

First women syariah judges a major step forward

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COMMENT Dr Mohd Naim Mokhtar of the Malaysian Syariah Judiciary Department has put to rest speculation that the first two women syariah judges may be disqualified in certain areas, such as being judicial guardians in family matters.

NONE Indeed Rafidah Abdul Razak (right) and Surayah Ramlee (left) have been granted powers equal to their male counterparts.

It's a good start. Rafidah and Surayah were appointed in May and started work officially, in Kuala Lumpur and Putrajaya respectively, on Aug 2.

Both earlier faced the gauntlet of a 20-member panel of senior judges to decide if there was anything to disqualify them from being judicial guardians. It would be a gross dereliction of duty to disqualify the women from carrying out this role as they stand in office as deputy to the head of religion in Islamic legal theory.

This fact eliminates any medieval fiqh (ruling/interpretation) on males-only as marriage-guardians (wilayat al-nikah). But perhaps the purpose of the 20-member panel was more in ensuring that whatever quirks to their appointments within the syariah system are ironed out at the outset. It is a conservative and male-dominated profession.

The two appointments go towards the country's commitment of meeting quotas for women to public office. This is an obligation under the Women's Convention (Cedaw). It is also one of the easiest targets to fulfill; it is a question of numbers.

Islam and politics

These appointments would look good in Malaysia's next UN report. The overdue Cedaw report is rumoured to be scheduled for submission in 2011. The combined first and second reports were submitted in 2004 and considered by the UN in 2006.

The women judges are unwittingly placed under a microscope. This public scrutiny escapes their civil law system counterparts.

Close scrutiny is reserved to the Syariah Court system because of the nature of politics and Islam in the country. In addition, there is the struggle among political parties in portraying a "more acceptable Islam" in their manifesto for a plural Malaysia and united Malaysia under Islam.

While Islam is a matter in the state legislative list, the federal government's Islamisation programme has developed federal bodies and authorities who are responsible for efforts in streamlining the administration of the parallel syariah legal system. This includes the content of Islamic state enactments.

Federal and state powers

There were the two exceptions, the Kelantan and Terengganu hudud and qisas enactments. Both originated from PAS. These laws remain in the statute book and are not enforced. At present, syariah judges in the country have no power to enforce a penalty under hudud and qisas. The Islamic criminal enactments in all states are not of the hudud and qisas genre.

Given the centralised administration of Islamic law in federal bodies, state governments under Pakatan appear to have little say in the functioning and staffing (administration and not interference in judicial independence) of the state Syariah Courts including its prosecutorial sections.

NONEThe confusion of federal and state powers on Islam and Islamic law however continues at the level of public perception. I would say that because there is a perception of a certain political party as "Islamist", that party may unwittingly be aligned with for example, unpopular Syariah Court decisions like in the Kartika (left) case. I have been in conversations where this happens. It does not help that PAS Youth were among the groups attacking the voices who disagreed with the Kartika ruling.

Umno ploy

On Feb 9 this year, two women were lashed for the syariah offence of having sex out of wedlock. Curiously, the second incident did not merit the same vociferous NGO condemnation as the earlier Kartika case.

Was there syariah fatigue or was the wind taken out of their sails because the women accused for having sex out of wedlock had surrendered themselves to the authorities?

pakatan pc on spr ban pondok panas 280409 dzulkefly ahmadOr was there a backlash to the NGO campaign for using the Kartika case as a platform for its call for the total abolition of Islamic criminal law? Certainly it should provide the campaigners some cause for reflection in their assessment of appropriate strategies in the future.

Dr Dzulkefly Ahmad (right) was reported to have cautioned PAS members from being entrapped in an 'Umno ploy'. Umno certainly had a field day, with the deputy prime minister and the home minister issuing press statements supporting the sentences and its enforcement.

However there was a troubling absence of reporting on the women's partners-in-crime and whether there was an investigation by the syariah prosecutor's office as to the veracity of the women's confessions.

Unintended consequences

I would have thought that even if we accept the medieval jurisprudence that a confession is admissible only as against the confessor and not any third party, it would still be in the state's interest to ensure that 'crimes against the state' be properly investigated.

The implication of a public crime would require that all actors to that crime be brought before the court. We should wonder why the state should be preoccupied with a personal sin.

It would augur well for the country if the government after GE13 goes back to the drawing board on rendering personal sins as crimes in the syariah system. The Feb 9 case may have other implications or unintended consequences when young Muslim women are reported to have unprotected consensual sex and become pregnant.

We continue to witness these outbursts of 'public Islam' without any real appreciation whether the administration of law in the syariah legal system is actually moving in the direction that we think accords with democratic ideals of justice and Malaysia's human rights obligations at the international level.

Judging in women's favour

There is an assumption that our first two women syariah judges would render judgments in favour of women. The question of favouring women confuses judges in both the civil and syariah system. The general understanding is that an applicant or litigant will succeed if there are merits in her case. Would gender theory and analysis clarify the arguments of merit?

Gender equality goes beyond quotas for women. Gender mainstreaming is an essential component for gender justice in judicial decisions as well. This would require an exposure to a gender analysis of legal theory and practice as a discipline at the undergraduate level in law schools.

The government's 2005 report on the millennium development goals or MDGs states that "gender-sensitisation courses" were introduced "since 2002" in the training modules of the Judicial and Legal Training Institute (Ilkap). "Gender-sensitisation" appears the generic term in all the government's reports to the UN and in its development plans.

If indeed these trainings were carried out after its inclusion in the training modules, we need to assess its impact on judicial decisions. An inbuilt gender M&E (monitoring and evaluation) system should take care of that. It should be noted that superior court judges in the civil system are not subject to the Ilkap trainings.

We do not know if the equivalent judicial training institute (Ilim) for syariah judges have included that "gender-sensitisation" course. However, experience of training of syariah judges elsewhere have shown that practical courses like gender analysis of decisions interfacing civil and Islamic shared notions of gender justice is key towards better judgments.

In the meantime, we should be confident that the women syariah judges would do as well as their male colleagues. Any other expectation would operate unfairly over them as women, and as judges.

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