# AN ANALYSIS & COMMENTARY OF THE FEDERAL COURT'S "BIN ABDULLAH" CASE: A CONCILIATORY APPROACH TO THE CONSTITUTIONAL DILEMMA IN THE LIGHT OF ASCRIBING AND REGISTERING PATERNITY OF ILLEGITIMATE CHILD

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## ABSTRACT

Prior to the Federal Court's decision, the Court of Appeal's judgment in the case of *A Child & Ors v Jabatan Pendaftaran Negara & Ors* [2017] 4 MLJ 440 that reversed the High Court's decision in *A Child & Ors v Jabatan Pendaftaran Negara & Ors* [2016] MLJU 1579 in unanimously allowing the illegitimate child to bear the name of his or her biological father and for the biological father's name to be registered in the birth certificate of the illegitimate child had witnessed nationwide controversies, debates and polemics in all stratum of society ranging from the local Islamic scholars and the Muslims in Malaysia in general. This controversial and endless critics against the Court of Appeal's decision was put to an end by the Federal Court in *Jabatan Pendaftaran Negara & Ors v A Child & Ors (Majlis Agama Islam Negeri Johor, intervener)* [2020] 2 MLJ 277, that reversed the said Court of Appeal's decision in the sense that it held that an illegitimate child could not bear the biological father's name. However, looking in an in-depth manner to the judgement, whether such judgment really put to an end of the issue of paternity and registration of an illegitimate child is a question that consequently triggers the writing of this paper. In pursuant thereof, this paper would dissect, analyse and comment the Federal Court's judgement comprehensively while drawing due reference to the principles and legal rulings in the Shari'ah. Having so doing, this paper would attempt to suggest and devise a harmonious legal landscape in the issue of ascription and registration of illegitimate child's paternity that would satisfy both civil and Shari'ah legal regime as applicable in Malaysia.

***Keywords:*** *Bin Abdullah, Syariah, Federal Constitution, Fatwa, Legitimacy of a Child, Ascription of Paternity, Registration of Illegitimate Child*

## 1.0 INTRODUCTION

Legitimacy of an illegitimate child and the registration of paternity of the said category of child have always been a controversial issue especially among the Muslim community that will always instigate legal and constitutional issues that will apparently 'conflict' both civil and *syariah* regime. In the light of this paper, the prevalent issue that will be put forward to the centre of the discussion is basically what has been arisen from a controversial case of "Bin Abdullah" which has been litigated

from the High Court, Court of Appeal and has ended up in the Federal Court. Generally, the case has sparked legal debates and issues when the Director General of National Registration Department has issued birth certificate where the child's full name was given "bin Abdullah" instead of being given the name of his biological father, and the applicants' application to delete such "bin Abdullah" and to substitute it with the actual father's name was apparently approved by the Court of Appeal in July 2017. Such decision was not in line with legal rulings as what has been concluded by the Majlis Fatwa Kebangsaan Malaysia on the naming of the Muslim's illegitimate child,[1] whereby it runs contrary to such fatwa which provides that a child conceived out of wedlock cannot be ascribed the name of his father, but must be ascribed "Bin Abdullah" or other names of Allah.[2] Consequently, it creates a polemic in the Muslim-dominant society in Malaysia.[3] Thus, in pursuant thereof, this paper would scrutinize the decision in the "Bin Abdullah" case up to the Federal Court, while further observing whether it is in consonance the legal and constitutional equilibrium in Malaysia.

## 1.1. PROBLEM STATEMENT & THE OBJECTIVE OF STUDY

It is observed that the presence of this case had created dilemma either legally or constitutionally for the court to choose whether to give precedence to the express words in the Births and Deaths Registration Act 1957 per se without throwing a glimpse to the Islamic law or to take into account the principles under the Islamic law as enshrined in the Fatwa and the State Enactment. This issue was even exacerbated by ambiguous and obscure framework dealing on this issue, i.e., regarding the ascription and registration of paternity of illegitimate child of Muslim parents. This has been proven by the presence of this case itself, which would not arise but for the lack of comprehensive legal framework on this issue, thus, opening doors for legal challenges. Premised on this mischief, it can be effectively outlined that the issues triggering the writing of this paper are, inter alia, as follows:

1. Whether, pursuant to this Federal Court's case, ascription and registration of paternity of the Muslim illegitimate children can be regarded as settled issue in law?
2. Whether the existing legal framework and statutory regime in Malaysia with regard to the ascription and registration of paternity in Malaysia is sufficiently clear for harmonious application of laws, regulation or policy regarding registration and ascription of paternity of a Muslim illegitimate child without federal-state law friction or conflict of jurisdictions?
3. Whether there is a need to revamp or revise such legal framework or statutory mechanism to be in line with the *Syariah*?

Thus, in pursuant thereof, it is the paramount objective of this paper to analyze the decision of the Federal Court on this issue in a more critical manner to determine the methodology and the approach of the court towards this issue, and to know whether the court's finding on this issue is reasonably sufficient in order to establish a strong legal framework on this issue. Reference and reliance to Islamic law principles would also be done in order to ensure that the discussion would be

[1] Kasa @ Muhyiddin, Mastura. "Penasaban Anak Tak Sah Taraf Menurut Perspektif Maqasid Syariah," (2009): 2
[2] Professor Dr Ashgar Ali Ali Mohamed, "Solving the 'Bin Abdullah' Dilemma: New Straits Times," NST Online (New Straits Times, August 10, 2017), https://www.nst.com.my/opinion/letters/2017/08/266075/solving-bin-abdullah-dilemma.
[3] Kasa @ Muhyiddin, Mastura. "Penasaban Anak Tak Sah Taraf Menurut Perspektif Maqasid Syariah," (2009):3

within the sphere of *Syariah* and would not goes beyond its boundaries. Furthermore, in the effort of reconstructing a crystal-clear framework and stance on this issue, this paper would attempt to construct a harmonious legal landscape where there could be harmonious co-existence of federal law governing registration of illegitimate child's paternity and the *Syariah* principles governing illegitimacy and the matters related thereto, without one jeopardizing each other.

## 1.2. RESEARCH METHODOLOGY

Qualitative research was used since this study requires people's understanding and experience which can be achieved by way of interviewing. Flexibility in qualitative research enables subjectivity of ideas to be taken into account. In executing this research methodology, library research of academic literatures, legal databases and online resources were heavily relied on. Such research method was a normative or literature research which is to research by accumulating and analyzing the existing materials elaborating on this point, and to make deduction thereon.

## 3.0 LITERATURE REVIEW

In the light of the increasing number of illegitimate children among the Muslims year by year, there are some studies that had examined the factors attributed to such increase. It is said that the reasons behind the spike in numbers of illegitimate child born in Muslim Malaysia community can be attributed to several factors: for example, family, religion, education, peer pressure, technology, sexual orientation, and promiscuity[4].

With regard to the registration of the child, it is a must for a child to be registered with the National Registration Department which is subject to Births and Deaths Registration 1957 ("BDRA 1957"). One of the articles had elaborated on the registration of illegitimate child according to JPN,[5] by citing Section 7 (1) of the said Act, it stated that any child born, either Muslim or not, has the right to be registered. As for registration of illegitimate child, it is explained that there is a specific provision to register an illegitimate child as discussed in one of the articles, and it is governed under Section 13 read together with 13A of the same Act. In one of the articles, it was stated that there is no specific definition of an illegitimate child but only identified as a 'child through Section 13 of the Births and Deaths Registration Act 1957'. The absence of a specific definition of an illegitimate child is due to the reason that jurisdiction of a person's legitimacy is under the jurisdiction of the Syariah Court.[6] In the naming of the said child, the illegitimate Muslim child will be associated only to its biological mother, and it is said that this may spark the stigma among the society.[7]

[4] Wan Ismail, Wan Abdul Fattah, Syahirah Abdul Shukor, Lukman Abdul Mutalib, Ahmad Syukran Baharuddin, Zulfaqar Mamat, and Nik Salida Suhaila Nik Salleh. " Factors and Solutions for Illegitimate Child Issue Among Muslims in Malaysia." INSLA E-Proceedings 3, no. 1 (2020):141

[5] Ibid, page 139

[6] Ibid, page 139

[7] Abu Bakar, Md Zawawi, Wan Ibrahim Wan Ahmad, and Mahyuddin Abu Bakar. "Registration Problems of Illegitimate Children among Muslims in Malaysia." Journal of Islamic Studies and Culture 5, no. 1 (2017):11

Every State in Malaysia reserved the right to enact law as stated through Article 74 (2) of the Federal Constitution. The State Legislative shall, within the jurisdiction, enact law on the matters enshrined in List II (State List) in the Ninth Schedule of the Federal Constitution. In this regard, there is a judicial precedent mandating the Muslims in Malaysia to be also bound by the Islamic law under the State. Through the case of ***Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib [1992] 2 MLJ 793***, the Supreme Court headed by Harun Hashim SCJ in this case contended that the makers of the Constitution clearly intended that Muslims of this country shall be governed by Islamic Family Law.

As far as the Islamic family law is concerned, generally the State law has set a minimum period of 6 *qamariah* month and a maximum of 4 *qamariah* years for the duration of pregnancy. There are also several authorities affirming that the child would be legitimate only if the child is born according to the prescribed period. Among such cases is the case of ***Wan Azmi v Nik Salwani [1990] 9 JH (2) 192***where court held that the child is indeed legitimate based on the proof that there was intercourse between the plaintiff and defendant during the marriage and the child was born more than 6 *qamariah* months. Apart from that there is also discussion on the methods in Islamic law to ascribe paternity to a child including expert evidence, paternity through drawing lots, paternity through acknowledgment or *al-iqrar*, and lastly, paternity through deoxyribonucleic acid or DNA test among others[8].

Generally, it can be observed that previous writings had only discussed on the issues of registration of Muslim illegitimate child, the application of Section 13 and 13A of Births and Deaths Registration Act 1957 on the Muslim illegitimate child, the different application of fatwa in the states, the ascription of 'bin Abdullah' onto the birth certificate according to each state's fatwa and the method to ascribe paternity of a child. It seemed the previous articles had explained the issues revolve around the illegitimate child in length, but most of the articles have yet to appreciate the fact that there were more issues that should be discussed together in order to complement the loopholes in the framework of illegitimate child.

This current article will discuss on some additional issues for the betterment of Muslim's community in order to cater the questions that riddle the society. Among the issues are critical commentary and analysis towards the Federal Court's "Bin Abdullah" case, constitutional dilemmas in registering Muslim illegitimate child; and the reconciliation with the Islamic principle to promote conciliatory and harmonization between framework of registration of illegitimate child. Furthermore, this article will be also focusing on tilting the balance between the right of the child to identity and the wisdom behind ascription of paternity of a Muslim illegitimate child. Finally, as to complement the loopholes of the previous article, this current article will suggest a harmonious ecosystem of law and *syariah* on the context of ascription of paternity of illegitimate child.

## 4.0 BACKGROUND OF THE CASE

This case stems from a judicial review application initially filed by the father ('second respondent' at the Federal Court), MEMK, and the mother ('third respondent' at the Federal Court),

[8] Mohd, Azizah. "Legitimacy of a child through acknowledgement (Al-Iqrar) under Islamic Law: the extent to which acknowledgement establishes paternity of an illegitimate child." (2009): 4

NAW, of a child ('first respondent' at the Federal Court) who seek to quash the decision of the Respondents, the National Registration Department ('first appellant' at the Federal Court or 'NRD') the Director General of National Registration Department ('second appellant' at the Federal Court or 'DGNR') and the Government of Malaysia ('third appellant' at the Federal Court) in 2012. The parents were married on 24th October 2009 (marriage date) whereas the child was born less than 6 *qamariah* months as prescribed under the Muslim law. Upon the registration at the National Registration Department (NRD), the child's birth certificate was issued on 06.03.2012, which registered the child's name as A Child bin Abdullah instead the child's father's name while the father's name is MEMK. To recapitulate the facts of the case, it will be as follows:

| Date | Events |
|---|---|
| **24.09.2009** | The second and third respondents were married on this date and day. |
| **17.04.2010** | The first respondent was born. |
| **16.06.2010** | i. The second and third respondents applied and registered for the birth of the first respondents, being 2 months late after the child was born. The registration was done according to Section 12 and 13 of Births and Deaths Registration Act 1957.<br>ii. The first appellant was only informed of the child when the parents submitted information concerning birth to the Registrar in the form for the Registration of the child's birth. |
| **09.01.2012** | The late registration application was later supplicated by a statutory declaration. |
| **06.03.2012** | i. The second appellant issued the child's birth certificate and in compliance with Section 13 entered the name of MEMK in the column on particulars of the father.<br>ii. However, the child's full name was given 'the child BIN ABDULLAH' instead 'the child BIN MEMK'.<br>iii. The child's birth certificate also contained a notation of "Permohonan Seksyen 13" which was an explicit acknowledgement that the application for the registration of birth is for an illegitimate child. |
| **02.02.2015** | About three years later, MEMK applied under Section 27 (3) of the Births and Deaths Registration Act 1957 to correct and change the child's name from 'bin Abdullah' to 'bin MEMK' (the second respondent's name) |
| **08.05.2015** | The application on 02.02.2015 was rejected by the second appellant on the basis that the child being an illegitimate Muslim child cannot be ascribed to the name of his biological father's name, MEMK. It is explained that the child's name shall be named to bin Abdullah in line with the fatwa issued on this subject matter. |

## 5.0 PROCEDURAL HISTORY AND JUDGMENT OF THE FEDERAL COURT

As far as this case is concerned, the respondents (who are the applicants at the High Court) had initially filed a judicial review application at the High Court to quash the decision of the appellants

(who are the respondents at the High Court) in refusing to correct the information while affirming the child's name, A child bin Abdullah. The issues that were raised in this court were, inter alia, whether the first appellant's refusal to alter the child's birth certificate to replace the word 'Abdullah' with 'MEMK' was in accordance with the law. It was held that the the first appellant's decision refusing to replace the word 'Abdullah' with the father's name was in compliance with the law and is not tainted with illegality, irrationality or procedural impropriety. Furthermore, Muslim citizen are subjected to both general laws enacted by the parliament and state laws (including Islamic law) enacted by the state legislature simultaneously.[9] Therefore, the second appellant was correct to rely on the Islamic law on legitimacy in rejecting the application to amend the child's full name as 'bin MEMK'. The respondents' application was therefore dismissed by the High Court.[10]

On appeal by the respondents (the applicants), the Court of Appeal had reversed the decision of the High Court and allowed the appeal.[11] The Court of Appeal held that the language of Section 13A (2), is to be read together with Section 27(3) of the Act, which enable the illegitimate child to bear either the mother's name or the father's name. Thus, the appellants were wrong in dismissing the application of the respondents. The Court of Appeal also opined that the nature of Births and Deaths Registration Act 1957 made no distinction between a Muslim and Non-Muslim child. The Court of Appeal further emphasized that the statutory duty of the second appellant as the Director General of National Registration Department is to merely register the births and deaths.

Moving on to the judgement given by the Federal Court,[12] where the majority allowed partly the appeal by the appellants (NRD, DGNR and the government), by which it was held that the child should not be ascribed to the father's name and that the appellants' refusal was justified. At the same time, the child was ordered to be given or ascribed only his name without the name of the father, with his name reading simply 'Child' and not 'Child bin Abdullah'. Thus, the insertion of 'bin Abdullah' is to be removed. In the grounds of judgment, the majority is of the opinion Section 13A is not mandatory to be applied in all cases and only relevant to a person who carries a surname, hence the word 'if any' written in the provision. It only discriminates people with surname or without and not between Muslim and non-Muslim. Furthermore, in so far as the respondents are all Muslims who shall be the subjects of the Islamic Family Law in line with the List II Ninth Schedule of Federal Constitution,[13] hence, the second appellant had acted reasonably in referring to Islamic law in performing the registration of birth of an illegitimate Muslim child. The rejection made by the second appellant to replace 'bin Abdullah' with 'bin MEMK' was in compliance with the law and it is not tainted with illegality, irrationality or even procedural impropriety such as to warrant interference by the courts. On the point of fatwa, it was found that since the Fatwa Committee had not adopted the fatwa of the National Fatwa Committee and no fatwa on how to name an illegitimate child was

[9] See ZI Publications Sdn Bhd & Anor v Kerajaan Negeri Selangor (Kerajaan Malaysia & Anor, intervener) [2016] 1 MLJ 153

[10] See High Court's decision in A Child & Ors v Jabatan Pendaftaran Negara & Ors [2016] MLJU 1579

[11] See Court of Appeal's decision in A Child & Ors v Jabatan Pendaftaran Negara & Ors [2017] 4 MLJ 440

[12] See the Federal Court's decision in Jabatan Pendaftaran Negara & Ors v A Child & Ors (Majlis Agama Islam Negeri Johor, intervener) [2020] 2 MLJ 277 ("Bin Abdullah" case)

[13] Habibullah bin Mahmood v Faridah bte Dato' Talib [1992] 2 MLJ 297

gazetted in Johor, the second appellant could not necessarily impose the fatwa of the National Fatwa Committee on the Appellants.

## 6.0 CASE COMMENTARY & CRITICAL ANALYSIS OF THE FEDERAL COURT'S CASE

This commentary aims to "read between the lines" of the judgment and to suggest improvement and further enhancement needed so as to provide clarity to the grey areas which may raise questions and issues. Generally, this paper would apparently agree with the majority judgment at the Federal Court whereby, in gist, the Federal Court, in majority, had decided that that the illegitimate child of a Muslim could not be bear his father's name by disallowing the National Registration Department to register the surname of the father into the child's name.[14] Generally, this paper would agree with the decision by the majority on basis that it is nearer *(aqrab)* to the spirit and established principles of *Syariah*. It is also more of a reconciliation between two sets of laws, i.e. the civil law and the *Syariah*. However, there are certain grey areas that may be relevant to be observed. Therefore, the commentary under this part would be done by duly compartmentalizing the aspects of commentary as follows:

### 6.1. FIRST ASPECT: JUDICIAL INTERPRETATION OF SECTION 13 AND SECTION 13A OF THE BIRTHS AND DEATH REGISTRATION ACT 1957 (BDRA 1957) & ITS APPLICATION TOWARDS ILLEGITIMATE CHILD OF MUSLIM PARENTS

The most prominent ground relied on the majority decision is that the Section 13A(2) of the BDRA 1957, which allows the entering of the surname of the illegitimate child's father, if any, to the name of the illegitimate child if a person who acknowledges to be a father in accordance with Section 13 of the BDRA 1957 so requests, would not be applicable and extended to the parties (who are of Malay race) on the principal reason that the provision would not be applicable between people who have surnames and that Malay would not carries surname.

As far as "surname" is concerned, it is observed that the court pointed out in the judgment that such term is not defined in BDRA 1957. Therefore, the court would observe external sources in the understanding of the plain and ordinary meaning of the word,[15] by which in this case, the court had extracted the definition from several established English Dictionaries.[16] The majority then concluded that Section 13A is clear in its language and does not call for any other rule of statutory interpretation, purposive or golden rule. However, there are no authorities cited to support the

[14]Ida Lim, "'Bin Abdullah' Case: What the Federal Court's Minority Rulings Said: Malay Mail," Malaysia | Malay Mail (Malay Mail, February 19, 2020), https://www.malaymail.com/news/malaysia/2020/02/19/bin-abdullah-case-what-the-federal-courts-minority-rulings-said/1838721.

[15]Reference to dictionaries is justified in law in the event where there is an absence of statutory definition and the term is not clear. This is enlightened in the case of Fothergill v Monarch Airlines Ltd [1980] 2 All ER 696; James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd [1977] 3 All ER 1048 at 1053 Per Lord Wilberforce.

