THE AWESOME (CURIOUS) POWERS OF THE REGISTRAR-GENERAL OF BIRTHS AND DEATHS: SOME OBSERVATIONS ON THE *BIN ABDULLAH* CASE

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Abstract

The majority of the judges in the case of *Jabatan Pendaftaran Negara & Ors v A Child & Ors (Majlis Agama Islam Negeri Johor, intervener)* held that the Registrar-General of Births and Deaths can apply Islamic law on the naming of illegitimate children when discharging his duty under the *Births and Deaths Registration Act 1957*. According to the majority decision in this case, the refusal of the Registrar-General to make corrections under s 27(3) of this Act was a proper exercise of his discretion because the parties were Muslims and accordingly, their personal law was applicable. This Note argues that the majority had misapplied the standard of judicial review, paid lip service to landmark cases, and ultimately rendered an absurd and cruel outcome with far reaching implications. This case, the Note further argues, should have been approached solely as an administrative law question where the focus of the analysis should be on the statute that created the public official, the Registrar-General. Approached in that manner, the legality of the Registrar-General's conduct for possible errors of law, not just for his abuse of discretion, could be fully examined.

Keywords: Administrative law, judicial review, *Births and Death Registration Act 1957*.

I INTRODUCTION

In *Jabatan Pendaftaran Negara & Ors v A Child & Ors (Majlis Agama Islam Negeri Johor, intervener)*,[1] ('the *bin Abdullah* case') the National Registration Department, the Registrar-General of the National Registration Department (the 'Registrar-General'), and the Government of Malaysia (collectively, the 'Appellants') appealed against the Court of Appeal's decision[2] that set aside the High Court's decision and held that the Registrar-General acted outside his statutory duty under the *Births and Deaths Registration Act 1957* ('BDRA'). The respondents were one Child and his father, MEMK, and his mother, NAW (collectively, the 'Respondents').

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1 [2020] 2 MLJ 277 (Federal Court) ('the *bin Abdullah* case').

2 *A Child & Ors v Jabatan Pendaftaran Negara & Ors* [2017] 4 MLJ 440 (Court of Appeal).

Below are the events that took place, and which prompted the Respondents to seek several forms of relief in the High Court:

- 24 October 2009, MEMK and NAW were married.
- 17 April 2010, the Child was born.
- In early 2012, MEMK and NAW registered the Child's birth pursuant to the provision regarding late registration of births namely, s 12(2) of the BDRA.
- 6 March 2012, the Registrar-General issued the Child's birth certificate with the Child's full name as "Child bin Abdullah" and not "Child bin MEMK," along with a notation "Section 13 Application."
- 2 February 2015, MEMK made an application to correct "bin Abdullah" to "bin MEMK" pursuant to the provision concerning the correction of records, s 27(3) of the BDRA.
- 8 May 2015, the Registrar-General rejected MEMK's application, affirming his decision to ascribe "bin Abdullah" on religious grounds.

Unhappy with the Registrar-General's refusal to make the correction, the Respondents applied for judicial review in the High Court and claimed for several forms of relief, including a declaration that the Registrar-General had no power under the BDRA to ascribe the patronymic surname "bin Abdullah" and a mandamus to remove the notation "Section 13 Application" and to replace "bin Abdullah" with "bin MEMK" on the child's birth certificate. After the application was rejected, the Respondents appealed to the Court of Appeal that allowed the appeal and held that the Registrar-General's actions were outside his statutory duty. The Registrar-General's statutory duty, according to the Court of Appeal, was simply to register births and deaths. Because MEMK's name had been entered in the birth registry, according to the Court of Appeal, the Registrar-General had neither reason nor justification to ascribe "bin Abdullah." Similarly, the Court of Appeal held that the Registrar-General had no authority to add the notation "Section 13 Application" in the birth certificate; he had no authority to do so under s 13 or under any other provision of the BDRA. The Appellants then appealed to the Federal Court.

A panel of seven judges heard the appeal in the Federal Court. The appeal was decided by a narrow majority of 4:3 for the Appellants.

For easy reference, this Note uses the term "Majority" to refer to the majority of the judges in the Federal Court and the term "Minority" to refer to the dissenting judges in this case. The term "Court" refers to the Federal Court.

