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Reflecting on the law Shad Saleem Faruqi

newsdesk@thestar.com.my

Constitutional view on Bin Abdullah case

Islam is like a mansion with many rooms, and diversity abounds in Islamic jurisprudence. *The Star - 3/8/2017 pg. 20*

COURT of Appeal judges Datuk Abdul Rahman Sebli, Datuk Tengku Maimun Tuan Mat and Puan Sri Zaleha Yusof must be congratulated for their courageous and principled decision in the "Bin Abdullah" case.

Their verdict is based on sound principles of administrative law and has far-reaching, positive implications for our constitutional system.

The issue, in this case, was whether an illegitimate Muslim child can carry the name of his father.

The child was conceived out of wedlock but the parents had married. The child was born a few days short of six months after marriage.

The relevant law on the point is the Births and Deaths Registration Act 1957, a federal law, which provides as follows:

> Under Section 13, the name of the person acknowledging himself to be the father of the illegitimate child is to be entered in the register as the child's father provided the mother agrees to it.

> Section 13A(1) provides that "where the person acknowledging himself to be the father of the child in accordance with Section 13 requests so, the surname may be the surname of that person".

> Section 13 explicitly bars any

other names or surnames except at the joint request of the mother and the person acknowledging himself to be the father.

> The surname "Abdullah" is not mentioned anywhere in the Act.

> The Act makes no distinction (as many laws like the Wills Act do) between a Muslim and a non-Muslim and nowhere does the Act say that it does not apply to Muslims.

According to the court, the statutory law was crystal clear that with the consent of the mother, the father acknowledging responsibility was entitled to have his illegitimate child carry his name.

The complication was that a 1981 and 2003 National Fatwa Council advisory opinion states that an illegitimate Muslim child cannot carry his father's name but must carry the surname "bin Abdullah".

Accordingly, the National Registration Department (NRD) felt that it has a higher obligation to apply the Fatwa Council's advisory opinion over and above the statutory law.

The court found this to be illegal. Despite the adverse court ruling the NRD is standing its ground and is publicly defying the court.

The unfortunate behaviour of the NRD raises a number of constitu-

tional law issues of critical importance to this nation.

Among them are: the relationship between Islamic law and enacted law, the federal-state division of powers especially on the issue of Islam, the subordination or superiority of our elected parliament to Syariah authorities, and the status of a fatwa as a source of law.

Islam as a source of law: Islam has indeed been given an exalted position as the religion of the Federation. Islamic law applies compulsorily to all Muslims but only in 24 areas specified in Schedule 9, List II, Para 1.

Syariah courts exist but have jurisdiction only over the 24 specified topics. In all other areas like contracts, torts, banking, insurance, commercial transactions and almost all crimes, civil law and not syariah regulates the life of the nation.

National registration is a federal, civil matter in List I, Para 3(e) and the court ruled rightly that rules of syariah are not applicable, unless the 1957 federal law specifically says so, which it does not.

Legitimacy, guardianship and inheritance, on the other hand, are clearly syariah matters and whatever name the child carries, the prin-

ciples of syariah will be applicable to these situations when the time comes.

Choice of one surname or another will not exclude the syariah as the National Fatwa Council and the NRD seem to fear.

Power over Islam: Each state has independent jurisdiction over the 24 assigned areas of Islam. The National Fatwa Council has no right to trespass on the powers of the State Sultan or to dictate Islamic laws to any state.

In this case, the family concerned is from Johor and because the national fatwa was not adopted by Johor and not duly gazetted, it has no applicability to the state.

Status of a fatwa: Fatwas by the various state religious authorities have the status of subsidiary legislation because they are authorised by an enabling, parent law. Being subsidiary legislation, fatwas cannot override primary legislation. In this case the NRD was allowing a federal fatwa to override Section 13A(2) of a federal law.

Belief in supremacy of syariah: It is an exaggeration to argue that all matters concerning Muslims are regulated by the syariah.

Only 24 areas are subject to Islamic law. Thus, if a Muslim mur-

ders another Muslim, even if the victim's family is agreeable in accordance with Islamic jurisprudence to receive blood-money in lieu of punishment, Islamic law cannot displace the Penal Code.

Islam and illegitimate children: Those who do not care about the constitutional perspective but only the Islamic perspective should be reminded that Islam is a mansion with many rooms. Diversity abounds in Islamic jurisprudence.

For example, Perlis allows illegitimate children to carry their fathers' name. The National Fatwa Council, on the other hand, takes a rigid stand against the child.

The Holy Quran in innumerable passages reminds us that no soul bears the burden of another and no one pays for another's sins: Surah 35:18, 17:13-15; 39:7. Muslims must, therefore, reflect whether Allah intends to punish in this life and in the hereafter the sons and daughters for misdeeds committed by their parents.

Emeritus Professor Datuk Dr Shad Saleem Faruqi is Tunku Abdul Rahman Professor of Law at Universiti Malaya. The views expressed here are entirely the writer's own.