[16]Such definitions from the dictionaries collectively differentiate between a personal name and a surname, by which the latter refers to a family, hereditary and inherited name, distinct from a personal name (in this case, the court concluded that the name of father of the illegitimate child, MEMK is a personal name and not a surname covered under the provision).

majority on this proposition. Thus, it is commented that in this regard, the majority should have cited several authorities to strengthen the point that detailed purposive interpretation is not needed to counter the approach adopted by the dissenting judgment that the term "surname" renders a purposive interpretation. For this purpose, it is relevant to cited the case of *United Malayan Banking Corp Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352b* (High Court) at 355, per Egar Joseph Jr J, that quoted the Federal Court in *Chin Choy & Ors v Collector of Stamp Duties [1979] 1 MLJ 69* in explaining the importance of giving effect the plain and ordinary meaning of the term:

> *"... that the meaning and intentions of a statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the court as to what is just and expedient ...*
>
> *However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. When once the meaning is plain, it is not the province of a court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words."*.[17]

**Even if the court is obliged to discover the intention of the legislature, the court may have clarified such purposive approach would subject to social consideration** as stated by Lord Denning in ***Seaford Court Estates Ltd v Asher [1949] 2 KB 481*** at 499 that:

> *"... it would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears, a judge cannot simply fold his hands and blame the draftsman. He must set out to work on the constructive task of finding the intention of Parliament and he must do this not only from the language of the statute, but also from a consideration of the social conditions which give rise to it and of the mischief which it was passed to remedy and then he must supplement the written word so as to give 'force and life' to the intention of the legislature".*

Subjectively, it is arguable that the mischief intended to be addressed by Section 13A (as quoted by the dissenting judgements themselves in paragraph [135] while referring to the Dewan Rakyat Hansard on 1st April 1975 during the second and third readings of what later became the Births and Deaths Registration (Amendment) Act 1975 (Act 296)) is primarily due to administration problems with regard to registration of illegitimate child, and the amendment would be to ensure and to facilitate the registration of details of illegitimate child. Thus, plainly, it is commented that the purpose is merely to provide administrative measures in ensuring registration of details of illegitimate child, and certainly not to infringe the fundamental principles of legitimacy of a Muslim illegitimate child,[18] especially when the local society is predominantly a Malay-Muslim community like in Malaysia. This could be achieved even if the father's surname, if any, is not entered in respect of illegitimate child since, as explained by the majority at paragraph [13], the father's name was already entered and

[17]See also the Federal Court in Andrew Lee Siew Ling v United Overseas Bank (M) Sdn Bhd [2013] 1 MLJ 449 which affirmed that purposive approach can only arise when the meaning of a statutory provision is not plain and is ambiguous. If therefore, the language of a provision is plain and unambiguous s 17A of the Interpretation Acts 1948 and 1967 will have no application as the question of another meaning will not arise.

[18]See paragraph [136] of the case, Jabatan Pendaftaran Negara & Ors v A Child & Ors (Majlis Agama Islam Negeri Johor, intervener) [2020] 2 MLJ 277 ("Bin Abdullah" case) as per David Wong CJ (dissenting) which quoted a distinct query by one member of the Senate to the relevant Deputy Minister on 18 April 1975 during second and third reading of the same Bill in the Dewan Negara who raised concerns of the provision affecting the Muslim's illegitimacy.

recorded in the birth register as the father of the child except that it was not put in the child's full name as the child's full name was given "bin Abdullah".

The next point to be the subject of current commentary is on the point of calling experts for the purpose of establishing the meaning of the surname and to determine whether surname is applicable in its plain and ordinary meaning towards Malay society. The dissenting judgment at paragraph [242] stated that expert evidence explaining certain races in Malaysia do not have surnames could not be accepted since it is a well-accepted principle of law that "the opinion of experts is confined to the facts of a case, and they cannot purport to draw legal inferences or provide their subjective view of a particular matter". **However, it is commented that, with due respect, the dissenting judgment had overlooked the court's ability to call for expert evidence to confirm the meaning of a term in the absence of any clear interpretation provided in the legislation.** The dissenting had thereafter adopted a very narrow approach in the sense that it only confines the calling of expert evidence towards the "facts of the case". It should be understood that, evidence may be admissible so long that it is relevant either legally or logically relevant,[19] and facts does not always mean physical facts, but it may also include psychological facts (such as the reputation of a person).[20] In the context of referring to expert opinion to establish the meaning and scope of a term, such act is validly justified in law as shown in the English case of ***Fothergill v Monarch Airlines Ltd [1980] 2 All ER 696 at 701*** Per Lord Wilberforce, that held that:

> *"In the present case the word 'avarie' would not I think convey a clear meaning to an English mind without assistance. The courts (both Kerr J [1977] 3 All ER 616 , [1978] QB 108 ) and the Court of Appeal [1979] 3 All ER 445 , [1980] QB 23 therefore looked at dictionaries and at certain textbooks and articles and in my opinion this process cannot be criticised. Neither could they have been criticised if they had allowed expert evidence to be called, for 'avarie' is, or may be, a term of art".*[21]

Notwithstanding the majority's interpretation that the application of Section 13A would not be extended to those who did not carry surname, such as Malay in this case, **it is commented that it is highly pertinent for the court to clarify the position of non-Malay carrying surname but is a Muslim – such as Chinese Muslim.** At this point, the established opinion in *Syariah* is clear for all Muslim regardless of race that an illegitimate child of a Muslim would not be ascribed to his biological father. In comparing this position with Section13A, it raises questions whether Section 13A would allow surname of the father to be entered in the case of non-Malay who is a Muslim whom name carries surname. Though the answer may be inferred by the statement from the majority saying that this provision only discriminates people with surname and not (paragraph 26), **it is still recommended for the court to answer to the issue in a clear term by way of obiter dicta (even the answer would be in affirmative), so as to provide guidance for the future, and to avoid unnecessary confusions.** The author opined that there is a legitimate point as voiced out by the dissenting judgment, as per Nallini Pathmanathan FCJ, at paragraph [241] pointing out that the concern of Muslims without typical surnames, certain Indian or Sri Lankan ethnic groups, natives of

[19]Director of Public Prosecutions v Kilbourne [1973] AC 729 at 756, Lord Simon of Glaisdale
[20]Crystal Realty Marketing Sdn Bhd v Hicom United Leasing Sdn Bhd [2008] 1 MLJ 142
[21]See also James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd [1977] 3 All ER 1048 at 1053

Sabah and Sarawak and many others and the application of s 13A of the BDRA 1957. Thus, certainty on this point is highly needed.

In so far as the discrimination of the application of the provision towards people carrying surname and not is concerned, it could be observed that the majority judgment at paragraph [26] merely stated that the provision of Section 13A does not discriminate between Muslim or non-Muslim, but it only discriminates between people with surname with one who has none, with no further elaboration. In this regard, **it is also commented that there is a need for the court to justify the said discrimination by explaining principles relating to "lawful discrimination" in reconciling with the prohibition of discrimination as envisaged under Article 8(1) of the Federal Constitution.** This is what have been done in the Federal Court's case of ***CTEB & Anor v Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2021] 4 MLJ 236*** (wherein some presiding judge in that case is similar in the current case including Rohana Yusuf PCA and Nallini Pathmanathan FCJ) where it is explained on lawful discrimination that *can forms in two ways as follows:*

> *"[81] Discrimination is not always unlawful. There are two ways in which the FC allows it. The first, as made plain by art 8(2), is where discrimination is expressly authorised by the FC itself. Article 8(5) is the constitutional exception to cll (1) and (2) of art 8, Clause 5 of art 8 reads:*
>
> > *(5) This Article does not invalidate or prohibit —*
> >
> > *(a) any provision regulating personal law;*
> >
> > *(b) any provisions or practice restricting office or employment connected with the affairs of any religion or of an institution managed by a group professing any religion, to persons professing that religion;*
> >
> > *(c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;*
> >
> > *(d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;*
> >
> > *(e) any provision of a Constitution of a State, being or corresponding to a provision in force immediately before Merdeka Day;*
> >
> > *(f) any provision restricting enlistment in the Malay Regiment to Malays.*
>
> …
>
> *[83] The second type of discrimination which art 8(1) allows, based on decided and settled cases is the concept of reasonable classification (see Public Prosecutor v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116 at p 117 and generally Mohamed Sidin v Public Prosecutor [1967] 1 MLJ 106). Discrimination is unlawful and in violation of art 8(1) if it is not founded on an intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question".*

In so far as second classification is concerned, the Federal Court in the case of ***Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal [2016] 2 SHLR 47*** had explained the doctrine of reasonable classification as follows:

> *"[129] With courts recognising the improbability of absolute equality, principles have been laid down by judicial doctrines of reasonable classification when interpreting art 8. Under the doctrine of reasonable classification people in like circumstances will be treated alike, with discrimination in certain instances existing between classes though not within a particular class. The necessity of legislative discrimination is due to the 'complex problems arising out of an infinite variety of human relations' (see Public Prosecutor v Su Liang Yu [1976] 2 MLJ 128). Without the need to dwell too deeply on case laws, suffice if I state that it is now well established that a law that discriminates may be validated if it is based on reasonable classification (Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, intervener) [2004] 2 MLJ 257; Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72). This point was ventilated by both parties as briefly mentioned at paras 23, 24, 36, 37 and 38".* [22]

Thus, in relation to this case, in so far as there was an absence of further elaboration on this point despite it being a fundamental importance in explaining the potential discrimination of a statutory provision under the federal law towards those who carries surname or not, it is suggested that **the court should have elaborated and explained such principle first, and to locate whether this case would fall under the first limb (exception provided in Article 8(5)) or the second limb of lawful discrimination (doctrine of reasonable classification), so as to legally justify the ability for the law to discriminate between classes for those with surname and those who without**. It is arguable that this case may, subject to the fulfilment of legal test and condition of the said doctrine, [23] fall within the category of the second limb, i.e., the discrimination was lawful since differentiating those who with surname and those who without is reasonable for the purpose of Section 13A BDRA 1957 arguing that differentiating there is a nexus between such classification with the purpose of BDRA 1957, in particular section 13A that is to merely ensure the smoothness of registration of illegitimate child and not to transgress the illegitimacy principles in *Syariah* as stated above.

[22]See also Public Prosecutor v Khong Teng Khen & Anor [1976] 2 MLJ 166, Abdul Ghani bin Ali Ahmad & Ors v Public Prosecutor [2001] 3 MLJ 561; [2001] 3 CLJ 769, Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Interverner) [2004] 2 MLJ 257, Badan Peguam Malaysia v Kerajaan Malaysia [2008] 2 MLJ 285; [2008] 1 CLJ 521, Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301; [2009] 5 CLJ 631 and Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333; [2010] 3 CLJ 507; Lembaga Minyak Sawit Malaysia v Arunamari Plantation Sdn Bhd & Ors and Another Appeal [2015] 4 MLJ 701; [2015] 5 MLRA 1 and Datuk Haji Harun bin Haji Idris v Public Prosecutor [1977] 2 MLJ 155

[23]As for the test and condition for the doctrine of 'reasonable classification', it is relevant to observe the case of Datuk Haji Harun bin Haji Idris v Public Prosecutor [1977] 2 MLJ 155 where His Lordship Suffian LP in referring to the Indian Supreme Court case of Shri Ram Krishna Dalmia v Shri Justice SR Tendolkar & Ors AIR 1958 SC 538, held that a law that discriminates is good law if it is based on reasonable or permissible classification. Two conditions must be satisfied, that is:

(a) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(b)the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

Furthermore, the majority only pointed out the presence of the phrase "if any" at paragraph [26] to justify the status of the provision being not mandatory to be applied in all cases, while no further explanation was given on the importance the presence of the phrase in the provision itself. Thus, **it is also commented at this juncture that there must be also an emphasis on the phrase "if any" as envisaged in Section 13A(2)** which provides that:

> *"The surname, if any, to be entered in respect of an illegitimate child may where the mother is the informant and volunteers the information, be the surname of the mother; provided 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."*

Moreover, the dissenting judgment had also not attempted to clarify the meaning behind the presence of "if any" in the said provision on the basis that a surname proper or a patronymic surname, directly constitutes a part of the child's name or full name.[24] It is relevant here for the authors to point out the case of ***Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samy Kano [1997] 1 MLJ 94*** where Gopal Sri Ram JCA in speaking for the Federal Court said at 100–101:

> *"The function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. Prima facie, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant."*

From this excerpt of judgment, it is known that every word present in a statutory provision might bring significant connotation. Thus, the dissenting judgment may not be simply held that the provision is a mandatory provision which is applicable for all without explaining why there is the presence of the word "if any" in the statutory provision, which ordinarily connotes non-compulsory, or a conditional statement.[25] The majority should have explained the significance of such word in detail, while referring to the principle as abovementioned.

Furthermore, it is paramount important for **the court to also highlight that there was also an absence of the statutory definition of the word "illegitimate child"**, in addition to their highlight on the absence of the statutory definition of the word "surname". Under the BDRA 1957, there is no specific definition on "illegitimate child" except that the child is recognized as a child that is subject to Section 13 BDRA 1957 (Act 299).[26] In this case, the court had not highlighted such absence of statutory definition, presumably because the fact regarding illegitimacy of the child is undisputed and uncontested. However**, it is commented that the court should highlight such absence in the course of interpreting the application of the Act**. In the event of absence of

[24] See paragraph 259 of the Federal Court judgement.

[25] Marcel Iseli, "How to Use the Phrase 'If Any,'" Linguablog, September 25, 2020, https://linguaholic.com/linguablog/how-to-use-the-phrase-if-any/.

[26] Mardi, S. M. (2019). Temu Bual Jabatan Pendaftaran Negara. 1 Julai as cited in Wan Ismail, Wan Abdul Fattah, Syahirah Abdul Shukor, Lukman Abdul Mutalib, Ahmad Syukran Baharuddin, Zulfaqar Mamat, and Nik Salida Suhaila Nik Salleh. " Factors and Solutions for Illegitimate Child Issue Among Muslims in Malaysia." INSLA E-Proceedings 3, no. 1 (2020): 139

statutory definition, the court may proceed to try and extract the true meaning of the expression.[27] Such phrase must then be given its natural and ordinary meaning.[28] In the pursuit thereof, the court may refer to other judicial pronouncements,[29] or may import definition from other relevant statutes,[30] in so far as it is relevant and reasonable in the light of the current statute, and in so far that it is not repugnant or inconsistent with such construction.[31] In the context of the illegitimate child of Muslim parents (for which the term "illegitimate" child itself is absence in BDRA 1957), the legal framework in Malaysia renders the definition of Muslim illegitimate child to be primarily based on the interpretation or the definition as prescribed under the Islamic Family Law Enactments in each state in Malaysia,[32] which has been upheld by the Syariah courts.

It is important to be understood that the state enactments are constitutionally empowered and justified in defining the term "illegitimate" since matters regarding the legitimacy of a Muslim person falls within the competency of State Legislature is authorised by the Federal Constitution to enact state law as enshrined in item 1 of List II (State List) in the Ninth Schedule of the Federal Constitution, and certainly not within the legislative competency of the Parliament based on item 4(e)(ii) of List I (Federal List) in the Ninth Schedule of the Federal Constitution which expressly excludes Federal Legislative competence for Islamic personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gift or succession, testate and intestate.[33] Thus, the court may infer from the absence of statutory definition in this context to determine the wisdom behind such absence that is primarily because the National Registration Department, a federal agency administering the federal law, i.e., BDRA 1957, only have the jurisdiction to register the birth of a child, while the jurisdiction to determine whether a child is legitimate or not falls within the jurisdiction of the Syariah court. [34]

In so far as the definition under the Islamic family law enactments is concerned, for instance, section 2 of the Islamic Law Family Enactment (Selangor) 2003 defines "illegitimate" as a child means born out of wedlock but not as a result of *syubhah* intercourse, and it was upheld by the Syariah High Court (Shah Alam) in the case of ***Mohamad Ariff bin Ali v Siti Nor Aslinah Lim Li Ming [2017] 4 SHLR 75***. Such definition is also in line with the fuqaha' opinions as stipulated in most past and

[27]All Malayan Estates Staff Union v Rajasegaran & Ors [2006] 6 MLJ 97 (Federal Court); Kerajaan Malaysia v Yong Siew Choon [2006] 1 MLJ 1

[28]Re Dow Jones Publishing (Asia) Inc' S Application [1988] 2 MLJ 414 (Original Civil Jurisdiction)

[29]Public Prosecutor v Sukumaran A/L Sudram [1999] 4 MLJ 462 (High Court)

[30]Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara and another appeal [2020] 4 MLJ 93 (Court of Appeal) (where the word "dealing" was imported from National Land Code to Strata Titles Act 1985); Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd [2008] 4 MLJ 641; [2008] 5 CLJ 321 (where the Federal Court imported the definition of 'public officer' in the Interpretation Acts into the Specific Relief Act 1950)

[31]Kesultanan Pahang V Sathask Realty Sdn Bhd [1998] 2 MLJ 513 (Federal Court).

[32]Ismail, Mohd Hazwan, and Jasni Sulong. "Maintenance Position For Illegal Children From Biological Fathers: A Study In Penang." Journal of Fiqhiyyat 1, no. 1 (2021): 4

[33]Para 52 Jabatan Pendaftaran Negara & Ors v A Child & Ors (Majlis Agama Islam Negeri Johor, intervener), Per Rohana Yusuf JCA

[34]Mardi, S. M. (2019). Temu Bual Jabatan Pendaftaran Negara. 1 Julai as cited in Wan Ismail, Wan Abdul Fattah, Syahirah Abdul Shukor, Lukman Abdul Mutalib, Ahmad Syukran Baharuddin, Zulfaqar Mamat, and Nik Salida Suhaila Nik Salleh. " Factors and Solutions for Illegitimate Child Issue Among Muslims in Malaysia." INSLA E-Proceedings 3, no. 1 (2020): 139

contemporary Islamic legal texts, such as Dr. Wahbah al-Zuhailiy, Syeikh Muḥammad bin Soleḥ al-Uthaimin, Dr Muhammad Muṣtafa Shalabiy and Dr Ramadan 'Ali al-Sayyid al-Sharanbassii.[35] The definition of the "illegitimate child" under the State enactment seems to be extended to include child born within 6 *qamariah* months from the date of the marriage of two parties,[36] as clarified by Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan Bagi Hal Ehwal Ugama Islam Malaysia Kali Ke-57 on 10th June 2003, which was further adopted in the State's gazetted fatwa such as the Selangor's fatwa as gazetted on 28th January 2005 as issued by the Selangor Fatwa Committee.[37] At this point, it should be clarified that, fundamentally, defining a term is important in construing the context and application of a statutory provision.[38]

In this regard, **should the definition of illegitimate child be premised based on the definition as laid down in the State enactments reflecting the position in *Syariah*, it is commented that it would subsequently entail and attract consequential legal rulings or hukm relating to the those falling in the scope of the definition.** As an illustration, in so far as the context of illegitimate child is based on the State enactment and state fatwa stating that the child is a child born out of wedlock which includes child born less than 6 *qamariah* months after the date of marriage (as what exactly happened in the current case that is the subject of this paper), it would further attract related legal rulings on that point including the prohibition of ascription of paternity to the child born less than 6 *qamariah* months, pursuant to the State Enactments as has been strengthen by the State gazetted fatwa (such as Section 111 of the Islamic Family Law Enactment (State of Penang) 2004, which further justified by the State's fatwa as gazetted on 27th October 2005 expressly prohibiting illegitimate child to be ascribed his/her paternity to the father that cause his/her birth[39]). Thus, by having definition set up in clarity in the outset, it would somehow facilitate the court in course of interpreting the overall spirit of section 13A towards Muslim, to be in line with the defined scope of the illegitimate child and its consequential legal rulings. Thus, it would assist the court to not make any decision which is in contrary with the defined term and its consequential legal rulings attached thereto.

### 6.2. Second Aspect: Clarifying Jurisdictional & Conflict of Law Issues on Both Legitimacy and Ascription of Paternity of Illegitimate Child Through Registration

The next part of the commentary is regarding the jurisdictional issues whereby it is commented that the Federal Court should provide with utmost clarity for matters relating legitimacy and registration of illegitimate child. In this regard, dissenting judgment seems to propose that the concept of legitimacy and ascription of paternity are two different and separate concepts to each other.[40]

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[35]Wan Ismail, Wan Abdul Fattah, Syahirah Abdul Shukor, Lukman Abdul Mutalib, Ahmad Syukran Baharuddin, Zulfaqar Mamat, and Nik Salida Suhaila Nik Salleh. " Factors and Solutions for Illegitimate Child Issue Among Muslims in Malaysia." INSLA E-Proceedings 3, no. 1 (2020):137

[36] Suriany Awaludin, "Nikah Anak Tak Sah Taraf," Harian Metro (New Straits Times, August 23, 2018), https://www.hmetro.com.my/addin/2018/08/370649/nikah-anak-tak-sah-taraf. ; See paragraph [13] of Mohamad Ariff bin Ali v Siti Nor Aslinah Lim Li Ming [2017] 4 SHLR 75 (Shariah High Court, Shah Alam)

[37]Warta Kerajaan Negeri Selangor – Jilid 58 P.U,7 28hb April 2005

[38] Tey Por Yee & Anor v Protasco Bhd and other appeals [2021] 1 MLJ 76 (definition of "document" and "Banker's Book" in facilitating the determination of the scope of Bankers' Books (Evidence) Act 1949 ('BBEA'))

[39] Warta Kerjaan Negeri Penang – Jilid 49 P.U, 19 27hb Oktober 2009

[40] See paragraph 181 of the Federal Court's "Bin Abdullah" case

**However, the authors submitted that, with due respect, this proposal may not be feasible in the context of Malay Muslim community applying *Syariah* in their family and personal matters, where legitimacy and ascription of paternity (that may be obtained through registration) is a highly inextricably-linked concept**. However, it is commented that this may not be reasonable in so far as illegitimate child of Muslim parents is concerned where both concepts are highly intertwined with each other in other to preserve the lineage of the child, which is one of the utmost goals of *Syariah*, i.e., *Hifz Nasal*.