The questions before the Court were listed as follows:

- whether in performing the registration of births of Muslim children, the Registrar-General may refer to and rely on sources of Islamic law on legitimacy;
- whether the civil courts may determine questions or matters on the legitimacy of Muslim children in respect of naming and ascription of paternity; and
- whether s 13A of the BDRA applies to the registration of births of illegitimate Muslim children, enabling the children to have the personal names of the persons acknowledging to be their fathers.

It is the author's view that by addressing the first question, namely whether in his performing the registration of births of Muslim children, the Registrar-General may refer to and rely on Islamic law on legitimacy, the remaining questions would have been answered, and answered correctly. The Court of Appeal and the Minority correctly observed that the child's illegitimacy was not an issue in this judicial review. Apart from the constitutional basis of the BDRA's enactment, this case involved no other constitutional law questions.

II ERRORS OF LAW BY THE REGISTRAR-GENERAL OF THE NATIONAL REGISTRATION DEPARTMENT

It is trite administrative law that every challenge to the power of a public official begins with the statute that creates the office. That statute may confer the official with absolute duties or discretionary powers, authorizing a specified action in certain circumstances. The BDRA is no different. Having stipulated, in s 3(1), for the appointment of the Registrar-General with the responsibility of carrying out the BDRA's provisions, the statute then directs how this responsibility is to be carried out. These are mandatory directions, expressed in terms such as "shall," addressed to the Registrar-General. The BDRA also confers discretion to the Registrar-General couched in specific language to convey the degree of discretion and how it should be exercised. Together, the statutory directions and the discretionary powers of the Registrar-General ensure an accurate repository of statistical births and deaths in Peninsular Malaysia—the only purpose intended by Parliament. Unfortunately, the Majority failed to engage in the crucial analysis of the Registrar-General's statutory duties. In fact, as far as administrative law is concerned, the Majority only focused on the discretion of the Registrar-General under s 27(3), which is addressed below in part III of this Note.

Judicial review in Malaysia generally involves cases of public authorities with wide discretionary powers. Cases involving public officials with a simple administrative function, a function to record prescribed particulars in a registry and to issue an extract of these particulars in a certified document commonly called a "certificate" specifically, are less common. A recent Federal Court decision where this issue arose is *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*[3] ('*Indira Ghandi*').

One of the issues in the *Indira Gandhi* case was whether Perak's Registrar of *Mualaffs* acted legally when he issued certificates of conversion of three minor children without their parents' written consent. The Federal Court examined the *Administration of the Religion of Islam (Perak) Enactment 2004* and found that the consent was a specific requirement before the issuance of a conversion certificate. Since the registrar did not obtain this consent, the certificates were held to be null and void. It was clear, according to the Federal Court, that the registrar had acted outside his statutory duty under the Perak enactment and that the registrar had stepped out of the "four corners" of that statute.

[3] [2018] MLJ 545 (Federal Court) ('*Indira Ghandi*').

In the *bin Abdullah*[4] case, the *Indira Gandhi* case was cited favorably by the Minority to highlight the administrative function of the Registrar-General, a function to be discharged pursuant to specific directives. There was no mention of this case in the Majority's opinion.

Indeed, the Federal Court's approach to its judicial review function in *Indira Gandhi* should have been instructive to the *bin Abdullah* court. The registrar in *Indira Gandhi* acted outside his statutory duty because he did not do what the statute required him to do. The Registrar-General in the *bin Abdullah* case acted outside of his statutory duty because he performed acts the statute did not authorize him to do. In both situations, the actions were *ultra vires* of the empowering statutes.

Under the BDRA, the duty of the Registrar-General is to register births in Peninsular Malaysia. This duty is set forth in s 7(1) read together with r 3 of the *Births and Deaths Registration Rules 1958* (the 'Rules').[5] These Rules were promulgated by the Minister pursuant to his powers under s 39 of the BDRA. Under these provisions, the Registrar-General *is required* to register every birth in Malaysia and he is to do so by *entering particulars* concerning the birth set out in Form JPN.LM01.

Section 7(1) reads in pertinent part:

> …. [T]he birth of every child born in Malaysia *shall be registered* by the Registrar in any registration area *by entering* in a register *such particulars* concerning the birth as may be prescribed; …. [emphasis added]

"Such particulars" in the language of s 7(1) are particulars in Form JPN.LM01, a form developed pursuant to r 3 of the Rules.

