why this submission is untenable. I agree.

[37] The essential difficulty that I have with this line of argument is that the equal protection of the law under Article 8 of the FC, as pointed out quite rightly by learned counsel for the Petitioner, militates

against the co-existence of the impugned provision and sections 377 etc. of the Penal Code on the same subject matter.

[38] The reason is this. Take now the very factual matrix of the present case as an example. The Petitioner is a Muslim man. He was charged in Selangor Syariah High Court under section 52(1)(a) of the Enactment, which is punishable under section 28 read together with section 52(2) of the Enactment. Primarily, it was alleged that the Petitioner had on 9 November 2018, between 9 p.m. to 10.30 p.m. in a house in Bandar Baru Bangi, attempted to commit sexual intercourse against the order of nature with certain other male persons. In the charge sheet, the other male persons included three non-Muslims.

[39] If the Syariah Court were to decide that the Petitioner guilty as charged, the maximum sentence that can be imposed under the Syariah Court (Criminal Jurisdiction) Act 1965 is imprisonment not exceeding 3 years, a fine not exceeding RM5,000.00 or whipping not exceeding six strokes or any combination thereof.

[40] On the other hand, as the impugned provision is not applicable to the three non-Muslims and the Syariah Court has no jurisdiction over them, they can be prosecuted in the Civil Court and the provision of section 377 Penal Code is applicable to them which carries a

sentence of imprisonment for a term, which may extend to 20 years and also fine or whipping. The same sentence is provided for an offence under section 377A where it is committed voluntarily (see section 377B). Where there is no consent, the punishment of imprisonment shall be for a term of not less than 5 years and not more than 20 years and shall also be punishable with whipping (see section 377C).

[41] It is hard to deny that a non-Muslim would be discriminated against by virtue of a Muslim having the benefit of a lesser sentence for a substantially similar offence under the impugned provision. Clause (1) of Article 8 of the FC provides that all persons are equal before the law and entitled to the equal protection. Generally, Clause (2) of Article 8 provides that there shall be no discrimination against citizens on the ground only, among others, of religion. Once acquitted or convicted by the Syariah Court that Muslim person would have the protection against repeated trials under Clause (2) of Article 7 of the FC.

Conclusion

[42] In the result, based on all the reasons given, I conclude that the Petitioner has successfully displaced the presumption of the constitutional legitimacy of the impugned provision. I have no doubt

in my mind that the impugned provision is invalid as being *ultra vires* the FC; the State Legislature made the impugned provision with respect to a matter to which it has no power to make. Only Parliament could enact such a law. I therefore agree with the learned Chief Justice that we grant Prayer (1) of the Petition. And as explained by the learned Chief Justice as for Prayer 2, we make no order as to costs.

[43] The learned Chief Justice and the other members of the panel have read this judgment in draft and have expressed their agreement with it.

Dated this day, 25 February 2021.

(AZAHAR BIN MOHAMED)
Chief Judge of Malaya

For the Petitioner

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For Suruhanjaya Hak Asasi Manusia Malaysia (SUHAKAM)
(Watching Brief)

Andrew Khoo Chin Hock
Messrs. Andrew Khoo & Daniel Lo.