Even the division of the legislative powers between the federation and the states under the Federal Constitution looks neat, perhaps on theoretical basis. It is said that perhaps the constitution drafters did not contemplate that there would be conflicts even of laws, which may lead to religious and racial friction.[41] One of such areas would be the area regarding legitimacy and ascription of paternity of an illegitimate child, for which the power to validate the legitimacy of a child fell within the Syariah Court's jurisdiction at the State level, while the registration and formal ascription of paternity lies within the jurisdiction of the National Registration Department or Jabatan Pendaftaran Negara, being a federal body at the federal level that has the authority of registering births and deaths under the BDRA 1957. [42] On the presence of this controversial area**, it is suggested in this commentary that it is incumbent upon the court to tolerate both set of laws so as not to bias towards one set of laws (e.g. federal law) in priority over the other counterpart (e.g. state law) to the prejudice of the latter.**

In so far as the concept of legitimacy and paternity, being two different subjects but are inseparable, it is commented that the **Federal Court must clarify jurisdictional matter regarding legitimacy and registration or ascription of paternity by clarifying that such matter is inextricably-linked and inseparable (despite it falls between different jurisdiction) so that it would not cause any confusion with regard to registration of illegitimate child of Muslim parents.** In other words, **it is commented that the Federal Court should recognize that this area may entail conflicts of laws by which intervention of the court is necessary to tolerate and address the need of both laws**. In the majority judgment of this case, despite the majority only explained that legitimacy of a Muslim person falls within the jurisdiction of the State,[43] and that the Director-General of National Registration (DGNR) acted reasonably in referring to Islamic law in refusing to ascribe the father's name to the child,[44] there was no judicial recognition been made that the separation between legitimacy and ascription of paternity in the context of Muslim is not viable since both concepts are practically intertwined with each other where in *Syariah*, if the child is considered as an illegitimate child, the consequence would be that the child could not be ascribed its paternity to the biological father.[45] Otherwise, if the attempt to ascribe paternity by registering and

[41] Abd Al-Razzaq Al-Sanhuri Lecture Islamic Legal Studies Programme Harvard Law School 6 November 2008 Harmonisation of Common Law and Shariah in Malaysia: Practical Approach [2009] A 2 Mlj Ix page 8

[42] Wan Abdul Wan Ismail et al., "A Comparative Study of the Illegitimate Child Term from Shariah and Malaysia Legal Perspective," Humanities & Social Sciences Reviews 8, no. 4 (October 2020): 106, https://doi.org/10.18510/hssr.2020.8412.

[43] See paragraph 52 of the Federal Court's "Bin Abdullah" case

[44] See paragraph 69 of the Federal Court's "Bin Abdullah" case

[45] See Mohd Faizol bin Zainal v Suhaila bt Yusoff [2014] 2 SHLR 83 (Shariah Subordinate Court, Kuala Terengganu). In this case, based on the defendant's admission, she had conceived the child out of an illicit intercourse with the plaintiff.

attaching the father's name to the child's name was allowed, it would defeat the very purpose of *Syariah* principles of legitimacy in preserving the lineage of the child. If the Federal Court recognized that this matter is highly intertwined, the Federal Court may further find its significance to recognize and reconcile both sets of laws, and not to be in favour of one set of laws. In the course of addressing both laws, the court may design the mechanism constituting the legal framework, for instance suggesting that the matters for legitimacy for illegitimate child of Muslim parents will be the subject of determination of Syariah Court in accordance with the powers conferred by the Federal Constitution, while the registration and ascription of paternity of the same child would be done by the NRD giving full and true effect what was concluded by the Syariah Court.[46]

In addition, **it is also commented that the Federal Court may proactively highlight the gap and loophole in the existing legal framework of legitimacy and ascription of paternity that need further legislative and executive intervention, and may design some viable solutions to this issue.** In this context, the court may highlight that the gap in the current legal framework of BDRA 1957 is basically the extent of application of Section 13A towards Muslim, and towards Malay or those carrying surnames. In pursuant thereof, the court may find the relevance to suggest directly in the judgment that the matter may need further legislative clarification or action such as statutory amendment to address the paternity of Illegitimate child of Muslim parents, and in the course of so doing, the requirements of *Syariah* as reflected in the State Enactments and Fatwa must be taken into account since it is a matter which concerns the position under Islamic law too and not the federal law per se.[47] Bear in mind that the act of the Federal Court in highlighting the gap in a legal framework and to suggest solution is not new and is justified by reference to the judicial convention. The Federal Court in some cases did embark on proactive action to straight away point out the gap and the solution that the legislature and executive may take into account in addressing some cases in some unique circumstances.[48]

Hence, the court held that the child was born out of wedlock or therefore, was an illegitimate child. Thus, it was held that the paternity of a man (biological father) cannot be ascribed to a child born out of the wedlock or an illegitimate child, hence, the child cannot carry the name of the father according to Islamic law. Confirming the fatherhood is to establish a lineage, but the confirmation of fatherhood here is more specific. It was stated that such actions are the same as ascribing paternity to an illegitimate child to a person who is not his lineage and this is contrary to Islamic law.

[46] The author found it relevant to draw an analogy to the case of inheritance and letters of administration of an estate, where both subjects are under separate jurisdiction, i.e., the State and Federal law respectively. In the case of Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor [2007] 5 MLJ 101, there was a conflict of jurisdiction issues between the Syariah Court and the High Court in this matter, where the issue was whether the civil High Court had the jurisdiction to grant letters of administration involving application of Islamic law of gifts (*Hibah*). In resolving the conflict of jurisdictions, the Federal Court held the determination of that issue and the beneficiary or beneficiaries entitled to it and in what proportion, if relevant, is within the jurisdiction of the Syariah court and the civil court shall give effect to it in the grant of a letter of administration, and subsequently, in distributing the estate. Using this analogy, the solution to the intertwining issue of legitimacy and ascription of paternity would be that the former is determined according to the *Syariah*, while the latter would effectuate the former, while not contradicting each other.

[47] Zanariah Noor, "Status Dan Hak Anak Tak Sah Islam Dalam Undang-Undang Di Malaysia," Sains Humanika 10, no. 3-4 (2018), https://doi.org/10.11113/sh.v10n3-4.1539, 65.

[48] For instance, in the Federal Court's case of Pushpaleela a/p R Selvarajah & Anor v Rajamani d/o Meyappa Chettiar and other appeals [2019] 2 MLJ 553, the Federal Court highlighted the gap in the National Land Code and the Malaysian Torrens System where no assurance funds been provided as remedy to innocent parties who are deprived of their lands due to fraud or forgery, and it did suggest the solution to such problem that may be achieved through new statutory provision to the National Land Code to provide a provision for assurance funds.

### 6.3. THIRD ASPECT: POSITION OF FATWA FROM LEGAL AND *SYARIAH* POINT OF VIEW

In the judgment of this case, the Federal Court was presented with two fatwas (religious edicts), issued by the National Fatwa Committee (Jawatankuasa Fatwa Kebangsaan), that proclaims that any illegitimate child should not be given the name of his birth father, and therefore the child would be named accordingly, including ascribing "bin Abdullah" to the illegitimate child's name. However, it was held by the Federal Court that a fatwa from the National Fatwa Committee would then become law in the relevant state (i.e., the State of Johore) and would be legally binding having the force of law only if it is adopted by the State pursuant to Section 52(1) of the Administration of the Religion of Islam (State of Johor) Enactment 2003 (Enactment No 16 of 2003), and it is gazetted in the State Gazette under s 49 of the same Enactment. Unfortunately, this fatwa has not been adopted by the State in this case, the court considered that there was no fatwa on how to name an illegitimate child was gazetted in Johor. Hence, naming 'bin Abdullah' on the said child is unlawful.

However, **it is commented at this juncture, as much as it was agreed on the legal force of the National Fatwa upon adopting and gazetting fatwa by the State, that the Federal Court must also view the position of the fatwa comprehensively from the viewpoint of fi*qh* or *Syariah*, in addition from the point of law.** Under the Islamic law, fatwa has a respectable position in *Syariah* whereby is a formal legal opinion issued by a mufti, who is a Muslim jurist who is authorised to give such fatwas,[49] as answers or solution to questions or issues submitted to him respectively, [50] and such matter are regarding Islamic rulings on matters which has not been conclusively settled and directly dealt with in the Quran or the Hadith. [51] Before being qualified as a Mufti, a Mufti should be a qualified *Mujtahid* (fulfilling all prescribed requirements to be a Mujtahid including mastering sciences of Quran, Hadith and others) who are highly proficient in deducing legal rulings based on the sources of Islamic law through the process of *ijtihad*, and in analyzing while applying such rulings appropriately to the circumstances of the case.[52] In so far as a fatwa is a form of *ijtihad*, it is not legally binding unless it is adopted into a legal or statutory instrument,[53] or it is adopted by the authority to be imposed mandatorily in the light of Siyasah al-Syariyyah (*Syariah* governance).[54]

However, viewing in a more critical view in so far as a Mufti is himself a *Mujtahid*, it is said in some studies that if all of the *mujtahidun* (plural form of *Mujtahid*) happened to arrive at one particular

[49] For definitions of fatwa, see Mahmud Saedon A Othman, Institusi Pentadbiran Undang-Undang & Kehakiman Islam, Dewan Bahasa dan Pustaka, Kuala Lumpur (1996) pp 137–144.

[50] Mohd Daud Bakar, Instrumen Fatwa dalam Perkembangan Perundangan Islam Jurnal Syariah, 5:1 [1997] 1–14 at p 2 as cited in Office of the Mufti in Malaysia: Legal History and Constitutional Role [2009] 3 ShLR xx

[51] Office of the Mufti in Malaysia: Legal History and Constitutional Role [2009] 3 ShLR xx

[52] Mahmud Saedon, Institusi Pentadbiran Undang-Undang pp 150–152; Abdul Monir Yaacob, Kepelbagaian Fatwa: Kekuatan atau Kelemahan? in Abdul Samat Musa et al (editors), Prinsip dan Pengurusan Fatwa di Negara-Negara ASEAN, World Fatwa Management and Research Institute (INFAD), Islamic University College of Malaysia (KUIM), Nilai, 2006, 1–18, pp 200–201 as cited in Office of the Mufti in Malaysia: Legal History and Constitutional Role [2009] 3 ShLR xx

[53] Office of the Mufti in Malaysia: Legal History and Constitutional Role [2009] 3 ShLR xx; Ibrahim, B., Arifin, M., & Abd Rashid, S. Z. (2015). The Role of Fatwa and Mufti in Contemporary Muslim Society. Pertanika Journal of Social Sciences & Humanities, 23. Retrieved from the http://journals-jd.upm.edu.my/Pertanika , page 316.

[54] Page 25 Kitab As-Siyasah Al-Syariyyah fi Ahwal al-Syakhsiyah, Abdul Fattah Amru

ruling on a certain issue, this agreement was referred to as ijma' (consensus),[55] by which it will be treated as the primary sources of *Syariah*, ranked third after Quran and Sunnah. Contemporarily, Imam Ahmad believed that ijma' was feasible and likely to take place in the form of ijma' held by a particular legal school,[56] or group of people,[57] or ijma' confined to particular localities.[5859] Some scholars, like Al-Khudari, even regards collective *ijtihad* (or *ijtihad jamaie* where common agreement was reached by more than one mujtahid in their ijtihad process towards an issue) as *ijma'*, as discussed in usul al-fiqh literature.[60] Thus, if all of the *mujtahidun*, or, according to some jurists, an overwhelming majority of them, reached an agreement on a particular issue, it may be considered as an ijma'.[61] Since in so far as it is considered as an ijma', it will have a binding force whereby its binding force is deduced based on the authority of a hadith in which the Prophet Muhammad is reported to have said, "My community will never agree on an error."[62]

On the other hand, notwithstanding several attempts by some scholars to equate collective *ijtihad* with classical *ijma'*, it is commented that, according to some studies that, the former is theoretically inferior to classical *ijma'* and yet the same is superior to individual *ijtihad*.[63] Therefore, since it is a mere ijtihad, its decisions are not considered binding.[64] However, it should be emphasized that, even if collective *ijtihad* would not be considered as an ijma' or even if it is not binding, collective ijtihad is a more reliable and practicable means of ijtihad, whereby it is more reliable than individual *ijtihad* and, practically more realistic that classical *ijma'*.[65]

In applying to this context, i.e., in this Federal Court's case, the Federal Court, as mentioned before, has been presented with Fatwa coming from the National Fatwa Committee (NFC) deciding that the illegitimate child should not be ascribed paternity to his or her biological father, and should

[55] Aznan Hasan, "An Introduction to Collective Ijtihad (Ijtihad Jama'i)," American Journal of Islam and Society 20, no. 2 (January 2003): pp. 26-49, https://doi.org/10.35632/ajis.v20i2.520, 30.

[56] This kind of ijma' is often cited in classical book of fiqh with the following citation "That on which our associates (ashabuna) have agreed and disagreed." For instance, see 'Umar ibn 'Abd al-'Aziz al-Husam al-Shahid Ibn Maza, Sharh Adab al-Qadi, ed. Abu al-Wafa' al-Afghani and Muhammad alHashimi (Beirut: Dar al-Kutub al-'Ilmiyah, 1994), 4-5. Cited in Wael B. Hallaq, Authority, Continuity and Change in Islamic Law (Cambridge, UK: Cambridge University Press, 2001), 80.

[57] Such as ijma' al-shaykhayn, ijma' al-khulafa' al-rashidin, or ijma' al-'itrah

[58] Such as ijma' ahl al-Madinah and ijma' 'ulama' al-Kufah. See al-Zuhayli, Usul al-Fiqh al-Islami, 1:505, 512-16; Wael B. Hallaq, A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh (Cambridge University Press: 1997), 20.

[59] Ibid

[60] Khalifah Babkar Al-Hasan, "Commentary on 'Abd al-Nasir's 'Al-Ta'rif,'" Conference, 1:116; Farhat, "Al-Ijtihad al-Jama'i," Conference, 1:146.Khudari, Al-Ijtihad fi Ma la Nass fihi, 81 as cited in Aznan Hasan, "An Introduction to Collective Ijtihad (Ijtihad Jama'i)," American Journal of Islam and Society 20, no. 2 (January 2003): pp. 26-49, https://doi.org/10.35632/ajis.v20i2.520, 30.

[61] Aznan Hasan, "An Introduction to Collective Ijtihad (Ijtihad Jama'i)," American Journal of Islam and Society 20, no. 2 (January 2003): 35, https://doi.org/10.35632/ajis.v20i2.520, 30.

[62] "Ijma," Oxford Reference, accessed November 28, 2021, https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095957346.

[63] Aznan Hasan, "An Introduction to Collective Ijtihad (Ijtihad Jama'i)," American Journal of Islam and Society 20, no. 2 (January 2003): pp. 26-49, https://doi.org/10.35632/ajis.v20i2.520, 44

[64] Ibid, page 44

[65] Ibid, page 37

be named as "bin Abdullah" (but it was not accepted on basis that it was not gazetted nor adopted by the respective State). Bear in mind that NFC is a federal body,[66] which acts as a coordinating body for state Fatwa Committees particularly in the discussion of significant issues, involving national interest or Muslim's faith.[67] Generally, it is a unanimous decision or opinion made by all the Muftis in Malaysia who are the members of the Committee, but it is not binding towards the State unless such decision was adopted in their state enactments, and the State may overrule such national fatwa choosing fatwa that is best suited to the State.[68] Despite this technical difference in the eyes of law (since some would argued that it is not a fatwa but a mere decision of a discussion), [69] such decision could still be considered as a fatwa in *Syariah*.[70]

In the issue of naming of illegitimate child, the Federal Court observed differences of opinions where majority of the states taking the stance of the National Fatwa, while Perlis on the contrary (which concluded that the illegitimate child could be ascribed with his biological father). Applying the aforementioned discussion, if one would take the opinion of some Muslim scholars advocating *ijma'* on basis of consensus by overwhelming number of *mujthahid*, such NFC's fatwa may be considered as contemporary *ijma'* of *mujtahid* in Malaysia (since Imam Ahmad's opinion that *ijma'* may even be on basis of localities), but on the other hand, even if it is not *ijma'* (by which the authors tend to agree due to presence of differences of opinion such as Perlis contrary to the national fatwa), **the NFC's fatwa could still be regarded as a collective *ijtihad*.** The difference between the former and the latter is binding effect under the *Syariah*, whereas the former is binding while the latter is not. Despite the Federal Court's decision not to consider the Fatwa on basis of non-adoption and non-gazettement by the State**, it is commented that one should also have regard to the position of Fatwa in the light of *Fiqh* and Syariah, whereby as stated before, fatwa resulted from a collective *ijtihad* (as in this case, arguably, the decision from the National Fatwa Committee which comprises all mufti in Malaysia), would bear higher reliability than mere individual ijtihad coming from individual mufti**. Thus, under the Islamic law, collective *ijtihad* would have higher degree of strength and reliability as compared to individual *ijtihad* of a mufti, which makes it highly relevant and highly persuasive to be considered in the decision-making process especially involving a matter which have been resolved by way of fatwa. As far as the civil court's reference to opinions of the Mufti is concerned, by looking at the previous precedents of the civil courts, the civil court often referred to legal opinion of the mufti to gain more information about the Islamic law in the course of preventing any misunderstanding of problems in the Islamic law, even the court is not bound by fatwas issued by the Mufti. [71] The civil court dependency on the mufti could be evidenced in the case of ***Re Dato***

[66] Para [284] of the judgement of Federal Court's case, as per Nallini Pathmanathan FCJ

[67] Nasoha, Zaini, Hayatullah Laluddin, Zuliza Mohd Kusrin and Mohd Rizal Muwazir. "Standardisation of fatwa in Malaysia: management and problems." Advances in Natural and Applied Sciences 6 (2012): 925

[68] Abu Bakar, Md Zawawi, Wan Ibrahim Wan Ahmad, and Mahyuddin Abu Bakar. "Registration Problems of Illegitimate Children among Muslims in Malaysia." Journal of Islamic Studies and Culture 5, no. 1 (2017): 11; See also para [83] in the Federal Court's judgment of the "Bin Abdullah" case.

[69] Ibid

[70] Ibid

[71] Mohd Kamel Mat Salleh and Mohd Al Samuri, "Fatwa as an Authority in Secular Courts of Malaysia," Proceedings of the 23rd International Academic Conference, Venice, 2016, https://doi.org/10.20472/iac.2016.023.067, 335.; See also Tengku Mariam binte Tengku Sri Wa Raja & Anor v Commissioner for Religious Affairs, Trengganu & Ors, (1970) 1 MLJ 222 (FC)

***Bentara Luar Decd Haji Yahya Bin Yusof & Anor v Hassan Bin Othman & Anor [1982] 2 MLJ 264*** where the Federal Court held that:

> *"The Mufti of Johore in his fetwa issued sometime in 1970 stated that the wakaf is valid. Whilst we are not bound to accept his fetwa as we are entitled to expound what the Islamic law on a given topic is, we are equally not bound to reject the opinion stated in the fetwa just because Islamic law is the law of the land and the duty to expound this law falls on us. In our view as the opinion was expressed by the highest Islamic authority in the State, who had spent his lifetime in the study and interpretation of Islamic law and there being no appeal against the fetwa to His Highness the Sultan in Executive Council under the relevant State Enactment — i.e. Enactment No. 48, now re-enacted by Enactment No. 14 of 1979 — we really have no reason to justify the rejection of the opinion, especially when we ourselves were not trained in this system of jurisprudence and moreover the opinion is not contrary to the opinions of famous authors of books on Islamic law."*[72]

Although it may be argued from the said judgement that the fatwa referred to fatwa issued by the Mufti at the State level, such judgement would nevertheless indicate the appreciation of fatwa by civil court, and the significance of the opinion of the Mufti to be applicable in the context of the case concerning Islamic law discussion. Thus, as much as it was agreed that the legal force of a National fatwa would be possessed upon adoption and gazettement by the State, it is also suggested that fatwa should not be viewed from the angle of civil law per se, but it must also be observed from the angle of *Syariah* especially in the matters which is highly-intertwined with *Syariah* such as in this "Bin Abdullah" case.