Having obtained the prescribed particulars, the Registrar-General's task in the registration process is to provide the child's parents, assuming they are the registrants under s 7(2), an extract of Form JPN.LM01's particulars in the prescribed format called a birth certificate.[6]

Nowhere during the entire process *i.e.* from the filling up of Form JPN.LM01 with the prescribed particulars to the issuance of the birth certificate, is the Registrar-General empowered to substitute "bin Abdullah" for "bin MEMK" as the child's patronymic surname. Such power is nowhere to be found in the BDRA. The power to substitute the "bin Abdullah" patronymic surname or to make any changes to the contents of a birth certificate only lies with the Minister pursuant to s 39 of the BDRA.[7] By doing so, the

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4 The *bin Abdullah* case (n 1).

5 The BDRA specifies no other duty to the Registrar-General as evident from s 2 that defines the term "Registrar" to mean the registrar appointed under the Act "whose duty it is to register particulars of a birth."

6 See s 14 of the BDRA, which requires the Registrar-General to issue a birth certificate at the time of the registration of the birth. Although in practice a birth certificate will not be issued on the day of the registration itself (as it will take time to process the document), the idea of s 14 is that once all the particulars of the birth are obtained and entered in the registry, what is left to be done by the Registrar-General is simply to issue the certificate reflecting the extracts from the registry. The provision does not expect the Registrar-General to incur time to perform an unrelated task.

7 Section 39(a) reads in relevant part: "Subject to the provisions of this Act the Minister may make rules in respect for all or any of the following matters: (a) *the form and contents of the registers, Certificates of Birth,*

Registrar-General had clearly committed an error of law. What the Registrar-General had done was no different from what the registrar in the *Indira Gandhi* case did. Because the Registrar-General had acted beyond the scope of his statutory duty, his action should be declared null and void.

The same argument applies to the Registrar-General's action of entering the notation "Section 13 Application" in the birth certificate.

Indeed, the Majority in the *bin Abdullah* case did not and could not pinpoint to any specific provisions in the BDRA that could justify the action of the Registrar-General to substitute the child's patronymic surname to "bin Abdullah" or to make the notation "Section 13 Application."

The simple administrative function of the Registrar-General, expressed in mandatory and clear language in s 7(1), along with the implementing Rules, received no attention from the Majority. Instead, the Majority focused on the reasonableness of the Registrar-General's conduct in the context of a s 27(3) application, an application the Respondents had to make to correct legal errors committed by the Registrar-General in the first instance.

III SECTION 27(3) APPLICATION AND THE REGISTRAR-GENERAL'S DISCRETION

Section 27(3) of the BDRA reads:

> Any error of fact or substance in any register may be corrected by the Registrar-General upon payment of prescribed fee and upon production by the person requiring such error to be corrected of a statutory declaration setting forth the nature of the error and the true facts of the case, and made by two persons required by this Act to give information concerning the birth, still-birth or death with reference to which the error has been made, or in default of such persons then by two creditable persons having knowledge to the satisfaction of the Registrar-General of the truth of the case; and the Registrar-General may if he is satisfied of the facts stated in the statutory declaration cause such entry to be certified and the day and the month when such correction is made to be added thereto.

Pursuant to s 27(3), the Respondents must pay a prescribed fee and submit a statutory declaration meeting the elements prescribed in the sub-section. For his part, according to s 27(3), the Registrar-General may make the requested correction if he is satisfied with the facts set forth in the statutory declaration. As evident from his rejection letter, the Registrar-General denied the application *not* because the Respondents failed to meet the requirements under s 27(3), but because the child was illegitimate.[8] The issue then

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Certificates of Death, forms, certificates, notices and other documents and the information to be supplied for carrying out the purposes of the Act." [emphasis added.]

[8] The Director-General's rejection letter in part, read as follows:

> 2. *Dukacita dimaklumkan bahawa permohonan pembetulan maklumat dalam Daftar Kelahiran anak tuan/puan telah DITOLAK kerana TEMPOH KELAHIRAN DAN TARIKH PERKAHWINAN TIDAK MENCUKUPI BAGI SABJEK DINASABKAN KEPADA BAPA*.

was whether the Registrar-General had abused his powers under s 27(3) for basing his rejection on religious reasons.

The Court of Appeal found that the Registrar-General's rejection of the Respondents' application in the context of s 13A(2) was irrational and in excess of power. Section 13A concerns the surname that is to be ascribed to a child. If the child is legitimate, according to s 13A(1), the surname shall normally be the surname of the father. On the other hand, if the child is illegitimate, the surname may be the surname of the mother unless the person acknowledging himself to be the father requests that his surname should be ascribed as the child's surname.

To the Court of Appeal, the word "surname" naturally would include the patronymic surname; in its view, a surname was nothing more than the name borne in common by members of a family. Upon concluding that a surname would include a patronymic surname, the Court of Appeal proceeded to review the reasonableness of the Registrar-General's rejection of the Respondents' s 27(3) application. The Court of Appeal held that the Registrar-General had acted irrationally and in excess of his power because the Respondents had met the requirements of s 13A(2). It was an abuse of power on the part of the Registrar-General to refer to Muslim name convention as there was nothing in the BDRA that allowed him to do so, the Court of Appeal reasoned.

The Majority, however, arrived at a different conclusion. After several testimonials from experts showing that Malays did not have surnames as the term is understood in its narrow and traditional meaning, the Majority concluded that the term did not include a patronymic surname; a surname was not the same as a personal name. The Majority maintained that the word's plain meaning be adhered to, and that a purposive approach to statutory interpretation was unnecessary to construe the term. Construed as such, the Majority concluded that s 13A had no application to Muslim children.[9]

The Majority found the child's surname was never an issue to the Registrar-General and was irrelevant in addressing the question at hand, namely, whether the Registrar-General had acted for a proper cause and was reasonable when he applied Islamic law in the performance of his statutory duty under the BDRA.

According to the Majority, looking generally at Islamic law and looking specifically at Islamic naming convention, it was reasonable conduct by the Registrar-General under

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[Translation: We regret to inform you that your application to correct the information on your child's birth certificate is REJECTED because the TIME FRAME BETWEEN BIRTH AND DATE OF MARRIAGE IS INSUFFICIENT TO ATTRIBUTE LINEAGE TO THE FATHER.]

[9] What the word "surname" meant was addressed extensively by the Court. In the author's view, the Minority's construction of the term was strongly supported by legislative history of s 13A and the Minority's criticism of the use by the Majority of experts in statutory interpretation was well supported. Moreover, the expert testimonials in this case merely confirmed what is generally known – that Malays do not have "surnames" as the term is traditionally understood and that they use patronymic surnames. The author also supports the use of a purposive approach to construe the term and of the view that the application of this approach was persuasively argued by the Minority. After all, the Registrar-General did not ascribe "bin Abdullah" because he was unclear as to what "surname" meant. In fact, he understood surnames as including patronymic surnames. As the Minority noted, the naming convention involving a child's personal name followed by the father's personal name after "bin" or "binti," as appropriate, has long been part of the culture of the Malays and other races (apart from the Chinese) in Malaysia.

the standard for judicial review of executive discretion. This has to be so, the Majority reasoned, due to the fact that Islamic law was the personal law of the Respondents.

The Court of Appeal referred to *Nitaben Nareshbhai Patel v State of Gujarat & Ors*,[10] ("*Nitaben*") an Indian case that construed s 15 of India's *Births and Deaths Registration Act 1969*. Section 15 is a provision regarding the correction of any errors in the Indian birth registry, similar to s 27(3) of the BDRA.

At issue in *Nitaben* was whether the Registrar could refer to certain guidelines when exercising his powers to make the corrections under s 15 of the Indian Act. There, the court held that the Registrar was not justified to refer to these guidelines and to read them so as to limit his powers to make corrections.[11]

The Majority, however, was not persuaded. It held *Nitaben* had no application to the *bin Abdullah* case because the facts were different, and the Indian statute had no equivalent to Malaysia's s 13A(2). More importantly, continued the Majority, the Registrar-General was not dealing with some guidelines, but rather the Respondents' personal law.

The point of *Nitaben* was lost to the Majority. The point of *Nitaben* was that the Registrar-General's powers under s 27(3) are so constrained that he could not look at any sources outside of the statute to exercise his discretion. Applying the reasoning in *Nitaben*, the Registrar-General must only look within the statute, the BDRA, to guide the exercise of his corrective powers. Indeed, s 27(3) itself was clear on how he should exercise the discretion – upon payment of the prescribed fee and upon satisfying himself of the truth of the facts in the accompanying statutory declaration.

We need not go to India to assess the legality of the Registrar-General's exercise of his discretion. We only need to apply the principles in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*,[12] ("*Pengarah Tanah dan Galian*") a celebrated Federal Court case on judicial review of executive discretion.