## 6.4. FOURTH ASPECT: CONCEPT OF JUDICIAL REVIEW IN EVALUATING DISCRETIONARY POWERS OF EXECUTIVE AUTHORITY & PRINCIPLES OF REASONABLENESS

In the majority judgment of this case, it was held that the DGNR's decision not to allow the child's full name as to ascribe the father's name in the registration was clearly justified by the law applicable to the respondents, that is the Islamic law. Thus, such decision was in compliance with the law and is not tainted with illegality, irrationality or procedural impropriety such as to warrant interference by the court. In the grounds of judgment on the reasonableness of the DGNR's decision, the court cited the Federal Court's case of ***Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors [2007] 4 MLJ 585*** to justify that act of the National Registration Department (NRD) to refer

[72] Majlis Agama Islam Negeri Pulau Pinang v Abdul Latiff Hassan (As Administrator of Estates of Hj Mohammad Hj Abdul Rasid; the Deceased) & Anor [2016] 2 CLJ 150 (endowment land case); Ahmad Yahaya v Majlis Agama Islam Negeri Pulau Pinang [2015] 1 LNS 802 and [2016] 1 CLJ 1018 (endowment land case); Ikbal Salam v Koperasi Permodalan Melayu Negeri Johor & Anor [2012] MLJU 738 (property claim case); Nor A'shedah Jamaluddin @ Yusor & Anor v Datuk Zainul Arifin Mohammed Isa & Anor [2012] 1 LNS 926 (defamation suit case); Fathul Bari Mat Jahya & Anor vs Majlis Agama Islam Negeri Sembilan & ORS [2012] 4 CLJ 717 (fatwa violation case); Majlis Agama Islam Pulau Pinang & Seberang Perai v Khatijah Yoan & ORS [2010] 3 LNS 5 and [2010] 4 CLJ 592 (endowment land case); Linggam Sundarajoo v Majlis Agama Negeri Kedah Darulaman [1994] 2 CLJ 494 (Dispute over claim of the deceased whether the remain died as Muslim or non-Muslim); Hjh Halimatussaadiah Hj Kamaruddin v Public Services Commission, Malaysia & Anor [1994] 3 MLJ 61 (violation of civil service ethic case); Dalip Kaur v Police Officer, Bukit Mertajam [1992] 1 MLJ 1 and [1991] 1 CLJ Rep 77 (apostasy case); .Viswalingam v Viswalingam [1980] 1 MLJ 10 (Muslim confirmation case); Re Property of Sheikh Mohamad bin Abdul Rahman bin Hazim [1974] 1 MLJ 184 (property claim case)

Islamic law in the course of exercising its duty and power under the federal law is not uncommon, but was reasonable. **However, there is no further explanation on the principles of reasonableness in evaluating the discretionary power of the DGNR.** Thus, it is therefore commented that **the principles of reasonableness as enshrined in the line of authorities in judicial review cases should have been looked into and be taken into consideration for stronger justification by the court.**

In this regard, it is important to observe the Federal Court's case of ***Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 SHLR 1*** (a case of using "Allah" word in the Bible) ("Titular's case") where it was held that that the test applicable in judicial review in determining the reasonableness of an executive is an objective test,[73] whereby the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable.[74] The Federal Court in the said case seemed to affirm the Court of Appeal in ***Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur [2013] 6 MLJ 468*** where Apandi Ali JCA had also applied the principle of reasonableness in determining the validity of the Minister's decision, where it is stated at paragraph [23] that the "*exercise of discretion must be reasonable. What is reasonable depends on the facts and circumstances of the case. What is a justifiable circumstances depends on the necessity of the occasion*".[75] Applying these principles in the light of "Bin Abdullah's case, of course, in view of the prevailing fatwa prohibiting ascription of paternity of an illegitimate child to his or her biological father which had affirmed in the State enactment (i.e., Section 111 of the Family Law (State of Johore) Enactment 2003 in this case), no reasonable person in the executive capacity like DGNR would saw registering towards his father's name reasonable considering the undisputed fact that the child is illegitimate, putting it as equally similar to legitimate child since doing so would lead to contravention of fatwa, the State Enactment and the *Syariah* which governs the Muslim (who are the applicants or respondents in this case). Thus, on the facts and circumstances of the case, it is justifiable for DGNR to register the name without ascribing the biological father's name. Such action should be considered as reasonable.[76] It is pertinent here to quote the excerpt of the judgement of the said Titular's case at the Court of Appeal at paragraph [104] which held that:

> *"[104] I would add however that the position of Islam as the religion of the Federation, to my mind imposes certain obligation on the power that be to promote and defend Islam as well to protect its sanctity. In one article written by Muhammad Imam, entitled Freedom of Religion under Federal Constitution of Malaysia — A*

[73] see also Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 (FC); JP Berthelsen v Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 134 (SC); Minister of Home Affairs v Persatuan Aliran Kesedaran Negara [1990] 1 MLJ 351 (SC); Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (CA); Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481; [1997] 1 CLJ 665 (CA); R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337 (FC); Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213 (CA)). As laid down by the above authorities it is therefore trite that the test applicable in judicial review is the objective test.

[74] Merdeka University Berhad v Government of Malaysia [1982] 2 MLJ 243 (FC), As per Suffian LP

[75] See Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223 and Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935; [1985] AC 374

[76] "The Court of Appeal May Have Erred in the Bin Abdullah Case – Aidil Khalid," 1Media.My, August 4, 2017, https://www.1media.my/2017/08/the-court-of-appeal-may-have-erred-in.html.

*Reappraisal [1994] 2 CLJ lvii (June) referred to by learned counsel for the eighth appellant it was said that: 'Article 3 is not a mere declaration. But it imposes positive obligation on the Federation to protect, defend, promote Islam and to give effect by appropriate state action, to the injunction of Islam and able to facilitate and encourage people to hold their life according to the Islamic injunction spiritual and daily life'."*

Furthermore, **it is also commented that the Federal Court may also adapt balancing exercise to balance the rights and interest of the parties in the course of judicial review in line with the principle of proportionality.** In this regard, similar reference would be drawn to the abovementioned case of Federal Court's case of ***Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 SHLR***, where it affirmed and quoted the Court of Appeal's judgment in ***Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur [2013] 6 MLJ 468*** which had indirectly applied proportionality principle in the light of balancing the between public interest and private interest where it is stated:

*[42] It is my judgment that, based on the facts and circumstances of the case, the usage of the word 'Allah' particularly in the Malay version of the Herald, is without doubt, do have the potential to disrupt the even tempo of the life of the Malaysian community. Such publication will surely have an adverse effect upon the sanctity as envisaged under art 3(1) and the right for other religions to be practiced in peace and harmony in any part of the Federation. Any such disruption of the even tempo is contrary to the hope and desire of peaceful and harmonious co-existence of other religions other than Islam in this country.*

*[43] Based on the reasons given by the Minister in his affidavit in reply, it is clear that he was concerned with national security and public order.*

*[44] When such exercise of discretion by the Minister becomes a subject of a judicial review, it is the duty of the court to execute a balancing exercise between the requirement of national security and public order with that of the interest and freedom of the respondent. As a general principle, as decided by case law, the courts will give great weight to the views of the executive on matters of national security. It is suffice to refer to what Lord Woolf CJ said in A, X and Y v Secretary of State for the Home Department [2004] QB 335, which reads as follows:*

*Decisions as to what is required in the interest of national security are self-evidently within the category of decisions in relation to which the court is required to show considerable deference when it comes to judging those actions (Emphasis added.)*

From the excerpt of the judgment, the court inferred that the executive act is proportionate in the light of balancing mechanism whereby it generally balances between the interest of the public and the private interest of the certain parties. Similar analogy may also be drawn in this "Bin Abdullah" case whereby the it is commented Federal Court may balance the public interest at large in this issue and the private interest of the parents or child. In so far as the public interest is concerned, the Federal Court may find it relevant to know the wisdom behind the prohibition in *Syariah* as expressed in the fatwa in the ascription of paternity to illegitimate child, and to take into consideration the risks and impacts by acting in contrary to such prohibition, which may impact the public at large. Generally, public interest will always prevail over the private interest.

**6.5. Fifth Aspect: Applying Harmonious Interpretation of Laws as a Rule of Interpretation of Two Colliding Statutes**

From the general reading of this case, roughly, it seems like there is quite a clash between the law on registration of illegitimate child which would ascribe the paternity of the child via registration that is under the federal legislative competence, as well as the law on legitimacy of a child which falls under the jurisdiction of the State. Notwithstanding this prima facie contradiction, it is submitted herein, with due respect, that there was no attempt made by the Federal Court, especially the majority judgment to relate the discussion with the principles of harmonious construction. **Thus, this commentary would suggest on the resort to the principles and jurisprudence of harmonious interpretation of laws which was developed by the courts in the effort of preventing contradiction of statues and to have harmonious application of laws.**

As such, it is relevant to observe the Court of Appeal's case of ***Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased) [2017] 5 MLJ 771***, in the excerpt of dissenting judgment as per Hamid Sultan JCA, which stated at paragraph [45] explaining on the jurisprudence relating to the concept of harmonious construction of statute or statutes as follows:

> *"[45] From, further development from the above primary rules of construction, courts have ventured into what now is often said as harmonious construction of statute. This concept has two parts, one is harmonious construction in relation to the various provisions of the statute itself and the other part is in relation to other statutes. This doctrine is invoked when there is a conflict between the parts or provisions of the statute or between two or more statutes. This doctrine advocates five main principles, as set out by the Supreme Court of India in the case of CIT v Hindustan Bulk Carriers (2003) 3 SCC 57. They are as follows: (a) courts must avoid head on clash of seemingly contradicting provisions and they must construe the contradictory provisions so as to harmonise them; (b) the provision of one section cannot be used to defeat the provision contained in another unless the court, despite its effort, is unable to find a way to reconcile their differences; (c) when it is impossible to completely reconcile the differences in contradictory provisions, the courts must interpret them in such way so that effect is given to both the provisions as much as possible; (d) courts must also keep in mind that interpretation that reduces one's provision to a useless number or dead is not harmonious construction; and (e) to harmonise is not to destroy any statutory provision to render it fruitless.".*

In the same regard, Hamid Sultan JCA in the same case also quoted the learned author GP Singh on Principles of Statutory Interpretation (5th Ed) at pp 94-95 that observes as follows:

> *"It has already been seen that a statute must be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. Such a construction has the merit of avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute. It is the duty of the courts to avoid 'a head on clash' between two sections of the same Act and, 'whenever it is possible to do so, to construe provisions which appear to conflict so that they harmonise'. It should not be lightly assumed that 'Parliament had given with one hand what it took away with the other'. The provisions of one section of a statute cannot be used to defeat those of another 'unless it is impossible to effect reconciliation between them'. The same rule applies in regard to sub-sections of a section."*

From the authorities cited above, it is learnt that the concept of harmonious interpretation or construction of laws is a mechanism of interpretation invented by judiciary in the course of reconciling

two competing statutes. In the event where there are clashes of statutes, based on this jurisprudence, it would be better for the court to embark on this mechanism, i.e., to have harmonious construction of laws, as in this context, between BDRA 1957 and the *Syariah* (as enlightened in the State enactment and fatwa). So long that both sets of laws are valid laws by which both laws were validly legislated in accordance with the powers conferred by the Federal Constitution, the court should endeavour at its best to effectuate both sets of law without any one of it jeopardizing the other. Thus, it is important for this concept to penetrate the discussion of the Federal Court, by which it was absence in the actual judgement of this case.

The question now is – how would the laws in question be interpreted in the sense that it would promote harmonious construction and application of laws? In this regard, it is submitted that the Federal Court, despite having no explanation of the said concept of harmonious construction, did reconciled between both laws which can be simplified as follows:

1. The Federal Court interpreted that although Section 13A(2) stated that the surname of the father, if any, shall be entered to the illegitimate child, it was not applicable towards those who are not carrying surname like the respondents (who are Malay Muslims). Hence, there was a presence of "if any" indicating that it will not be applicable mandatorily in all cases.
2. At the same time, the respondents, the parents and the illegitimate child, in so far as they are Muslims, are bound not only by the federal legislation, but also subjected to personal law enacted under the State which prohibits illegitimate child to be ascribed paternity to the biological father.
3. The DGNR is correct in the exercise of his discretion under BDRA 1957 in taking into consideration the laws governing the respondents (the Islamic law under the State) while determining whether to register and ascribe the name of biological father to the illegitimate child or not.

Thus, by the above attempt of reconciling both laws, the Federal Court could ensure co-existence of both laws without one law being superior to another and would operate to the detriment to the other laws. Hence, it is important that the principle of harmonious construction of statute to be firstly elaborated. Adversely, if one would not apply the principle of harmonious interpretation as enlightened above, it may lead to making of a decision where the operation of one law would topple another law by which it will consequently lead to confusion and inconsistency of laws in the Malaysian legal system. This consequence could be observed, with due respect, to the dissenting judgement where David Wong CJ (Sabah and Sarawak) stated at paragraph [156] – [157] that:

> *"[156] As for s 111 of the Johor Enactment 2003 and any legal effect of any fatwa connected thereto, the Court of Appeal found that the Johor Enactment is State Law and cannot override what is provided in BDRA especially s 13A(2).*
>
> …
>
> *[157] The above passage indicates a correct application of the law and I find no reason to depart from it."*

It is also relevant to observe the said consequence in the light of another dissenting judgment by Nallini Pathmanathan FCJ which stated at paragraph [283] as follows:

> *"[283] Section 111 of the Johor Enactment relates to the legal status of paternity. Thus, even if the birth certificate affirmatively describes someone as the father, it is still open to him to legally deny paternity and thus legitimacy in accordance with their Islamic personal law. In other words, while the register might recognise him as the father, Islamic personal law might not. It thus remains open to such person or even the other parent to deny any parental responsibility such as maintenance and guardianship, as the case may be."*

To accumulate both dissenting judgements, it is understood that the dissenting judges tend to put the federal law in priority above the *Syariah* as reflected in the State Enactment. This is exacerbated when the latter dissenting judgment as quoted above seems to suggest, with due respect, impractical solution that the father may still be registered in the name of illegitimate child, but at the same time may deny such under the Islamic law. **Impliedly, the dissenting judges seems to uphold solely the federal law, notwithstanding it contravenes the *Syariah* through the State Enactment.** Indirectly, if one is to hold this opinion, it would allow a person to act in accordance to one law while permitting contravention with another law. In other words, by holding that the child could be put his father's name despite the former's illegitimate status, the Court had effectively held that Muslims in this country could in fact act against a state enactment and fatwa issued by religious authorities. [77] It is noteworthy that this Malaysia is a "mixed legal system" or "pluralistic system", having common law system and Islamic legal system, where both systems function within the limits set by the Constitution and there is no one system superior to the other.[78]

Thus, the principle of harmonious construction could save the harmonious co-existence of laws by attempting reconciling between the laws. It is commented that such laws in this case, stands on an equal footing where neither one would prevail over each other. Thus, instead of choosing which one to be applied in the context of the case, it is preferable for the court to learn how could competing legislations be reconciled to address all rights and interest involved. It is to be emphasized that, under the framework of Malaysian Constitution, such the federal law may override state law only in a limited scope, such as primarily, through Article 75 of the Federal Constitution if there is inconsistency of a state law and the federal law where the federal law shall prevail. In this case, there is no occasion which renders the inconsistency between the Federal and State whereby BDRA 1957 is enacted for purpose of registration of births and death of any person including an illegitimate child, while the State enactment, i.e. Islamic Family Law (State of Johore) Enactment, 2003 is enacted to govern Muslim family and personal matters including legitimacy of an illegitimate child. The former was to be executed by the National Registration Department, who is a federal agency, while the latter is to be enforced by the State and the Syariah Courts. [79] Thus, since no inconsistency on the subject matter of the provision had arisen, it is commented that the dissenting should have not prevail the federal law over the State law. Since in so far as both laws are standing on equal footing, it is incumbent for the

[77] "The Court of Appeal May Have Erred in the Bin Abdullah Case – Aidil Khalid," 1Media.My, August 4, 2017, https://www.1media.my/2017/08/the-court-of-appeal-may-have-erred-in.html.

[78] Professor Dr Ashgar Ali Ali Mohamed, "Solving the 'Bin Abdullah' Dilemma: New Straits Times," NST Online (New Straits Times, August 10, 2017), https://www.nst.com.my/opinion/letters/2017/08/266075/solving-bin-abdullah-dilemma.

[79] Wan Ismail, Wan Abdul Fattah, Syahirah Abdul Shukor, Lukman Abdul Mutalib, Ahmad Syukran Baharuddin, Zulfaqar Mamat, and Nik Salida Suhaila Nik Salleh. " Factor and Solutions for Illegitimate Child Issue Among Muslims in Malaysia." INSLA E-Proceedings 3, no. 1 (2020): 141

court to ensure its operational mechanisms to be working reasonably for the public without any infringement of one law.

## 7.0 ANALYSIS ON THE *HUKM* OR LEGAL RULINGS UNDER THE *SYARIAH* IN THE LIGHT OF THE ISSUE OF ASCRIPTION OF PATERNITY OF ILLEGITIMATE CHILD

Illegitimate child or *walad al-zina* is an issue of paternity which intertwined with issues of maintenance, inheritance, registration, and others. One must note that legitimacy can be ascertained through the establishment of legal paternity. Section 2 of Islamic Family Law Act 1997 defines an illegitimate child to mean a child born out of wedlock but not as a result of *syubhah* intercourse. According to Surah al-Furqan verse 54:

وَهُوَ الَّذِي خَلَقَ مِنَ الْمَاءِ بَشَرًا فَجَعَلَهُ نَسَبًا وَصِهْرًا وَكَانَ رَبُّكَ قَدِيرًا

*And He is the One who created man from water, then made of him relations created by lineage and relations created by marriage. Your Lord is All-Powerful.*

From this verse it can be understood that ascription of paternity can be done through a valid marriage, and it is indeed part of the blessing from Allah S.W.T to human beings. On the other hand, it is an indignation for a child to be born from an illicit intercourse and it is not permissible to glorify the adulterers by ascribing the paternity of the said child that was born from an illicit intercourse.[80] Apart from that, an illegitimate child can be born from a valid marriage, but he is born less than six months from the date of marriage. According to Dr. Wahbah Zuhailiy, the period of pregnancy was affirmed by the scholars with references to Quranic verses.[81]Firstly, verse 15 Surah al-Ahqaf:

وَحَمْلُهُۥ وَفِصَٰلُهُۥ ثَلَٰثُونَ شَهْرًا ۚ

*Their period of bearing and weaning is thirty months.*

Moreover, referring to verse 14 Surah al-Luqman:

وفِصَٰلُهُۥ فِى عَامَيْنِ

*And their weaning takes two years.*

Through the second Quranic verse, Allah SWT explain the period of pregnancy and breastfeeding is 30 months or about two years six months. While in the third verse, Allah SWT further explains that the period for breastfeeding only takes two years. This means, if the breastfeeding period lasts for two years, then the period for pregnancy is only for six months. Based on these findings, the jurists concluded that the minimum gestation period is six months.[82]

[80] Othman, Abdul Hafiz. "Aplikasi Hukum Nasab Anak Zina: Kajian Terhadap Fatwa Negeri-Negeri." (2018): 8

[81] Ismail, Mohd Hazwan, and Jasni Sulong. "Maintenance Position for Illegal Children From Biological Fathers: A Study In Penang." Journal of Fiqhiyyat 1, no. 1 (2021): 3

[82] Ibid, page 4

Furthermore, referring to hadith Prophet S.A.W narrated by Abu Hurairah:

عن أبي هريرة أن رسول الله صلي الله عليه وسلم قال: الولد للفرش وللعاهر الحجر

From the abovementioned hadith, which was reported by Muslim 1457, it can be understood that the child will belong to the husband or wife, and the adulterers are disgraceful and a disappointment.[83] This hadith in terms of the strength of its chain is not disputed even if it was classified as *mutawatir*.[84] As another explanation of the hadith, it can be understood that if a man has a wife or female slave, both can be considered *'firasy'* to him. If a child was born from his wife or his slave, then the child shall be recognized as biological to him.[85]

Generally, the jurists unanimously agreed that if a child was born and the pregnancy occurred before the marriage of the parents, the child shall be considered as an illegitimate child[86]. According to Hanafi School of thought, if a man marries a woman, then the woman gives birth to a child within less than six months from the date of their marriage, the child cannot be ascribed to the man because the insemination has taken place before marriage.[87] Moving on to the opinions of scholars with regards to this issue, there are two views with regards to ascription of paternity to the child. According to Syafie School of thought, a child that is born out of wedlock has no family relationship nor the right to be ascribed paternity of the biological father.[88] It can be concluded that firstly, the majority's view (Mazhab Syafie, Maliki, Hanbali, Hanafi and Zahiri) is of the opinion that it is absolutely not permissible for the illegitimate child to be ascribed the paternity of the father. The illegitimate child can only be ascribed to his mother.[89] The majority's view based their arguments on the above-mentioned Quranic verse and hadith (verse 45 of Surah al-Furqan and hadith narrated by Abu Hurairah). Other than that, the decision from the majority's view was also based on the rational reason, with which they contended that by denying the ascription of the father's paternity to the illegitimate child, it is a part of the effort to curb the society from committing adultery.[90]

Secondly, the minority's view (Ibnu Tamiyyah and Ibnu Qayyim) is of the opinion that the illegitimate child can be ascribed to his father when there is a request from the father. The second's view contended that ascribing the father's paternity to the illegitimate child will bring greater benefits to the child. The child will enjoy life and get the same rights as other legitimate children[91]. The minority's view based their reasoning on verse 164 Surah al-An'am:

[83] Othman, Abdul Hafiz. "Aplikasi Hukum Nasab Anak Zina: Kajian Terhadap Fatwa Negeri-Negeri." (2018): 8
[84] Ibid, page 9
[85] Sandimula, Nur Shadiq. "The Status and Rights of an Illegitimate Child According to Mazhab Asy-Syafi'i Perspective on the Development of Islamic Family Law in Indonesia." Jurnal Ilmiah Al-Syir'ah 17, no. 2 (2019): 4
[86] Omar, Abdul Majid. "Kedudukan anak tak sah taraf: Dari aspek pandangan Syarak, nasab dan pewarisan serta kekeluargaan Islam." (2013):6
[87] Ibid, page 6
[88] Sandimula, Nur Shadiq. "The Status and Rights of an Illegitimate Child According to Mazhab Asy-Syafi'i Perspective on the Development of Islamic Family Law in Indonesia." Jurnal Ilmiah Al-Syir'ah 17, no. 2 (2019): 4
[89] Kasa @ Muhyiddin, Mastura. "Penasaban Anak Tak Sah Taraf Menurut Perspektif Maqasid Syariah," (2009): 55
[90] Othman, Abdul Hafiz. "Aplikasi Hukum Nasab Anak Zina: Kajian Terhadap Fatwa Negeri-Negeri." (2018):9
[91] Kasa @ Muhyiddin, Mastura. "Penasaban Anak Tak Sah Taraf Menurut Perspektif Maqasid Syariah," (2009): 55

وَلَا تَزِرُ وَازِرَةٌ وِّزْرَ أُخْرٰىۚ

*And no bearer of burden shall bear the burden of another.*

From the above verse, it is contended that by attributing the illegitimate child to the father when the mother is yet to be married, shall preserved the child lineage and his future's interest. The illegitimate child has the right to be attributed to the father, failure to do so, would be tantamount to injustice on the illegitimate child since he is innocent, contradicted with the abovementioned verse.[92]

Apart from the Quranic verse, the minority had referred to hadith of Prophet S.A.W narrated by Abu Hurairah and reported by Bukhari (3436):

فقال : دعوني حتى أصلي، فصلى، فلما انصرف أتى الصبي فطَعَنَ في بطنه، وقال : يا...