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[10] [2008] 1GLR 884 (High Court) ('*Nitaben*').

[11] The *Nitaben* court referred to the decision in *Registrar, Birth and Death Rajkot Municipal Corporation v. Vimal M Patel Advocate in Letters Patent* (Appeal No. 231/2001) (unreported) that construed s 15 of the *Births and Deaths Registration Act 1969*. The *Vimal* court at para 4.1 addressed the Registrar's s 15 powers to make corrections as follows:

> 4.1 It will be seen from the above provision that the registrar is empowered to correct the entries or cancel them by suitable entry in the margin without any alteration of the original entry and he shall sign the original entry and add thereto the date of the correction or cancellation. Such correction can be made when the registrar is satisfied that any entry of a birth or death in any Register kept by him under the Act is erroneous in form or substance or has been fraudulently or improperly made. *Such power has to be exercised subject to the rules that may be made by the State Government with respect to conditions on which and the circumstances in which the entries may be corrected or cancelled*. Since the powers of the Registrar are wide enough to ensure that the entry made in the Register does not mislead or give an incorrect impression, it is his duty to ensure that suitable correction is made in the entry to ensure the authenticity of the Register by reflecting the correct state of affairs in the marginal entry that he is required to make. *No direction can be issued by any authority to take away the powers of the Registrar of making correction in entries which are erroneous in form or substance in the Register*. The Registrar, therefore, *was not justified in referring to some guidelines and reading them so as to curtail his own powers under section 15 of the Act*. *No guidelines can be issued against statutory provisions empowering the Registrar to make corrections except by way of rules made by the government with respect to the conditions on which and the circumstances in which such entries may be corrected or cancelled as provided in Section 15 itself.* [Emphasis added].

[12] [1979] 1 MLJ 135 (Federal Court) ('*Pengarah Tanah dan Galian*').

In *Pengarah Tanah dan Galian*, the respondents who were proprietors of a parcel of land in Kuala Lumpur, applied for the subdivision of the land to the Land Executive Committee. Their application was approved subject to certain conditions, one of which was an exchange of the title of the land in perpetuity for a 99-year lease. The respondents challenged this specific condition as invalid on the ground that the committee went beyond its powers and the condition was *ultra vires*. The Committee argued that the condition was valid because s 124(5)(c) of the *National Land Code 1965* allowed the Committee to approve a conversion of land use subject to 'such other requirements as the state authority may think fit.' Relying on English cases decided under the United Kingdom town and country planning legislation that empowered planning authorities to refuse permission or to grant permission unconditionally or to impose such conditions 'as they think fit,' Raja Azlan Shah Ag CJ (Malaya) (as his late Royal Highness then was) held that the Committee's discretion was not unfettered so as to permit it to impose whatever conditions it likes; the conditions imposed must relate to the permitted development. Since the condition had no relation to the permitted development, the condition was *ultra vires*.

Applying the foregoing standard to the *bin Abdullah* case, the issue then was whether the basis of the rejection of the Respondents' application had any connection with the purpose of the BDRA.

As fully explained by the Minority, the BDRA is a statute enacted pursuant to Item 12 of the Federal List in the Ninth Schedule of the *Federal Constitution*, which relates to the census and statistics of the country. The statute's object, made even clearer by its long title, is to provide a census of all citizens through a national system of registration of births and deaths. Using the statute for a purpose other than its intended purpose, no matter how desirable, is an abuse of his powers. What the Registrar-General did in the *bin Abdullah* case was no different from what the Executive Committee did in *Pengarah Tanah and Galian*.

That the executive with discretionary powers would be acting unlawfully if he failed to exercise his discretion in furtherance of the objects and policy of the empowering statute was reaffirmed by several cases under the *Industrial Relations Act 1967* cited by the Majority.

For example, in *National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower*,[13] the issue was whether the minister abused his discretion under s 26(2) of the *Industrial Relations Act 1967* to refer a trade dispute to the Industrial Court. The Federal Court approached the review of the minister's discretion by taking into account the policy and objects of the *Industrial Relations Act 1967*. Having so construed, the court held that the minister had not abused his discretion. The court said the minister would have abused his discretion if he had misconstrued the statute or if his actions defeated the statute's policy and objects.