غلام، من أبوك؟ قال: فلان الراعي

The above hadith discussed on Juraij who was framed to have sex with a woman, resulting in a child being born. Juraij asked the child who is his father, and with Allah's will, the child answered it was the shepherd. The question posed to child was 'who is your father' and not 'who is the fornicator'. Since the child answered the shepherd was his father, the child was attributed to the shepherd. The minority's view affirmed that by the very virtue of this hadith, it is allowed to attribute the illegitimate child with his biological father.[93]The majority is of the opinion that the ruling (the illegitimate child can be attributed to his father) extracted from this hadith was before the coming of Islam or شرع من قبلنا. Perhaps in their law it is permissible for the biological father to attribute himself to the illegitimate child.[94]

Ultimately, the prevailing opinion on the issue of ascription of paternity to the illegitimate child is the majority's view. In order to preserve the *Maqasid Syariah* and to protect the sanctity of marriage, it is not permissible to attribute the illegitimate child to his biological father. This is in line with the arguments of the majority's view. Alternatively, the illegitimate child can be ascribed with the ninety-nine names of Allah apart from Abdullah.

The issue of ascribing the father's paternity to the child is no stranger to Malaysians as there are few cases that have been discussed not only in courts but also by the Muftis. It has to be noted that the decision made by the Fatwa Committee of the National Council for Islamic Affairs can be considered as a unanimous decision made by all Muftis in the Committee but the decision is not binding. The fatwa needs to be gazetted and published in order to bind and to be legally recognized by the courts. There are also fatwa from the State in this issue that could be observed as follows:

| No. | State | Fatwa | Status[95] |
|---|---|---|---|

[92] Sarumi, Isa Abdur-Razaq, Azizah bt Mohd, and Norliah bt Ibrahim. "A Polemical Discourse over the Legitimation of Illegitimate Children under Islamic Law." IIUM Law Journal 27, no. 1 (2019): 14

[93] Ibid, page 16

[94] Ibid, page 17

[95] As at the date of the writing of this paper

| | | | |
|---|---|---|---|
| 1 | Wilayah Persekutuan | If the child is born less than 6 months and two lahzahs from the date of marriage, the child is not permissible to be attributed to the father or to male who caused the pregnancy. | Gazetted[96] |
| 2 | Kelantan | | Not gazetted[97] |
| 3 | Negeri Sembilan | | Gazetted[98] |
| 4 | Terengganu | | Gazetted[99] |
| 5 | Pulau Pinang | | Gazetted[100] |
| 6 | Kedah | | Gazetted[101] |
| 7 | Melaka | | Gazetted[102] |
| 8 | Sarawak | | Not gazetted[103] |
| 9 | Selangor | | Gazetted[104] |
| 10 | Johor | | Not gazetted[105] |
| 11 | Sabah | | Not gazetted[106] |
| 12 | Perlis | If the child is born less than six months and two lahzahs from the date of the marriage on a condition that the father does not deny his association with the | Gazetted[107] |

[96] Warta Kerajaan Wilayah Persekutuan – P.U. (B) 446 18hb September 2017

[97] "Senarai Fatwa Yang Dikeluarkan Oleh Jabatan Mufti Negeri Kelantan - Senarai Fatwa Yang Dikeluarkan Oleh Jabatan Mufti Negeri Kelantan, 2015 - 2018 - Mampu," Senarai Fatwa Yang Dikeluarkan Oleh Jabatan Mufti Negeri Kelantan - Senarai Fatwa Yang Dikeluarkan Oleh Jabatan Mufti Negeri Kelantan, 2015 - 2018 - MAMPU, accessed November 29, 2021, https://www.data.gov.my/data/en_US/dataset/senarai-fatwa-yang-dikeluarkan-oleh-jabatan-mufti-negeri-kelantan/resource/c56322ab-9928-46e5-a4de-a591f608a1c5.

[98] Warta Kerajaan Negeri Sembilan – P.U, 5 12 Januari 2002

[99] "Anak Tak Sah Taraf," E, accessed November 28, 2021, http://e-smaf.islam.gov.my/e-smaf/fatwa/fatwa/find/pr/11920.

[100] Warta Kerjaan Negeri Penang – Jilid 49 No. 22 P.U, 19 27hb Oktober 2005

[101] Warta kerajaan Negeri Kedah – Jilid 54 No. 506 23hb Jun 2011

[102] "Anak Tak Sah Taraf," E, accessed November 28, 2021, http://e-smaf.islam.gov.my/e-smaf/fatwa/fatwa/find/pr/10599.

[103] "Garis Panduan Penamaan (Bin/ Binti) Anak Tak Sah Taraf, Anak Angkat Dan Saudara Kita," E, accessed November 28, 2021, http://e-smaf.islam.gov.my/e-smaf/index.php/main/mainv1/fatwa/pr/15994.

[104] Warta Kerajaan Negeri Selangor – Jilid 58 No.9 P.U, 7 28hb April 2005

[105] "Anak Tidak Sah Taraf," E, accessed November 28, 2021, http://e-smaf.islam.gov.my/e-smaf/fatwa/fatwa/find/pr/10525.

[106] Mohd Iskandar Ibrahim, "3 Negeri Warta Fatwa Bin Atau Binti Abdullah, 99 Nama Allah," Berita Harian (Berita Harian, February 14, 2020), https://www.bharian.com.my/berita/nasional/2020/02/655683/3-negeri-warta-fatwa-bin-atau-binti-abdullah-99-nama-allah.

[107] "Anak Tak Sah Taraf," E, accessed November 28, 2021, http://e-smaf.islam.gov.my/e-smaf/fatwa/fatwa/find/pr/12335.

| | | | |
|---|---|---|---|
| | | child, the child can be ascribed to the father. | |

From the above table, it can be concluded that the state of Perlis has a different fatwa with regards to ascription of paternity of illegitimate child to the father. According to the Syariah Committee of Perlis if the child is born less than six months after the marriage, it is permitted to be attributed to the father except when the father denies his association. This fatwa which was passed during the Meeting of Perlis Islamic Religious Council and Malay Affairs was gazetted and bind the residents of Perlis state. For the Perlis' fatwa to be enforced, apart from being gazetted and published, the father needs to be married with the mother who carries the illegitimate child, and the father shall not deny the illegitimate child is his.[108] This means, the Perlis' fatwa can only be extended to and only if the father and mother of the illegitimate child get married.[109] Other than that, the majority fatwa by the other states contended on the period of the child is born which is not less than six months to be considered as legitimate child while the Perlis' fatwa dissents.[110] It is crucial to point out that Perlis' fatwa is contradictory with the majority's view in which it is not permissible to attribute the illegitimate child with his father's paternity.

Hence, the fatwa from Wilayah Persekutuan, Negeri Sembilan, Selangor, Kedah, Melaka, Pulau Pinang and Terengganu on the view that the attribution of paternity to the illegitimate must be more than six months can be considered as the closest to the majority view. To support this contention, the fatwa by the majority states (whether gazetted or not) shares the same characteristics as mentioned in the provisions of the state enactment or ordinance. For example, through section 111 of Islamic Family Law (Johor) Enactment 2003 and section 110 of Islamic Family Law (Federal Territories) Act 1984, both of these provisions dictate that if the child is born less than 6 *qamariah* months, the child shall not be attributed to the father. Therefore, the codified laws and the fatwa is in agreement which substantiated by the majority views.

## 8.0 FRAMEWORK OF REGISTRATION FOR ILLEGITIMATE CHILD IN MALAYSIA

Each birth in Malaysia must be registered according to the statutes (Births and Deaths Registration Act 1957, Registration of Birth and Death Ordinance 1951 (Sabah Cap. 123) and Registration of Birth and Death Ordinance 1951 (Sarawak Cap. 123)). To reiterate, the primary sections applicable in respect of any children according to the Births and Deaths Registration Act 1957, are section 4, Section 7 (1) of the Act 1957, where it is it stated that any child born, either Muslim

[108]"Anak Tidak Sah Taraf," E, accessed November 28, 2021, http://e-smaf.islam.gov.my/e-smaf/fatwa/fatwa/find/pr/10525.

[109] Ibid

[110]Abu Bakar, Md Zawawi, Wan Ibrahim Wan Ahmad, and Mahyuddin Abu Bakar. "Registration Problems of Illegitimate Children among Muslims in Malaysia." Journal of Islamic Studies and Culture 5, no. 1 (2017): 5

or not, has the right to be registered. Referring to the same Act, Section 7 (2) stated the conditions imposed on a person who is allowed to provide birth information[111].

As far as the registration of illegitimate children is concerned, the term itself is mentioned and stated in the Births and Deaths Registration Act 1957 through Section 13 and 13A. The first provision of the Act provides that no person shall be registered as the father of the child except with a joint request of the mother and the person alleging himself as the father to the child. Only then shall that person sign the register together with the mother. The second provision with regard to illegitimate children is Section 13A which distinctly provides on the surname of the child. The illegitimate child shall bear the name of the mother as the surname, but the father's name shall be entered if the person acknowledging himself to be the father of the child in accordance with Section 13 requests so. Based on the two provisions cited earlier, it is self-evident that the illegitimate child according to this statute, has the right to be registered in the same way as the other rightful children. There is no discrimination between both children, legitimate and illegitimate.

According to the National Registration Department, there are two types of systems that record the registration of the illegitimate child which are "Section 13" and "child without father's information".[112] These two types of registration are not permanent, and it can be varied according to the order from the Syariah Court with regards to the child's status, pursuant to section 27 of the Births and Deaths Registration Act 1957.[113] Such two types of systems are elaborated as follows:

1. The first type holds the information of an illegitimate child who has information of their parents at the time of the registration and it can further be divided into three categories:
    (i) Where the parents of the child are not married,
    (ii) Where the parents' child is married but the marriage documents cannot be registered and
    (iii) Where the parents are married but the child is born less than 6 *qamariah* months.
2. The second type is for the child without father's information which means the illegitimate child only has the information of the mother. The second type will further be discussed in two categories:
    (i) firstly, there is no document of the father which includes the situations where the father is abroad or the child is birthed from rape or *syubhah* marriage.
    (ii) Secondly, when the mother refuses to disclose father's information. Before 2009, the National Registration Department's practice was to leave blank the part 'father's name' which will be replaced with 'tidak diketahui' in the birth certificate of the illegitimate child. Through National Registration Department Circular No. 8 2009, this practice was abolished in order to complement

[111] Ismail, Wan Abdul Fattah Wan, Syahirah Abdul Shukor, Lukman Abdul Mutalib, Ahmad Syukran Baharuddin, Zulfaqar Mamat, and Nik Salida Suhaila Nik Salleh. " Factors and Solutions for Illegitimate Child Issue Among Muslims in Malaysia." INSLA E-Proceedings 3, no. 1 (2020): 139

[112] Wan Abdul Wan Ismail et al., "A Comparative Study of the Illegitimate Child Term from Shariah and Malaysia Legal Perspective," Humanities & Social Sciences Reviews 8, no. 4 (2020): 5, https://doi.org/10.18510/hssr.2020.8412.

[113] Ibid, page 7

Section 13A of the Births and Deaths Registration Act 1957[114]. Furthermore, the National Registration Department will not accept a birth registration for the biological father's name to be included in the child's name in the birth certificate if certain documents (marriage certificate or the child was born less than 6 months from the date of the marriage) are incomplete.

As far as Section13A (2) is concerning, in the case of ***Yew Yin Lai v Teo Meng Hai & Anor [2013] 8 MLJ 787***, the High Court held that through Section 13A (2), it is not compulsory under this provision for a married Chinese woman in Malaysia to put her husband's surname as child's surname. If the child is an illegitimate child, then the mother or a male who admits he is the father can apply for his surname to be entered in the register of birth or they can also register any name. However, this case was related to non-Muslim parties, which is different from the current case.

## 9.0. CONSTITUTIONAL DILEMMA IN REGISTERING MUSLIM'S ILLEGITIMATE CHILD & RECONCILIATION WITH ISLAMIC LAW OF LEGITIMACY

From the judgment of the case, it is understood that the constitutional dilemma created herein is basically on the application of the laws with regards to the ascription of paternity of the child, whereby the federal law allows entering of surname of father towards illegitimate child, while the state enactment and the fatwa prohibit Muslim illegitimate child to be ascribed his/her paternity to the biological father. On its surface, one might perceive that apparently, the federal law somehow allows registration of illegitimate child with his or her biological father's surname, which indirectly contrary to the prohibition of ascription of paternity enlightened in the state enactment and the fatwa. Thus, the ultimate issue for the discussion now is to unveil whether there would be a ray of hope for a harmonious application of both sets of legislative and statutory regime of federal law and state law in clarifying the said constitutional dilemma.

## 9.1. HARMONIZING BDRA 1957 TOWARDS MUSLIM & THE PRACTICE OF NRD

Thus, the initial step in this discussion is to figure out whether the statutory provision under the BDRA 1957, particularly section 13A (2) regarding the additional information to be added to the illegitimate child, including the surname of the father, is a *Syariah*-compliant provision in the sense that it is not a law which contrary to the Islamic law. Generally, it is submitted that the Section 13A (2) apparently seems to be contrary to the principles of illegitimate child under the *Syariah* (as codified in State Enactment and explained in the fatwa) since it allows the child to be registered to his biological father's surname. However, looking into a more critical view of Section 13A (2) of BDRA 1957, whether it really contravenes the Islamic law under the State?

Thus, it is suggested that, despite merely looking at the wording of statutory provision per se, it is also relevant to observe how such words are interpreted in the actual operational mechanism of

[114] Zulkifli Hassan. "Kedudukan Anak Tak Sah Taraf Menurut Perspektif Undang-Undang". (Universiti Sains Islam Malaysia), Slide Presentation. https://www.zulkiflihasan.com/wp-content/uploads/2008/05/Analisa-Kes-Anak-Tak-Sah-Taraf-di-Mahkamah-Syariah-dan-Mahkamah-Sivil.pdf

registration of Muslim illegitimate child as executed by the NRD pursuant to the BDRA 1957. In practice or in conventional practice, NRD would generally enforce BDRA 1957 in the context of registration of illegitimate child in Malaysia, however, when it comes to the illegitimate child of Muslims, ordinarily the NRD would widen the application of BDRA 1957 by exercising the discretion under such Act to also consider legitimacy principles under the *Syariah* applicable to the parties while registering the particulars of the illegitimate child of Muslims. This convention has been long practiced by the NRD where illegitimate child of Muslim (such as who are born within 6 *qamariah* months) would not be given name as to ascribe "bin/binti" to the biological father, or the said illegitimate child would be ascribed "bin Abdullah" or other 99 names of Allah on the birth registers which was endorsed as application under Section 13. [115]

Thus, it can be observed, based on the practice and convention applied by the NRD itself, BDRA 1957 is interpreted accordingly to make it compatible with Islamic law, whereby for illegitimate child of Muslims, the discretionary power of DGNR would be duly exercised to make a decision which is not causing any conflict of laws. Furthermore, based on a study, it is found that NRD recognized that registration of illegitimate child under Section 13 for Muslim is temporary in nature which is subject to changes under Section 27(3) in accordance with the order of the Syariah Court deciding on point of legitimacy. [116] Based on the practice, it can be said that this is a conciliatory approach which can be seen in practise where the conduct of NRD is not arbitrary but was guided by both set of laws. It is commented that this is a good administrative and executive move by the NRD to ensure accuracy and genuineness of information and details of the illegitimate child of a Muslim, in line with the personal law which the parties are subjected to in order to avoid inconsistency between both laws.