In *Minister of Labour Malaysia v Lie Seong Fatt*,[14] another case cited by the Majority, the question was whether the minister abused his discretion pursuant to s 20(3) of the *Industrial Relations Act 1967* when he refused to refer the respondent's complaint to the

[13] [1980] 2 MLJ 189 (Federal Court) ('*National Union of Hotel, Bar and Restaurant Workers*').

[14] [1990] 2 MLJ 9 (Federal Court).

Industrial Court. The minister had broad discretion under s 20(3) because the section empowered the minister to refer complaints to the Industrial Court if he 'thinks fit' to do so. Nonetheless, the court held that it would be proper for the court to intervene if the minister's decision 'militates against the object of the statute.'

The same principle was applied in another case referred to by the Majority. In *Menteri Sumber Manusia v Association of Bank Officers*,[15] at issue was whether the threshold jurisdiction of the minister under s 9(1A) of the *Industrial Relations Act 1967* covered only employee–employer disputes. There, again, the Federal Court construed the minister's discretion in light of the object of the empowering statute and held that the plain reading of the statute authorized the minister to also refer disputes involving "a trade union of workmen or an employer or a trade union of employers."

To sum up, *Pengarah Tanah dan Galian* and the other cases that the Majority cited demanded that judges construct executive discretion in the context of the specific objects of the empowering statute.

The Majority also cited *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Ors*[16] ("*Lina Joy*") to show that the practice of applying Islamic law on the part of the National Registration Department was not new. Without commenting on the correctness of *Lina Joy*, it must be recalled that *Lina Joy* did not involve the BDRA, but rather the *National Registration Act 1959* and its implementing regulations, the *National Registration Regulations 1990*. One statute cannot be used to construe another. In *National Union of Hotel, Bar, Restaurant Workers*,[17] which quoted Lord Wilberforce's statement in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*,[18] the court reiterated the fundamental rule that each statute should be individually construed because "there is no universal rule as to the principles on which the exercise of a discretion may be reviewed; each statute or type of statute must be individually looked at."[19]

The practice of the National Registration Department under a different statute, and not the objective of the BDRA, also explains the Majority's approach to its analysis of the Registrar-General's discretion.

The Majority seemed to appreciate the stringent standard that was called for. It quoted, and it quoted approvingly, the famous statement of Raja Azlan Shah in *Pengarah Galian dan Tanah*.[20] According to Raja Azlan Shah:

> Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper cause, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal constraints; where it is wrongly exercised, it becomes the duty of the courts to intervene.[21]

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15 [1999] 2 MLJ 33 (Federal Court).
16 [2007] 4 MLJ 585 (Federal Court).
17 *National Union of Hotel, Bar and Restaurant Workers* (n 13).
18 [1976] 3 All ER 665 (House of Lords).
19 Ibid 682.
20 *Pengarah Tanah dan Galian* (n 12).
21 Ibid 148.

What the foregoing statement meant by "reasonableness" and "proper cause" must relate to the purpose of the statute that conferred the discretion, as explained earlier.[22] The meanings of these terms were not to be coloured by the personal beliefs of the Registrar-General. Put differently, these terms are terms of legal constructs of *Pengarah Tanah dan Galian* and the cases referred to earlier.

No one questions the special status of Islam under the Federal Constitution. No one questions that Islamic law is the law of the land.[23] No one questions the personal law of the Respondents. But one questions if the Majority appreciated the limits of executive discretion as *Pengarah Tanah dan Galian* and its progeny require us to appreciate.

IV THE ULTIMATE DECISION AND THE CONSEQUENTIAL ORDER

The Majority left undisturbed the Registrar-General's decision to reject the Respondents' application to substitute "bin Abdullah' for "bin MEMK" because that part of the decision was the correct application of Islamic principles set forth in *Islamic Family Law (State of Johor) Enactment 2003* (Johor was the state of the Respondents' residence). The Majority also left the notation 'Section 13 Application' undisturbed, holding that the Registrar-General was merely reflecting the record and dismissed the Respondents' discrimination claims. However, the Majority quashed the Registrar-General's decision to ascribe "bin Abdullah" because that decision was not based on the correct application of the Johor enactment. The Majority made a consequential order for the Registrar-General to remove "bin Abdullah" from the child's birth certificate. The final outcome resulted in the child's personal name being the only name on his birth certificate along with the notation 'Section 13 Application.'

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[22] While Raja Azlan Shah in this passage called for the "proper cause and reasonableness" standard to check executive discretion, other courts have used different terms. In one case, for example, the court required the discretion be exercised "without improper motive." In another, the court demanded the executive to "act bona fide, fairly, honestly and honorably." Notwithstanding the language, the discretion must be exercised to advance the objects of the empowering statutes.

[23] The special status of Islam under the *Federal Constitution* does not elevate the status of Islamic law as the supreme law of Malaysia, a status only the *Federal Constitution* enjoys. The "law of the land" means the law of the country, and in Malaysia, it means Malaysian law as opposed to foreign law. If the law in question is local law as opposed to foreign law, the judge is not competent to allow evidence to inform him what that law is. The judge is said to take judicial notice of that local law, to propound that law. This is the meaning of the famous statement "Muslim law is the law of the land" in *Ramah v Laton* [1927] 6 FMSLR 28 quoted by the Majority.

The question in *Ramah v Laton* concerned the application of a local law relating to *harta syarikat* in a dispute between the surviving widows. At the trial, witnesses were called to give their opinions regarding *harta syarikat*. Thorne J held that it was not competent for the trial judge to allow evidence to prove what the law was because the law before the court was local law, the law of the land, and not foreign law for which the use of expert opinions would be appropriate. Thus, the famous statement of Thorne J in its entirety reads:

> The local law [Muslim Law] is a matter of which the court must take judicial notice. The Court must propound the law, and it is not competent for the Court to allow evidence to be led as to what is the local law…. For these reasons the books and the oral testimony of the witnesses who quoted from those books were wrongly admitted…."

The famous statement should not be taken out of context and be given beyond what was intended.

It is unclear if the consequential order was the correct exercise of the court's power in judicial review in this case. In *Pengarah Tanah dan Galian*,[24] the Federal Court held that it was inappropriate for the High Court to make a consequential order and that the correct course of action for the court was to remit the case back to the Executive Land Committee for reconsideration in line with the court's ruling.

Although the foregoing is still the general rule, it appears that Malaysian courts have also been ready to make consequential orders when justice so requires. Justice may require the court, for example, to make such order in an industrial relations case in order to prevent further harm and injustice the claimant.[25] In situations such as this, quicker justice trumps the separation-of-powers doctrine at the heart of the general principle.

It is unclear what kind of justice entered the mind of the Majority for it to break with the general principle. The consequential order was more like injustice without further delays. Without a proper name and family identity, the Child (and other illegitimate children) must face a new form of discrimination and further stigmatization, a condition no civilized society should condone.

V CONCLUSION

MEMK and NAW were more than upset to discover their son's name on the birth certificate was "Child bin Abdullah," and not "Child bin MEMK." Thinking there was an honest error on the part of the Registrar-General, they requested the mistake be corrected. The Registrar-General denied the application because the son, according to his calculation, was conceived out of wedlock. Disappointed and distraught, MEMK and NAW asked the Registrar-General to show where his powers to change their son's name came from. The Registrar-General showed the BDRA. MEMK and NAW then asked which provision in the BDRA conferred on the Registrar-General the power to change their son's name. The Registrar-General was unable to do so. Nor could the Majority help him.

What the Majority did instead was to review the Registrar-General's action from the standpoint of Islamic law, a new standard unsupported by the object of the BDRA and judicial review cases. The approach enlarges the powers of the Registrar-General far beyond those provided specifically by the BDRA. It emboldens bureaucrats, many with personal agendas and who, as the *bin Abdullah* case demonstrated, would (mis)apply their own understanding of areas where Islamic law has no application.

Forty years ago, in 1979, Raja Azlan Shah made the following observation regarding the arrogance of the government departments of his time and the duty of the courts to intervene when discretionary power is wrongly exercised. He said:

> The Courts are the only defense of the liberty of the subject against department aggression. In these days when government department and public authorities have such great powers and influence, this is a most important safeguard for the

[24] *Pengarah Tanah dan Galian* (n 12).

[25] For example, the Federal Court in *Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, made a consequential order because remitting the case back to Industrial Court would do great harm and injustice to the claimant given his age and personal situation.

> ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place"' (per Danckwerts L.J. in *Bradbury v London Borough of Enfield* [1967] 3 All ER 434, 443).[26]

In the same vein, we must call upon the courts to compel the bureaucrats to observe the law, and for the courts not to create more confusion, especially confusion of the line between the secular and the Islamic drawn carefully in the Federal Constitution.

[26] *Pengarah Tanah dan Galian* (n 12) 148.