## 9.2. CASE STUDY FOR HARMONIZATION & MECHANISMS OF HARMONIZATION

As far as harmonization is concerned, it is pertinent to observe a case study based on a real court case happening in Indonesia, whereby the law, by virtue of Article 43 paragraphs (1) of Marriage Law, it states that "a child born out of wedlock (Anak Luar Kawin) only has the civil relationship with his/her mother and his/her mother's family". Thus, by the effect of this provision, the illegitimate child has no rights to civil rights like legitimate child having to their biological father, including maintenance, inheritance and guardianship. However, the Constitutional Court (Mahkamah Konstitusi) by its decision No. 46/PUU-VII/2010, regarding illegitimate children, held a decision, on basis of upholding the rights of illegitimate child, to extend the family relation to the father as well.[117] In its ground of judgment, the Indonesian Constitutional Court reasoned that the said law is contrary to the Constitution of the Republic of Indonesia Year 1945 (such as Article 27, 28B and 28I on the

[115] Ismail, Mohd Hazwan, and Jasni Sulong. "Maintenance Position For Illegal Children From Biological Fathers: A Study In Penang." Journal of Fiqhiyyat 1, no. 1 (2021): 43

[116] Wan Ismail, Wan Abdul Fattah, Syahirah Abdul Shukor, Lukman Abdul Mutalib, Ahmad Syukran Baharuddin, Zulfaqar Mamat, and Nik Salida Suhaila Nik Salleh. " Factors and Solutions for Illegitimate Child Issue Among Muslims in Malaysia." INSLA E-Proceedings 3, no. 1 (2020):140

[117] M. Nurul Irfan, Anak Luar Nikah Pasca Putusan Mahkamah Konstiusi Perspektif Konsep Nasab dalam Hukum Islam, Madania Scientific Journal, Vol. 16, No. 1, June (2012), 1 as cited in Habibi, Ahmad Rizza. "The Dynamics of Illegitimate Child Status in Sharia and National Law of Indonesia: Is There a Harmonization?" Al-Manhaj: Journal of Indonesian Islamic Family Law 3, no. 1 (2021):71

right of child to survical, to grow, to develop, and to be protected from any discrimination) [118] since it eliminates all legal relationships with the man who is proven legally or scientifically to have filiation.[119] However, kindly note that the child born in this Indonesian case is considered illegitimate under the national law not because of adultery (zina), but because of a *sirri* marriage (illegitimate marriage, whereby marriages that have fulfilled the requirements in *fiqh,* but it was not done in the presence of the Marriage Registrar (PPN) to be listed pursuant to the applicable regulations (Article 2 Marriage Law)).[120]

As similar like the Federal Court as this paper discuss, this Indonesian court's decision had sparked controversy, particularly when it is said to be contrary to Islamic principles of the rights and status of illegitimate child, resulting to "a change in the formulation of article 43 of Marriage Law and making all children born outside of legal marriages get the lineage *(nasab)* from their father",[121] by which it may also potentially open the floodgate to also extend the rulings for other categories of illegitimate child under the national law including the child born pursuant to adultery practices (*zina*). This would be apparently contradicting with established principles in *Syariah* and its objective *(Maqasid*).[122] Pursuant to the Constitutional Court's ruling, it has been commented that conflict of laws can be occurred if such ruling is to be applied in the context of children born outside of marriage due to adultery *(zina)* by establishing the lineage or *nasab* for the said illegitimate child, since Islamic law, by virtue of its fundamental objectives *(Maqasid Syariah),* aims to protect, inter alia, the lineage of a person and therefore, a child born as a result of *zina* could not form his or her lineage to his or her father since there is no valid marriage happening in the first place.[123]

In the effort of harmonization, it must be firstly cautioned that any attempt at harmonisation between *Syariah* and law, should be carried out with full awareness of Islamic legal foundation, its religious texts to prevent secularising Islamic law under the banner of harmonisation. If this specific methodological step in harmonization effort of the law is duly adhered with, it can preventively avoid the risk of equating harmonization for rewriting Islamic law by secularizing it with non-Islamic legal constructs.[124] Furthermore, in the course of harmonization, Professor Mohammad Hashim Kamali attempted to suggest a tentative methodology for harmonization by using the usul formulas such as selection of opinions *(takhayyur)*, amalgamation of opinions *(talfliq), Syariah*-oriented policy and

[118] Ibid page 72.
[119] Ab Rahman, Azman. "Konsep Fatwa dan Cabaran Penguatkuasaannya di Wilayah Persekutuan Kuala Lumpur." Journal of Fatwa Management and Research 2, no. 1 (2011): 50
[120] Ahmad Rizza Habibi, "The Dynamics of Illegitimate Child Status in Sharia and National Law of Indonesia: Is There a Harmonization?," Al-Manhaj: Journal of Indonesian Islamic Family Law 3, no. 1 (October 2021): pp. 70-80, https://doi.org/10.19105/al-manhaj.v3i1.4787, 73.
[121] Muhammad Taufiki, Konsep Nasab, Istilhaq, dan Hak Perdata Anak Luar Nikah, AlAhkam, Vol. XII, No. 2, (2012), 59 as cited in Ahmad Rizza Habibi, "The Dynamics of Illegitimate Child Status in Sharia and National Law of Indonesia: Is There a Harmonization?," Al-Manhaj: Journal of Indonesian Islamic Family Law 3, no. 1 (October 2021): pp. 70-80, https://doi.org/10.19105/al-manhaj.v3i1.4787, 73.
[122] Ahmad Rizza Habibi, "The Dynamics of Illegitimate Child Status in Sharia and National Law of Indonesia: Is There a Harmonization?," Al-Manhaj: Journal of Indonesian Islamic Family Law 3, no. 1 (October 2021): pp. 70-80, https://doi.org/10.19105/al-manhaj.v3i1.4787, 72.
[123] Habibi, Ahmad Rizza. "The Dynamics Of Illegitimate Child Status In Sharia And National Law Of Indonesia: Is There A Harmonization?." Al-Manhaj: Journal of Indonesian Islamic Family Law 3, no. 1 (2021):74-75
[124] Comparing Shariah with Law: Methodological Complexity in the Modern Context [2020] 1 ShLR, page 14.

governance *(siyasah shar'iyyah*), goals and objectives of Sharia *(maqashid al-shar'iyyah),* formal legal opinions by Mufti (fatwa), juristic discretion *(istihsan*), and through process of *ijtihad* (which is, generally, juristic process of making legal decision or ruling by exertion of a qualified *Mujtahid*'s mental faculty in the interpretation of revelations).[125]

In relation to the case study in Indonesia, it is observed that some studies that harmonization between *Syariah* and Civil law in this context is needed to prevent potential disharmony between Constitutional Court decision and the arrangement of children born because zina in Islamic law.[126] Such legal harmonization approach has been observed to be carried out by Indonesia Ulema Council (MUI), through their fatwa number 11 of 2012 concerning the position of children caused by zina and the treatment of them, where they have utilized the Kamali's approach where several methodologies has been applied such as making reference to Qur'an, hadith, ijma 'ulama, *atsar sahabat* and the juristic opinion under *fiqh* mazhab, and applying the rules of *ushuliyyah* such as *takhayyur, talfiq*, preventive measure under *sadd al-dẓari'ah* concept and others. [127] Based on the opinions of majority of jurists *(Jumhur)*, it was held that the lineage is determined due to the presence of marriage relationship.[128]

Despite this Indonesian case, in the Malaysian Federal Court's "Bin Abdullah'" case, the Federal Court has been presented with Fatwa with regard to the ascription of paternity of the illegitimate child, and the guidelines of naming the illegitimate child of Muslims. From our view, such Fatwa by the National Fatwa Committee has indeed applied harmonization approach in accordance with what has been explained earlier based on the principles of *Syariah* whereby it attempts to provide a ruling to clarify Muslim's position in the matter, despite Section 13A BDRA 1957 is in existence. However, in the factual matrix of the case, as stated earlier, the fatwa from National Fatwa Committee has not been recognized since no adoption and gazettement was made. Thus, as much as this paper advocates (in the previous part of discussion) for the application of the doctrine of harmonious construction in the mechanism of judicial interpretation of law to reconcile between two competing laws, it would also suggest that harmonization could be also done in the administrative or executive capacity by the relevant agencies or authorities. For instance, by ensuring legal force of fatwa through State adoption and gazette to effectuate such fatwa to refine the application of Section 13A towards Muslims. The legislature may also come into this picture in the effort of harmonizing the laws, whereby they can review the laws and the legal framework, as well as can suggest amendments if necessary (by which this would be explained in the suggestion part of this paper).

[125] Kamali, Hashim, "Sharī'ah and Civil Law: Towards a Methodology of Harmonization", Islamic Law and Society Journal, Vol. 14, No. 3 2007 as cited in Ahmad Rizza Habibi, "The Dynamics of Illegitimate Child Status in Sharia and National Law of Indonesia: Is There a Harmonization?," Al-Manhaj: Journal of Indonesian Islamic Family Law 3, no. 1 (October 2021): pp. 70-80, https://doi.org/10.19105/al-manhaj.v3i1.4787, 75-76

[126] Habibi, Ahmad Rizza. "The Dynamics of Illegitimate Child Status in Sharia and National Law of Indonesia: Is There a Harmonization?" Al-Manhaj: Journal of Indonesian Islamic Family Law 3, no. 1 (2021):75

[127] Irfan, M. Nurul, Nasab Dan Status Anak Dalam Hukum Islam, Jakarta: Amzah, 2013, page 13 as cited in Habibi, Ahmad Rizza. "The Dynamics of Illegitimate Child Status in Sharia and National Law of Indonesia: Is There a Harmonization?" Al-Manhaj: Journal of Indonesian Islamic Family Law 3, no. 1 (2021): 77

[128] Ibid

## 9.3. CRITICAL OBSERVATION ON THE MINORITY VIEW IN THE ISSUE OF ASCRIPTION OF PATERNITY IN THE COURSE OF HARMONIZATION

On the other hand, in the light of differences of juristic views in the issue of ascribing paternity of illegitimate child to the father and "Bin Abdullah" issue, it is pertinent to know whether such harmonization would be achieved if a ruling under the *Syariah* allowing ascription of paternity of illegitimate child to the biological father was preferred over the prohibition of such matter (as conclusively determined in the National Fatwa Committee and the State Enactment). Some proponents viewed that a ruling allowing ascription of paternity of the illegitimate child's father by allowing its name to be entered to the child must be taken into account, preferring dissenting juristic opinion like fatwa in Perlis while citing the opinion of one of prominent contemporary Muslim scholars, Dr. Abdul Karim Zaidan.[129] This scholar opinion was evidently upheld in the Terengganu's Syariah High Court case of ***Zafrin Zulhilmi bin Pauzi v Noor Aini bt Nasron [2013] 2 SHLR 39*** where the Syariah High Court affirming that the child born within 6 *qamariah* months to be ascribed to her father and to allow the registration of such. The applicant father and the respondent mother have agreed to such for such ruling and there was no objection towards it. However, it was also held that the applicant could not be the guardian *(wali)* of the child and would not inheriting each other. [130]

If one would observe critically the statement of Dr. Abdul Karim Zaidan, he generally agreed that the stronger opinion is that the child born as a result of adultery should not be ascribed to his or her illegitimate father either the said father marrying the mother and the mother gives birth to the child within the 6-months span, or not.[131] However, it is important to know that Dr. Abdul Karim Zaidan had also stated that the said illegitimate child (since the child was born less than 6 *qamariah* months) may be ascribed to the father if the father has not asserted that the child is the child born as a result of his adulterous act, where the child may be ascribed according only to the worldly *laws (al-ahkam al-dunya)*,[132] where the *nasab* would not change the status of *wali* and inheritance by which the said father was not entitled or have rights to.[133] The same ruling would be applicable if the said illegitimate father is married to the mother in the event where the father is silent (and not asserted that the child was from adulterous act) or insisting the ascription of the illegitimate child.[134]

It is important to observe that the core condition before ascribing that the paternity of the said child is that the father has not asserted that the child is the child born as a result of his adulterous

[129] "'Bin Abdullah' Case: Uphold Child's Right to Name, Identity, Family," Aliran, February 20, 2020, https://aliran.com/civil-society-voices/bin-abdullah-case-uphold-childs-right-to-name-identity-family/.
[130] Mutalib, Lukman Abdul, Zulkifli Hassan, and Irwan Mohd Subri. "Keputusan Mahkamah Tinggi Syariah Terengganu Tentang Nasab Anak Tak Sah Taraf: Krisis Perundangan?." Al-Qanatir International Journal of Islamic Studies (2015): 3
[131] Al-Mufassol fi Ahkamil Mar'ah wa al-Bayt al-Muslim fi al-Shari'atil Islamiyyah, juzuk kesembilan, percetakan Muassasah Al-Risaalah, Beirut, Lebanon, cetakan ketika 1417H/ 1997M., pada muka surat 384, atau pada butiran 9924 as cited in Mat Rashid, Azizah, and Nor 'Adha Abdul Hamid. "Kajian Awal Kerangka Undang-Undang Sedia Ada Bagi Anak Tak Sahtaraf ." E - Jurnal Penyelidikan Dan Inovasi 2, no. 2 (2014): 86
[132] Ibid
[133] Hassan, Zulkifli, Irwan Mohd Subri, and Lukman Abdul Mutalib. "Analisa Kes Melibatkan Anak Tak Sah Taraf Di Mahkamah Syariah," (n.d): 17
[134] Al-Mufassol fi Ahkamil Mar'ah wa al-Bayt al-Muslim fi al-Shari'atil Islamiyyah, juzuk kesembilan, percetakan Muassasah Al-Risaalah, Beirut, Lebanon, cetakan ketika 1417H/ 1997M., pada muka surat 384, atau pada butiran 9924 as cited in Mat Rashid, Azizah, and Nor 'Adha Abdul Hamid. "Kajian Awal Kerangka Undang-Undang Sedia Ada Bagi Anak Tak Sahtaraf ." E - JURNAL PENYELIDIKAN DAN INOVASI 2, no. 2 (2014): 86

act.[135] However, it is submitted that in the current Federal Court's case, it is undisputed fact that the child is an illegitimate child under the Muslim law.[136] According to Section 2 of the Islamic Family Law (State of Johore) Enactment 2003 (a law which applicable to the parties in the case at that material time) defines "illegitimate" in relation to a child, means born out of wedlock but not as a result of *syubhah* intercourse. Being an undisputed fact, it can be implied that the parties concurred that the child is a child born out of wedlock. Thus, it is doubtful whether the condition put by Dr. Abdul Karim Zaydan has been complied with whereas the father should not assert the fact that the child was a result of an adulterous act, but at the same time, the child is undisputedly illegitimate, by which according to the said definition, it would mean a child born out of wedlock. This is different from the cited Syariah High Court's case case of ***Zafrin Zulhilmi bin Pauzi v Noor Aini bt Nasron [2013] 2 SHLR 39*** where both father and mother had, from the outset, contended that the child, despite born within the 6-months span, are legitimate child of themselves, and that the child should have been ascribed paternity to the father.

Therefore, it is commented that, in the effort of harmonization, it is a must to critically observe whether there have been truly sufficient adherence and attention to the prescribed requirements before justifying a view (such as Dr. Abdul Karim Zaydan's view) to be taken in a circumstance of the case. This is to ensure that it is truly reflected the position in *Syariah*, to enable it to be harmonized with the civil law. It is important to highlight that, as stated earlier, even Dr. Abdul Karim Zaydan himself conceded that the stronger view (or the *rajih* opinion) in *Syariah* is that the illegitimate child could not be ascribed his or her paternity to the father. Furthermore, there has been also commentary suggested that the said Syariah High Court's case to be reviewed, not because of error of law, but to clarify with absolute clarity the position of the child born is a period lesser that the 6 *qamariah* months span.[137] Premised on the *rajih* opinion, it could be said that the *Syariah* is highly meticulous on determining the legitimacy and paternity of a child to safeguard that the lineage of the child is pure and genuine without any mixture of third-party lineage.[138]

## 10.0 TILTING THE BALANCE BETWEEN THE RIGHT OF THE CHILD TO IDENTITY & THE WISDOM BEHIND PROHIBITION OF ASCRIPTION OF PATERNITY OF ILLEGITIMATE CHILD

In adding the strength to effort of harmonization of laws, it is better to know the balance and comparison *(muqaranah)* between the right of the child to identity and the prohibition of ascription of paternity in case of illegitimate child. Both competing rights must be duly observed with for a more balanced discussion, without disregarding either opinion.

### 10.1. TWO COMPETING VIEWS: TO ASCRIBE OR NOT TO ASCRIBE PATERNITY?

[135] Hassan, Zulkifli, Irwan Mohd Subri, and Lukman Abdul Mutalib. "Analisa Kes Melibatkan Anak Tak Sah Taraf Di Mahkamah Syariah," (n.d):16

[136] Para 4 of the Federal Court's "Bin Abdullah" case.

[137] Hassan, Zulkifli, Irwan Mohd Subri, and Lukman Abdul Mutalib. "Analisa Kes Melibatkan Anak Tak Sah Taraf Di Mahkamah Syariah," (n.d):1

[138] Ibid, page 20

Generally, there are proponents advocating that the illegitimate child should be ascribed to the father, and that the "Bin Abdullah" should be duly removed from the illegitimate child's name on basis that the child has right to the identity, and with the presence of "bin Abdullah", it would be stigmatizing such child. As such, Sisters in Islam argued that if an illegitimate child would not be ascribed to the father but instead to any other names, it would have the effect that the Muslim child is being stigmatized as "illegitimate" bearing his or er parents' sin of conceiving the child out of wedlock.[139] This is in contrary to the principle of best interest of the child since it would deprive the child's rights and entitlements as a member of a family, as well as putting the child in stigma.[140] This was also the stance of the Malaysia's Human Rights Commission (Suruhanjaya Hak Asasi Manusia Malaysia, SUHAKAM) which advocated children's equal rights in its effort to prevent stigma and discrimination since all children have equal rights to name, identity and nationality.[141]

On the other hand, there is also other proponents that contented the illegitimate child shall not be ascribed his or her paternity to the father on the basis that the ascription of paternity would be contrary to the basic objective of *Syariah*, that is to protect the lineage (*Hifz al-Nasal*). This is basically what was concluded at the National Fatwa Committee, and what was enshrined the State enactment through Section 111 of the Islamic of the Family Law (State of Johore) Enactment 2003. According to the former Perak Mufti, who was one of the prominent religious scholars in Malaysia, the late Tan Sri Harussani Zakaria, opined that said fatwa by NFC is in line with *Syariah*, and that the Muslims must strictly adhered to it regardless of whether the worldly laws allow such.[142] In rebutting the argument on the rights of the child and the discrimination, it can be observed that Ustaz Abd ur-Rahman Mohamed Amin, a lecturer at the Universiti Teknologi PETRONAS (UTP) stated that even if the child is considered illegitimate under the *Syariah*, they still have the rights to a living as a normal child, where they should be given protection, fundamental necessities, and necessary education without any discrimination.[143]

Notwithstanding both opinions, it is pertinent for this paper to determine, on the balance, which of the views would promote the best choice to the best interest not only for the parties to the case, but also to the Muslim Ummah at large. In any matters not limited to the issue of illegitimate child per se, it is a must to have the utmost safeguard to the ultimate objectives of *Syariah* (*Maqasid Syariah*) so that a decision or a matter would be ensured to be within the permitted boundaries as prescribed by the *Syara'* and would not transgress such limit. Islam do have a serious attention to the status of a child whether he/she is illegitimate or not, since it will have direct legal consequences to

[139] "Ahead of 'Bin Abdullah' Ruling, SIS Calls to Uphold Best Interest of Child," Malaysiakini, November 15, 2019, https://www.malaysiakini.com/news/499955.
[140] Ibid
[141] "Malaysia: Federal Court Holds That Illegitimate Muslim Child Cannot Use Father's Last Name," The Library of Congress, accessed November 28, 2021, https://www.loc.gov/item/global-legal-monitor/2020-03-06/malaysia-federal-court-holds-that-illegitimate-muslim-child-cannot-use-fathers-last-name/.
[142] Yadim -, "Isu Bin Anak Luar Nikah: Umat Islam Wajib Patuh Hukum, Syariat," Yayasan Dakwah Islamiah Malaysia, July 28, 2017, https://www.yadim.com.my/v2/isu-bin-anak-luar-nikah-umat-islam-wajib-patuh-hukum-syariat/.
[143] Hafizah Iszahanid, "Pelihara Anak Tidak Sah Taraf Ikut Syariat, Kemanusiaan," Berita Harian (Berita Harian, April 5, 2019), https://www.bharian.com.my/rencana/agama/2019/04/549142/pelihara-anak-tidak-sah-taraf-ikut-syariat-kemanusiaan.

the other rulings of the *Hukum Syara'*,[144] where it would give implication to the guardianship (*wali*), inheritance, familial relationships (such as aurat between the family). [145] [146] Thus, in so far as this issue is one of the controversial *khilafiyyah* or *ijtihadiyyah* (a matter which gives rise to differences of juristic opinions due to absence of conclusive rulings), [147] it is a must to consider holistically the good *(maslahah)* and the bad *(mafsadah)* pursuant to the issue of ascription of paternity to the illegitimate child,[148] and to decide accordingly based on such balance. [149]

## 10.2. BALANCING THE VIEWS IN THE LIGHT OF *MAQASID AL-SYARIAH*

As far as the Objectives of *Syariah (Maqasid al-Syariah)* are concerned, it is the meanings and wisdoms set by *Syari'ah Islamiyyah* in the sanctioned rulings as well as the secrets behind it with the purpose of protecting the welfare of humans.[150] It must be understood *Maqasid al-Syariah* could be categorized according to the certain themes and categories, such as firstly, based on the level and degree of necessity where matters are accordingly classified into either of three categories; (1) *al-Dharuriyyat* (the essentials or necessites); (2) *al-Hajiyyat* (the needs); and (3) *al-Tahsiniyyat* (the complementary).[151] As for *Hifz al-Nasab or al-Nasal* (preservation of lineage), it falls under the first limb, i.e., al-Dharuriyyat and it is compulsory to be protected or otherwise would collapse the public order.[152] *Syariah* is revealed to protect the overall structure and order of the society through the five necessities which, inter alia, includes the protection of lineage.

In this context, *Syariah* only permits attribution of paternity only to a child legitimately conceived within a period of a valid marriage, by which *Syariah* guarantees the child's right to have a proper lineage and be the product of legitimate wedlock.[153] At the same time, the *Syariah* commands Muslims to avoid from shameful deeds and adultery (*zina*). [154] Through this conduct, *Syariah* protect the child to have a proper and genuine identity resulting from a legitimate lineage. The status of illegitimate child is based on a Hadith which stated that "a child is associated with a bed (legal marriage), while a person who commits adultery, then he gets a loss." *(al walad lil firash wa lil ahir*

[144] Ismail, Wan Abdul Fattah Wan, Syahirah Abdul Shukor, Lukman Abdul Mutalib, Ahmad Syukran Baharuddin, Zulfaqar Mamat, and Nik Salida Suhaila Nik Salleh. " Factors and Solutions for Illegitimate Child Issue Among Muslims in Malaysia." INSLA E-Proceedings 3, no. 1 (2020): 136

[145] Fatwa Kebangsaan, kali ke 57, 10 Jun 2003 as cited in Abdullah, Mohd Azhar, and Muhammad Lukman bin Ibrahim. "Kedudukan Anak Tak Sah Taraf Dalam Sejarah Awal Islam." Jurnal KIAS 9, no. 1 (2014): 103-123

[146] Kasa @ Muhyiddin, Mastura. "Penasaban Anak Tak Sah Taraf Menurut Perspektif Maqasid Syariah," (2009):4-5

[147] Abdullah, Mohd Azhar, and Muhammad Lukman bin Ibrahim. "Kedudukan Anak Tak Sah Taraf Dalam Sejarah Awal Islam." Jurnal KIAS 9, no. 1 (2014)

[148] Ibid

[149] Kasa @ Muhyiddin, Mastura. "Penasaban Anak Tak Sah Taraf Menurut Perspektif Maqasid Syariah," (2009): 45

[150] Luqman Tarmizi, "Irsyad Usul Al-Fiqh Series 33: Introduction to Maqasid Al-Syari'ah," Pejabat Mufti Wilayah Persekutuan, March 6, 2019, https://muftiwp.gov.my/en/artikel/irsyad-usul-fiqh/3099-irsyad-usul-al-fiqh-33-introduction-to-maqasid-al-syariah.

[151] Dr. Ahcene Lahsasna. "Consumer Protection in the Context of Regulatory Efforts and Maqasid al Shariah". (Berjaya Times Squre, 9th April 2019). Slide Presentation. https://www.mfpc.org.my/wp-content/uploads/2019/04/ahcene.pdf

[152] Ibid

[153] Disa, Mahamad Naser. "An Evaluation of The Implementation of Sharī 'ah Law of Malaysia in Protecting the Rights of a Child." Al-Itqan: Journal Of Islamic Sciences and Comparative Studies 2, (2018):10

[154] Kasa @ Muhyiddin, Mastura. "Penasaban Anak Tak Sah Taraf Menurut Perspektif Maqasid Syariah," (2009):71

*alhajur*).[155] Generally, most scholars agreed that a child born due to adultery cannot be connected to his biological father's lineage.[156]

In the author's analysis, it is submitted that the right of child to identity should also include the right of child towards the genuineness of lineage, whereby the child has the right to genuinely know the root of his familial lineage. This right would be doubted to be achieved if the illegitimate father ascribed his name and paternity to the illegitimate child even when the child is born out of a lawful wedlock, putting a veil towards the child's right to know genuineness of his or her lineage and relationship with his or her respective parents. It is said that preserving lineage are among the ultimate priorities in the value chain of *Syariah* system because the recognition of lineage is the anchor for many other rights such as inheritance and guardianship *(wali).* [157] If illegitimate child is permitted to inherit or bear the name of the biological father, it may cause chaos to the *nasab* of the entire Muslim community.[158]

For another categorization of *Maqasid al-Syariah*, is, inter alia, includes categorizing *Maqasid* based on the comprehensiveness of the *Maqasid* itself, whereby it encompasses *Maqasid al-Ammah* (where such objectives are general objectives where the *Syariah* intends to protect in all spheres of life such as the principles of justice *(al-'adalah),* facilitation *(taysir),* public interest *(maslahah),* elimination of hardship *(raf'u al-harj)* and other general principles); Secondly*, Maqasid al-Khassah* (by which the objectives is observed in the light of topics or areas of the Syariah such as Islamic criminal law or Islamic family law); and thirdly, *Maqasid al-Juziyyah* (by which the objectives is observed in specific legal rulings in specific issue).[159] In the context of ascription of paternity of illegitimate child, the *Syariah*, in accordance with the principles of justice, is fair and just to sanction that the illegitimate child not to be ascribed to their parents since it protects the pure lineage of Muslim children at large from being mixed with others. If an illegitimate child is permitted to be ascribed to the father, in the long-term run, the society would be in absolute confusion and hardship in figuring out their legitimate root of family due to mixing of lineage, what more when this issue is intertwined with other matters in *Syariah* such as inheritance (whether a person would be entitled inherit from another and vice versa) and others. It is not fair and just to drag the whole system in chaos.

In the light of Islamic family law, it is said that the *Maqasid* behind such area of *Syariah (Maqasid al-Khassah)* is to protect the lineage and to ensure the best interest of the child.[160] It is said that the very foundation of family is *nasab*, i.e., a pure relationship or blood ties that eternally bonds family members obtained through a formal marriage of the parents, where the absence of such *nasab* will result into

[155] Al-Bukhârî, Shahîh al-Bukhârî, Hadis no. 2053; Muslim, Shahîh Muslim, Hadis no.1457; Sunan Abî Dâwûd, Hadis no. 2273; Sunan alTirmidzî, Hadis no. 1157; Sunan al- Nasâ'î, Hadis no. 3482; Sunan Ibn Mâjah, Hadis no. 2006; al-Muwaththa` Mâlik, Hadis no. 20; Musnad al-Syâfi'î, Hadis no. 1201.

[156] Habibi, Ahmad Rizza. "The Dynamics of Illegitimate Child Status in Sharia and National Law of Indonesia: Is There a Harmonization?" Al-Manhaj: Journal of Indonesian Islamic Family Law 3, no. 1 (2021):75

[157] Ibid, page 10

[158] "Bin/Binti bapa biologi boleh cetus kekeliruan", Berita Harian Online, August 30,2017, https://www.bharian.com.my/berita/nasional/2017/08/307864/binbinti-bapa-biologi-boleh-cetus-kekeliruan.

[159] Nur Mardia Mazri et al., "Kedudukan Ilmu Sains Dan Teknologi Dalam Menentukan Hukum 'Iddah Dan Kesannya Terhadap Maqasid Syariah," International Journal of Business, Economics and Law 18, no. 6 (April 2019): 70-80.

[160] Anas bin Nordin "Kedudukan Anak tak sah taraf". Slide Presentation. https://www.sppim.gov.my/pdf/panduan/kedudukan_anak_tak_sah_taraf.pdf

adverse consequences of many rights and responsibilities.[161] Arguably, it is not for the best interest of the child if the child is deceived when the matters regarding his or her illegitimacy is concealed due to ascription of paternity to the father. [162] Some would argue that letting an illegitimate Muslim child know of his or her status from an early age (through non-ascription of paternity and to the use of "bin Abdullah" or its alternatives) could be better, psychologically and mentally, rather than having them discover his status at a later stage of their lives.[163]

The concern relating to *Hifẓ al-Nasl* or *al-Nasab* where the *Syariah* ensure proper and legitimate lineage would be even rocketed taking into account the alarming rate of the illegitimate child, whereby it was recorded that about 25,567 illegitimate child was registered at the National Registration Department since 2019 until early 2020 for marriage which has not yet sustained 6-months span.[164] In view of increasing numbers of illegitimate child, if one would allow paternity to be ascribed by the father of illegitimate child to the said illegitimate child, it would allow significant number of people to by-pass the objectives of *Syariah* while being in contrary to the concept of preservation of lineage. In ensuring accuracy and genuineness of lineage, taking into account the increase in number of illegitimate children, it is better for the child not to be ascribed to father, otherwise it would cause great confusion on the general public on the status of the child to the detriment of other matters, such as law of inheritance, guardianship in marriage, the question of incest, and many other things related to Islamic family law.[165] Thus, preventing ascription of paternity of illegitimate child, from our analysis, is more compatible with the *Maqasid al-Syariah*.

### 10.3. The Potential Existence of Stigma of the Illegitimate Child: Whether It is Justified?

As could be observed earlier, some would argue that ascribing "bin Abdullah" to a Muslim child born out of wedlock in the official documents while refusing to ascribe the name of the said child's father would carry a stigma where the innocent child would be subjected to humiliation, discrimination and public scorn for the rest of his life.[166] *Syariah* is said to be unfair to label them as "anak tak sah taraf" (illegitimate child) and to put the child in embarrassment where the child would

[161] MdZawawi, A. B., Wan Ab. Rahman Khudzri W. A. & Wan Ibrahim, W. A. (2011). Research on the Fatwa of Nasab Rulings in Malaysia. 2nd International Soft Science Conference, Oscar Saigon Hotel,Ho Chi Minh, Vietnam pada 23-25 November 2011 as cited in Abu Bakar, Md Zawawi, Wan Ibrahim Wan Ahmad, and Mahyuddin Abu Bakar. "Registration Problems of Illegitimate Children among Muslims in Malaysia." Journal of Islamic Studies and Culture 5, no. 1 (2017):10

[162] Kasa @ Muhyiddin, Mastura. "Penasaban Anak Tak Sah Taraf Menurut Perspektif Maqasid Syariah," (2009):104

[163] "Malaysia: Federal Court Holds That Illegitimate Muslim Child Cannot Use Father's Last Name," The Library of Congress, accessed November 28, 2021, https://www.loc.gov/item/global-legal-monitor/2020-03-06/malaysia-federal-court-holds-that-illegitimate-muslim-child-cannot-use-fathers-last-name/.

[164] Nor Fazlina Abdul Rahim, "Jpn Kaji Dasar Pendaftaran Anak Tak Sah Taraf," Berita Harian (Berita Harian, February 20, 2020), https://www.bharian.com.my/berita/nasional/2020/02/657401/jpn-kaji-dasar%09pendaftaran-pendaftaran-anak-tak-sah-taraf%20%5B26%20April%202020.

[165] Wan-Ibrahim, W. A., Wan Ab Rahman Khudzri Wan Abdullah, Zawawi Abu Bakar, and H. A. R. Asyraf. "Illegitimate child in Malaysia." Advances in Natural and Applied Sciences 7, no. 4 SE (2013): 369

[166] Professor Dr Ashgar Ali Ali Mohamed, "Solving the 'Bin Abdullah' Dilemma: New Straits Times," NST Online (New Straits Times, August 10, 2017), https://www.nst.com.my/opinion/letters/2017/08/266075/solving-bin-abdullah-dilemma.

not bear the name of his or her father. [167] Some would even suggested that by labelling the child illegitimate would contribute to more baby dumping cases.[168]

Fundamentally, it is highly essential to emphasize from the very beginning that the legal rulings whether to allow or disallow illegitimate children to bear their father's name, is not meant to subject innocent children to the sins of their parents and to unfairly subject the child to social stigma, but instead, it must be strictly understood in the context of safeguarding the integrity of lineage or progeny from being adversely compromised,[169] which consequently lead to far-reaching impacts on other substantive issues involving the administration of various branches of sharia, including on inheritance, marriage, guardianship, and others. [170] It would be unfortunate that the adverse impacts to the integrity of *nasab* or lineage through recognition of illegitimate child as legitimate, is more significant compared to the shame that the illegitimate child must endure. [171] By this act, it would be somehow prioritizing interests of the private entities over the interest owed to the general community at large, which is generally not acceptable. Furthermore, the argument that ascribing "Bin Abdullah" to a child would cause embarrassment to the child is highly doubtful whereby it is merely based on prejudices of certain individuals which is said to have no basis in Islam. [172] It is also the duty of the relevant authority to educate the society to eliminate social stigma against illegitimate child.[173] Thus, it is appropriate to say that two wrongs do not make a right, where the presence of inevitable social stigma per se does not render ascription of paternity of illegitimate child to his or her father in contravention with the principles and objectives of *Syariah*.

In this discussion, it is also relevant to refer to the statement by, Sohibus Samahah Dr. Zulkifli Mohamad Al-Bakri, Wilayah Persekutuan's Mufti (at that material time) where he stated that covering *'aib* or embarrassment is not a strong ground since the *Syariah* is clear on prohibiting ascribing "bin" or "binti" other than his or her father through a valid marriage. It is because that there are many sanctions or punishments in Islam is ordered to be implemented openly in public including the whipping punishment for *zina* offence. [174] Instead of narrowing the impacts towards the child such as the potential stigma of the child, some would argue that it should be viewed in a bigger picture in the light of alarming rate of *zina* cases.[175]

[167] Disa, Mahamad Naser. "An Evaluation of The Implementation of Sharī 'ah Law of Malaysia in Protecting the Rights of a Child." Al-Itqan: Journal of Islamic Sciences and Comparative Studies 2, (2018):8
[168] Erni Mahyuni, "Stop Calling Babies Illegitimate if You Don"t Want Baby Dumpling, The Malay Mail, March 29, 2017. https://www.malaymail.com/news/opinion/2017/03/29/stop-calling-babies-illegitimate-if-you-dont-want-baby-dumping/1344869
[169] Kasa @ Muhyiddin, Mastura. "Penasaban Anak Tak Sah Taraf Menurut Perspektif Maqasid Syariah," (2009):5-6
[170] "The Court of Appeal May Have Erred in the Bin Abdullah Case – Aidil Khalid," 1Media.My, August 4, 2017, https://www.1media.my/2017/08/the-court-of-appeal-may-have-erred-in.html.
[171] Noor, Zanariah. "Status Dan Hak Anak Tak Sah Islam Dalam Undang-Undang Di Malaysia." Sains Humanika 10, no. 3-4 (n.d.): 11 doi:10.11113/SH. V10N3-4.1539
[172] Ibid
[173] Ibid
[174] "Bayan Linnas Siri Ke-106 : Isu Penamaan 'Bin/Binti Abdullah' Kepada Anak Tidak Sah Taraf Oleh Mahkamah Rayuan," Pejabat Mufti Wilayah Persekutuan, November 3, 2017, https://muftiwp.gov.my/artikel/bayan-linnas/736-bayan-linnas-siri-ke-106-isu-penamaan-bin-binti-abdullah-kepada-anak-tidak-sah-taraf-oleh-mahkamah-rayuan.
[175] Mansor, Muhammad Hafiz and Muna Adila Che Rime. "Anak Tidak Sah Taraf dan Jenayah Zina di Malaysia" page 2

As for the argument that the illegitimate child is carrying the sin of the adulterous parents through the said prohibition of ascribing paternity, it should be clear that in Islam, the child is considered as totally innocent, where Islam does not in any way victimizing the said child based on the sins of the parents. [176] It is one of the principles in Islam that one person shall not be burden by the sin of others.[177] Necessary protection and assistance must be well provided for the child, regardless of the child's status. [178]

## 10.3. A GLIMPSE TO ISLAMIC LEGAL MAXIMS (AL-QAWAID AL-FIQHIYYAH) IN THIS ISSUE

It is well established that the Islamic Legal Maxims, i.e., the general proposition and rules which applicable to all its related particulars,[179] have their prevalent role of assisting the mujtahid in arriving at the appropriate ruling where there is no direct text is available on a particular matter.[180] It is fundamental to note that a legal maxim is not an authority by itself, rather it relies upon established sources of the law such as al-Qur'an, Hadīth and recognised *Ijmā'* and *Qiyās*. In other words, the integral function of a maxim is merely guiding the mujtahid in arriving to a *hukm*, and not as a source of *hukm*. Thus, for this purpose, it is relevant to observe some of such maxims:

1. **الضرر يزال (Al-Dharar Yuzal: Harm Must be Eliminated) or لا ضرر ولا ضرار (La Dharar Wa La Dhirar)** which means that (there shall be no harm inflicted nor reciprocated): In this context, in so far as the ascription of paternity of illegitimate child would adversely impact the integrity of lineage which is strictly protected in Islam. Furthermore, such act would also cause chaos to other consequential legal rulings such as causing confusion in inheritance, guardianships and others. In light of such harms and negative impacts, such harms shall be eliminated. [181]
2. **درء المفاسد مقدم على جلب المصالح (Dar'i al-Mafasid Muqaddam 'ala Jalbi al-Masalih**: the repelling of mischief is preferred to the attainment of benefits) –where if there is two simultaneous conflicting effect and causes in a matter – between a mischief and benefit, it is better to prevent and expel the said harm or mischief, rather to attain and acquire the benefit: In relation to this issue, it can be observed that there are certain disadvantages (*mafsadah*) in terms of harms to the principles of lineage and other established rulings in *Syariah*. [182] Thus, elimination of such

[176] Ibid
[177] Quran 17:15
[178] Ishaque, Shabnam. "Islamic principles on adoption: examining the impact of illegitimacy and inheritance related concerns in context of a child's right to an identity." International Journal of Law, Policy and the Family 22, no. 3 (2008):400-401
[179] Mohammad Hashim Kamali, Qawa'id Al-Fiqh: The Legal Maxims of Islamic Law, (UK, The Association of Muslim Lawyers, n.d.), 1. Accessed November 28, 2010, www.sunnah.org/fiqh/usul/Kamali_Qawaid_al-Fiqh.pdf. 11 Ahmad bin Muhammad Al-Hamawi, Ghamz 'Uyūn al-Basā'ir Sharh al- Ashbāhi wa al-Nazā'ir, vol. 1, (Beirut: Dār Al-Kutub Al-Ilmiyyah, 1405H/1985), 22, as cited in Shettima, M., Biu, H. A., & Deribe, M. A. A. (2016). The Relevance of Islamic Legal Maxims in Determining Contemporary Legal Issues. IIUM Law Journal, page 418.
[180] Muhammad Shettima, "Effects of the Legal Maxim: No Harming and No Counter-Harming on the Enforcement of Environmental Protection" IIUM Law Journal 19 (2011): 294, as cited in Shettima, M., Biu, H. A., & Deribe, M. A. A. (2016). The Relevance of Islamic Legal Maxims in Determining Contemporary Legal Issues. IIUM Law Journal, page 417.
[181] Kasa @ Muhyiddin, Mastura. "Penasaban Anak Tak Sah Taraf Menurut Perspektif Maqasid Syariah," (2009): iv
[182] Ibid, page 103

harms (which may be attained by prohibiting ascription of paternity of illegitimate child) must be prioritized over the benefits (which apparently, to enable the right of child to identity and to avoid social stigma).

3. **اليقين لا يزول بالشك (al-Yaqin la Yazulu bi as-Syak)** which means that doubt does not remove certainty: In this matter, it can be said that the argument on social stigma is basically devised upon mere probabilities which are not conclusively certain. It is not necessary that "bin Abdullah" would certainly lead to the child being stigmatized, since Abdullah is an ordinary name which means a servant of Allah and does not by itself connotes an illegitimate child. On the other hand, the harmful effects towards the integrity of lineage and other legal rulings as aforementioned is certain if an illegitimate child is to be ascribed his or her paternity to the biological father.

These are some the important legal maxims that are relevant in this matter, while the maxims are non-exhaustive by which it may be relevantly used in this context. Thus, in light of the aforementioned discussion, this author is of the view that the view prohibiting the ascription of paternity of illegitimate child is more in parallel with the spirit of *Syariah*, and is more reflecting the position and principles of *Syariah*. The prevalence should be given in favour of the prohibition of ascribing paternity of illegitimate child instead of permission of such action. The basis is to protect the public interest *(maslahah umum)* such as the implication of zina damaging the society, and the Islamic family structure as a whole, as comparaed to private interest *(maslahah khusus)* concerning potential stigma which may be faced by the illegitimate child.[183] Thus, it is reiterated that an illegitimate child under Islamic law is not attributable legally to his biological father and this ruling cannot be altered by a mere argument of possible stigma an innocent child would be subjected to.[184]

In this regard, it is to be emphasized that such preference does not in any way suggest that the potential stigma should be totally disregarded, but instead it is contended that such stigma could be prevented by due action and measures by the authority in educating and instilling the awareness of the society. In other words, while ensuring the protection of lineage and other matters in *Syariah*, preventive measures could also be carried out hand-in-hand with that regard. This would better promoting harmonious application of the laws. In other words, it is said that harmonious application of laws in the context of illegitimate child would render that the public welfare be afforded with protection, but will also ensure that it would not transgress the limitation set by the *Syara*' which has been predetermined by Allah.

## 11.0 SUGGESTIONS FOR HARMONIOUS ECOSYSTEM OF LAW & *SYARIAH* IN THE CONTEXT OF ASCRIPTION OF PATERNITY OF ILLEGITIMATE CHILD

[183] Noor, Zanariah. "Status Dan Hak Anak Tak Sah Islam Dalam Undang-Undang Di Malaysia." Sains Humanika 10, no. 3-4 (n.d.):65. doi:10.11113/SH. V10N3-4.1539; "Isu Anak Tidak Sah Taraf: Maslahah Umum Lebih Utama," Majlis Ulama ISMA, August 2, 2017, http://muis.org.my/2017/08/isu-anak-tidak-sah-taraf-maslahah-umum-lebih-utama/.
[184] Professor Dr Ashgar Ali Ali Mohamed, "Solving the 'Bin Abdullah' Dilemma: New Straits Times," NST Online (New Straits Times, August 10, 2017), https://www.nst.com.my/opinion/letters/2017/08/266075/solving-bin-abdullah-dilemma

Although apparently the court concluded on the issue that it affirms the prohibition of ascription of paternity by registering the name of the father to the illegitimate child, but still in reality or in practical implementation of laws, there are other factors which must be reviewed in order to create a strong, firm and consistent legal framework on this issue. It must be remembered that based on the Federal Court's judgment, it only affirms the NRD's act in refusing to ascribe the name of the father to the name of the illegitimate child, but held that the act of naming "bin Abdullah" by the NRD was unfounded due to the fact that primarily the national fatwa was not adopted and gazetted by the State. Thus, it is not sufficient to have sole reliance on this Federal Court's precedent, where there should be also supporting mechanism for a clear framework for the ascription and registration of Muslim illegitimate child. Certain measures may be taken by the relevant executive and legislature as will be elaborated in this part.

## 11.1. REVISITING EXISTING STATUTORY PROVISIONS & SUGGESTION FOR STATUTORY AMENDMENTS

There is overwhelming call for amendment of the BDRA 1957 so that to make it clear that it would not be an apparent contrary to the principles of *Syariah* regarding illegitimacy. Thus, the first suggestion in this paper is that the relevant authority through relevant legislature may make certain statutory amendments to avoid disputes or confusions.[185] Such call for amendment had even been initiated far before the decision of the Federal Court in 2020. This could be observed in the case of ***Mohd Faizol bin Zainal v Suhaila bt Yusoff [2014] 2 SHLR 83*** at the Syariah Subordinate Court, Kuala Terengganu, where the court suggested for statutory amendment upon finding Section 13 BDRA 1057 being contrary to the *Hukum Syara'*.

Among those who advocating such idea is Dr. Muhammad Fathi Yusof, a Research Fellow (Law and Constitution) at the Perdana Policy Centre of Razak Faculty of Technology and Informatics, Universiti Teknology Malaysia (UTM), who asserted that the BDRA 1957 should be amended by including specific provisions on the naming of illegitimate children of Muslims, in accordance with the guidelines and decision concluded by the Muzakarah Jawatankuasa Fatwa Majlis Kebangsaan bagi Hal Ehwal Ugama Islam Malaysia. [186] Such amendment is needed due to the fact that the existing provisions is, prima facie, not really compatible with Muslims, and to avoid potential disputes pursuant to the BDRA 1957. [187] *Syariah* principles concerning illegitimacy of child and ascription of their paternity should be integrated in the form of statutory provisions of BDRA 1957, and, thus, the practice and convention as administratively applied by NRD in referring Islamic principles on the point of ascription of paternity of illegitimate child alone is not sufficient where it must be pursued with necessary statutory codifications. [188]

[185] Professor Dr Ashgar Ali Ali Mohamed, "Solving the 'Bin Abdullah' Dilemma: New Straits Times," NST Online (New Straits Times, August 10, 2017) https://www.nst.com.my/opinion/letters/2017/08/266075/solving-bin-abdullah-dilemma

[186] Mutalib, Zanariah Abd. "Kerajaan Disaran Pinda Akta Berkaitan Penamaan Anak Orang Islam." Berita Harian. Berita Harian, February 14, 2020. https://www.bharian.com.my/berita/nasional/2020/02/655527/kerajaan-disaran-pinda-akta-berkaitan-penamaan-anak-orang-islam.

[187] Ibid

[188] Ibid

Apart from adding additional provisions in the BDRA relating to naming of illegitimate child of Muslims, Datuk Zainul Rijal Abu Bakar, the president of Muslim Lawyers Association of Malaysia (PPMM) suggested that the amendment towards BDRA 1957 (Act 299) is made to make certain exceptions in some provisions of the Act which apparently contravenes the *Hukum Syara'*, expressly making such provisions inapplicable towards Muslim.[189] It is argued that, in matters concerning illegitimacy and ascription of an illegitimate child's paternity, Islamic Family Law enactments shall be the main reference since it is more specific in its application towards Muslims, while BDRA 1957 is more of a general legislation.[190] This suggestion was also put forward by the Sharie Court judge, Kamalruazmi Ismail ShSUB J in the aforementioned case of ***Mohd Faizol bin Zainal v Suhaila bt Yusoff [2014] 2 SHLR 83*** where the court suggested, at paragraph [65], that the relevant statutory amendments so as to exempt the application of the said statutory provisions of BDRA 1957 towards Muslims, while Muslims would resort to the *Hukum Syara'*. This is in accordance with the practice of NRD which usually refused to register the name of the biological father to be ascribed to the name of the illegitimate child, if the child is found to have been born less that the 6-months span from the date of marriage. [191]

Furthermore, in this paper analysis, apart from suggestion to make additional provisions and the suggestion to create statutory exception on this matter, this paper would attempt a reconciliatory approach between both sets of laws by suggesting viable and practical amendment as follows:

1. To add and/or modify provisions empowering the discretionary powers of the DGNR or NRD to allow the reference to Islamic law be done in case concerning Muslim family where their personal law is duly governed by the State enactments and the Syariah courts. This would incorporate the administrative practices and conventions as applied by NRD.
2. Instead of putting total exception towards the statutory provisions as aforementioned, the provisions may be amended to qualify the general application of the said provisions, such as Section 13 and Section 13A whereby it would make that the sections would be applicable subject to the determination or decision of the Syariah Court (since it is within the Syariah Court's jurisdiction to determine of legitimacy and its related aspects), the relevant enactments and the state's fatwa.

As far as statutory amendment is concerned, it is also a must that the amendment not only limited to the provisions of the BDRA 1957, but such effort must also be reciprocated by the legislature at the State level to make necessary amendments towards the Islamic Family Law Enactments. Among suggested amendments for the state enactments is to add express and crystal-clear prohibition in the relevant statutory provisions (e.g., Section 111 of Johor's Islamic Family Law Enactment 2003) not to ascribe an illegitimate child to the biological father. It has been observed in a commentary towards the Terengganu Syariah High Court's case that allowed ascription of paternity of the child despite the child born within 6 *qamariah* months that there has been no specific and clear statutory provision that prohibit or prevent the court to allow the ascription and attribution of paternity for an illegitimate

[189] Adnan, Ahmad Suhael. "Pinda Akta 299 - PPMM." Berita Harian. Berita Harian, July 28, 2017. https://www.bharian.com.my/berita/nasional/2017/07/306596/pinda-akta-299-ppmm.
[190] Ibid
[191] Noor, Zanariah. "Status Dan Hak Anak Tak Sah Islam Dalam Undang-Undang Di Malaysia." Sains Humanika 10, no. 3-4 (n.d.): 65. doi:10.11113/SH.V10N3-4.1539.

child born less than 6 *qamariah* months.[192] In addition, the state legislature may provide statutory guidelines with regard to the naming of the illegitimate child – whether to be ascribed as "bin Abdullah" or other appropriate Allah's names. Since the related laws in this issue comprises of laws at both federal and state level, it is suggested that regular interaction being made between these two governments, to find the solution to issues relating to illegitimate child, and to observe any improvements that could be implemented which can benefit the application of laws at both levels. [193]

Notwithstanding the suggestions given, it is important to know that, despite calls for statutory amendments towards BDRA 1957 in the aftermath of the Federal Court's decision, as at 15th February 2020, according to Datuk Seri Dr. Mujahid Yusof, the Minister at the Prime Minister's Department (as he was then), the government has not yet planned on making statutory amendments towards BDRA 1957.[194] However, according to the Hansard for Parliamentary Debate dated 6th December 2018, according to Dato' Mohd Azis bin Jamman, the Deputy Minister of Home Affairs (as he was then), it was stated that the NRD, the Attorney General's Chamber was still observing the statutory provisions of the BDRA 1957 regarding illegitimate child.[195] Thus, apart from the suggestions for statutory amendment, it is suggested that the government to have strong willingness in ensuring the clarity of the legal framework on this issue.

## 11.2. IMPORTANCE OF GAZETTING STATE FATWA AND LEGAL RULINGS FOR BETTER ENFORCEMENT

It is pertinent to bring forth the fact that Fatwa in Malaysia has its own position and significant role in issues regarding Islamic law. There is no definition of fatwa that can be found in any statutes, but it can be understood as a formal ruling or interpretation on a point of Islamic Law given by Mufti in response to questions from individuals[196]. There are three types of fatwa practices in Malaysia: (i) fatwa produced by the Mufti together with the Fatwa Committee and gazetted, (ii) fatwa produced by the Mufti or through Fatwa Committee but is not gazetted lastly (iii) the personal opinion of the Mufti or his personal assistant[197]. For a fatwa to be legally recognized or in other term to have legal consequences, it must be gazetted. As mentioned in Section 34 of Administration of Islamic Law (Federal Territories) Act 1933 it stated that:

> 34. Fatwa
>
> (3) Upon publication in the Gazette, a fatwa shall be binding on every Muslim resident in the Federal Territories as a dictate of his religion and it shall be his religious duty to abide by and

[192] Zulkifli Hassan, Irwan Mohd Subri, and Lukman Abdul Mutalib, "Analisa Kes Melibatkan Anak Tak Sah Taraf di Mahkamah Syariah," (n.d):18

[193] Nor Fazlina Abdul Rahim, "Jpn Kaji Dasar Pendaftaran Anak Tak Sah Taraf," Berita Harian (Berita Harian, February 20, 2020), https://www.bharian.com.my/berita/nasional/2020/02/657401/jpn-kaji-dasar%09pendaftaran-pendaftaran-anak-tak-sah-taraf%20%5B26%20April%202020.

[194] "Isu Bin Abdullah: Tiada Cadangan Pinda Akta BDRA ," Astroawani.com, accessed November 28, 2021, https://www.astroawani.com/berita-malaysia/isu-bin-abdullah-tiada-cadangan-pinda-akta-bdra-mujahid-230796.

[195] DR Deb 06 December 2018, Bil 48, 122.

[196] Habibi, Ahmad Rizza. "The Dynamics of Illegitimate Child Status in Sharia and National Law of Indonesia: Is There a Harmonization?" Al-Manhaj: Journal of Indonesian Islamic Family Law 3, no. 1 (2021):2

[197] Kasan, Hasnan. "Institusi Fatwa Dalam Perundangan Negara: Satu Penilaian Menurut Siasah Syar'iyyah." Journal of Contemporary Islamic Law 1, no. 1 (2016): 17

uphold the fatwa, unless he is permitted by Islamic Law to depart from the fatwa in matters of personal observance, belief, or opinion.

(4) A fatwa shall be recognized by all Courts in the Federal Territories as authoritative of all matters laid down therein.

Therefore, once the fatwa has been gazetted and published, it has the same enforcement effect and spirit as any written law and the court shall recognized it. The applicability of the gazetted and published fatwa is only confined within the states. Article 74 and List II of Ninth Schedule through Federal Constitution has determined that matters related to Islamic Religion shall fall under state jurisdiction, and any fatwa issued by a state only binds the residents living in the state where the fatwa is issued.

In the case of ***Mohd Shafiee bin Arshad & Anor v District Officer Sibu [2021] 10 MLJ 506***, the High Court in this case had emphasized that the gazetted fatwa shall and will only bind the naming of an illegitimate child for an application after the gazetted fatwa has come into force. This case not only stressed on the binding effect of a gazetted fatwa, but also mentioned that a gazetted fatwa should not have a retrospective effect. This means a fatwa should be bound and effected to the residents of the state after it has been gazetted and published.

Hence, principally a view of a Mufti or a fatwa are generally not bound onto the residents of the state until and unless the fatwa is published and gazetted. There will be a significant impact towards method and procedure of registration of the illegitimate child. To ascribe the child with the father's paternity will only tarnish the sanctity of *Maqasid Syariah* specifically and especially under the protection of lineage and wealth.

## 11.3. ROLE OF THE AUTHORITY IN THE COURSE OF PROTECTING THE ILLEGITIMATE CHILD'S WELFARE AND EDUCATING THE SOCIETY TO CURB SOCIAL STIGMA

Apart from legislative role which has been duly enlightened earlier, this suggestion proposes the action that ought to be taken in administrative or executive capacity of relevant authority such as the federal and state government, its agencies and any other relevant entities. In order to counter the argument of potential discrimination and stigma that would be faced by the illegitimate child of Muslims, it is relevant to exert the executive function of relevant authority to provide protection to the welfare of the child as well as the child personally against such discrimination and social stigma respectively. The suggestion to exert the responsibility on the part of the authority is mainly due to the Hadith of the prophet Muhammad which stated that "Every one of you is a guardian and answerable with regard to his trust". [198] Thus, in the effort of ensuring harmonious application of laws with regard to the illegitimate child, there is also responsibility on the part of executive authority.

[198]al-Bukhari, Al-Imam Abi Abdullah Muhammad bin Ismail (1428H/2007M). "Bab al-'Abdu Ra'in fi Mali Sayyidihi" dlm. Sahih Bukhari. Kitab Al-'Itqu. Hadis No. 2558. Beirut: Dar al-Ma'arifah as cited in Ahmad, Abd Ghani, and Nuarrual Hilal Md Dahlan. "Kewajipan menanggung nafkah anak tak sah taraf: Satu kajian kes di Negeri Kedah." Kanun: Jurnal Undang-Undang Malaysia 28, no. 2 (2016): 236
hlm. 656.

Among the effective executive measures that could be taken is to create taskforce or a specialized committee for policy-making to make relevant policies, in addition to the applicable statutory provisions, to guide the administration of matters relating to illegitimate child. [199] At the same time, the relevant authority may be entitled to make collaboration or engagement with other relevant ministries, agencies, or entities such as the Ministry of Women, Family and Community Development (KPWKM) (the ministry that protects rights of the women, family and community in a fair and just manner without any discrimination),[200] Prime Minister's Department (Religious Affairs), Department of *Syariah* Judiciary Malaysia (JKSM) and others such as Non-profit organization (NGO),[201] to collectively study any issues arising from illegitimate child and to formulate the mechanism to solve such issues, as well as to suggest better protection mechanism towards illegitimate child. It must be clearly understood that the status of a child as an illegitimate child does not in any way negative his or her fundamental rights politically, socially, and economically, such as the right to education, right to citizenship or other rights.[202] As to avoid potential discrimination as advocated by some groups of people, it is a must that necessary protection is provided by the relevant authority to them to mitigate the burden that would be faced by the illegitimate child. For instance, there is existing Family Support Division (BSK) at JKSM that aimed to channel financial assistances to the wife or the child who failed to obtain necessary maintenance.[203] There are also other forms of assistance which the executive authority may be creatively devised by the said authority to protect the welfare of the illegitimate child.

As far as social stigma is concerned, it could be observed that stigma is defined by the World Health Organisation (WHO) as "a mark of shame, disgrace or disapproval that results in an individual being rejected, discriminated against and excluded from participating in a number of different areas of society".[204] It is submitted herein that several psychological studies revealed that stigma usually arises from, inter alia, lack of awareness, lack of education, and lack of perception.[205] Thus, in combatting such social stigma, education serves as an important weapon and tool to instil awareness among the society and to eliminate social stigma. It is the responsibility of the government to educate society not to discriminate or stigmatise children of unlawful conjugations.[206] It must ensure that the society understands that a *Syariah*-centric society which values *Syariah* does not disregard or disrespect

[199] Mansor, Muhammad Hafiz and Muna Adila Che Rime. "Anak Tidak Sah Taraf dan Jenayah Zina di Malaysia"page 3
[200] Ahmad, Abd Ghani, and Nuarrual Hilal Md Dahlan. "Kewajipan menanggung nafkah anak tak sah taraf: Satu kajian kes di Negeri Kedah." Kanun: Jurnal Undang-Undang Malaysia 28, no. 2 (2016): 238
[201] Ahmad, Abd Ghani, and Nuarrual Hilal Md Dahlan. "Kewajipan menanggung nafkah anak tak sah taraf: Satu kajian kes di Negeri Kedah." Kanun: Jurnal Undang-Undang Malaysia 28, no. 2 (2016): 239
[202] Mat Rashid, Azizah, and Nor 'Adha Abdul Hamid. "Kajian Awal Kerangka Undang-Undang Sedia Ada Bagi Anak Tak Sahtaraf ." E - Jurnal Penyelidikan Dan Inovasi 2, no. 2 (2014): 84–99.
[203] Kasa @ Muhyiddin, Mastura. "Penasaban Anak Tak Sah Taraf Menurut Perspektif Maqasid Syariah," (2009): 98
[204] Subramaniam, M., E. Abdin, L. Picco, S. Pang, S. Shafie, J. A. Vaingankar, K. W. Kwok, K. Verma, and S. A. Chong. "Stigma towards People with Mental Disorders and Its Components – a Perspective from Multi-Ethnic Singapore." Epidemiology and Psychiatric Sciences 26, no. 4 (2017): 371–82. doi:10.1017/S2045796016000159.
[205] Subramaniam, M., E. Abdin, L. Picco, S. Pang, S. Shafie, J. A. Vaingankar, K. W. Kwok, K. Verma, and S. A. Chong. "Stigma towards People with Mental Disorders and Its Components – a Perspective from Multi-Ethnic Singapore." Epidemiology and Psychiatric Sciences 26, no. 4 (2017): 371–82. doi:10.1017/S2045796016000159; Julio Arboleda-Flórez. "What causes stigma?". World Psychiatry 1 (2002):25-26.
[206] Disa, Mahamad Naser. "An Evaluation of The Implementation of Sharī 'ah Law of Malaysia in Protecting the Rights of a Child." Al-Itqan: Journal of Islamic Sciences and Comparative Studies 2, (2018): 11

children born out of the moral failings of one or both biological parents.[207] The illegitimate children should be regarded as valuable blessings from God, who must not suffer for the previous sins of their parents. [208]

## 12.0 CONCLUSION

In the analysis of this paper towards the judgment of the Federal Court, there is indeed a presence of constitutional dilemma of whether to prefer the federal law as stipulated under BDRA 1957 or the position of Islamic law as enshrined in the fatwa and the State enactments. Thus, it is the utmost contention of this paper that the said dilemma could be resolved by a conciliatory approach reconciling both set of laws without preferring one laws to be prevailed over the other laws to the detriment of the latter.

Such conciliatory approach may be viewed in the light of the earlier discussion of this paper. For instance, BDRA 1957, although apparently it is seemed to be contrary to prohibition of ascription, it may be interpreted in the light of practice and convention as executed by the NRD pursuant to the BDRA 1957 by which NRD exercises its discretion to refer the position under the Islamic law to streamline both set of laws, i.e., BDRA 1957 (on registration of illegitimate child) and Islamic Family Law enactment as well as fatwas (on the issues of ascription of paternity of illegitimate child) which are highly-intertwined with each other. Furthermore, such conciliatory approach is also evident when this paper balanced the views of the parties by taking into consideration the arguments by the proponents, either advocating for or prohibiting the ascription of paternity. Upon weighing the balance, in the end, this paper found that the prohibition of ascription of paternity is in line with the *Hukum Syara'* protecting the integrity of lineage, which could be used for harmonization purpose.

Although generally, the issue of ascribing and registering paternity of illegitimate child seems to have settled with the decision of the Federal Court in the case of 'Bin Abdullah', there are few questions that still persist, among others, whether the Births and Deaths Registration Act 1957 will have to be amended in order to put an end to this controversial issue. Thus, while this paper attempts to harmonize the laws, there are certain grey areas (as duly pointed out in the suggestion) that needed to be addressed to ensure a clear legal framework on this matter and to enable both sets of laws to be interacted healthily without one jeopardizing the other. Thus, it is not enough to solely rely on this Federal Court precedent, whereby it is suggested that there should be a collective proactive measures taken on the part of the government comprising the legislature (by way of statutory amendment); the executive arm (by way of providing necessary protection to the illegitimate child and education to the public to combat social stigma); as well as the judiciary (as stated in the case commentary and analysis which, inter alia includes, applying the doctrine of harmonious interpretation to interpret two competing statutes) in the effort of designing a harmonious landscape and legal framework in the issue of ascription and registration of illegitimate child's paternity. As for maintaining the legal position of

[207] Ibid

[208] "The Court of Appeal May Have Erred in the Bin Abdullah Case – Aidil Khalid," 1Media.My, August 4, 2017, https://www.1media.my/2017/08/the-court-of-appeal-may-have-erred-in.html.

fatwa, it is emphasized that all states need to gazette and publish the fatwa revolve around this current issue in order to preserve and protect the *Maqasid Syariah*.

It is the ultimate hope of this paper that a crystal-clear framework on this matter would be devised by the government that are compatible to all Malaysians, particularly the Muslim community in accordance with *Syariah*. Being a Muslim-dominant country having a plural legal system like Malaysia, it is highly important to harmonize the civil law and *Syariah* so that both sets of laws can co-exist in harmony without any disputes and issues between the public. Harmonization of laws between *Syariah* and Civil law, seeks to establish and institute a better legal system that is not only Muslim friendly law, but also laws that can be publicly outstretched to the Malaysian at large.

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