PRO BONO STORIES


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Lawyers have a license to practice law, a monopoly on certain services.
But for that privilege and status, lawyers have an obligation
to provide legal services to those without the wherewithal to pay,
to respond to needs outside themselves,
to help repair tears in their communities.

Justice Ruth Bader Ginsburg
(US Supreme Court Associate, March 2014)

The Firm's goal is to help focus and strengthen the Firm's commitment
to the community and public interest
by actively encouraging our lawyers to provide legal services pro bono,
especially to those unable to pay for those services
or persons, groups or non-governmental organisations of limited means.

Pro bono services are provided without expectation of a fee;
therefore the Firm is solely motivated by our professional responsibility
to render free legal services,
which is inherently the good and the right thing to do.

Lee Hishammuddin Allen & Gledhill
(Pro bono policy statement)


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Pos Tohoi

The Tragic Cost of Education for the Orang Asli

Gokul Radhakrishnan

Just over three years ago, on 23 August 2015, the nation woke up to the news of the disappearance of seven primary school children from a government boarding school deep in the jungles of Kelantan.

These children of Sekolah Kebangsaan Tohoi, some as young as seven, appeared to have run away out of fear of corporal punishment.

As days mounted to weeks and search and rescue operations failed to locate them, concern turned to anxiety for the parents and other ordinary Malaysians.

Grieving for the lost children. Photo by Miera Zulyana/Malay Mail.

On 8 October, 47 days after they were reported missing, anxiety turned to shock and sorrow. The remains of Linda binti Rosli, aged 7, were found approximately one kilometer from the school. The following day, two survivors were found in a severely malnourished and critical state—Norieen Yaakob and Miksudiar Aluj, aged 10 and 11. On the same day, the remains of Ika Ayel, 9, were found, and on the day after, the remains of Juvina David, 7, and Haikal Yaakob, 7. Sasa Sobrie was never found. She was 8 years old.

Although the right to education is a fundamental right guaranteed under the Federal Constitution, the lack of schools near their villages force aboriginal families to send their children, even for primary schooling, to live in hostels far from home and among strangers. The hostel at Pos Tohoi housed about 200 pupils, under the supervision of one warden and another teacher from the school who is chosen on a weekly rotational basis.

This typically inadequate arrangement left the pupil boarders to fend for themselves unsupervised. It was under these circumstances that these seven pupils, no doubt feeling insecure and unsafe, fled the school for fear of being punished. They escaped the premises through a broken fence adjacent to the hostel.

The acting headmaster of the school did not lodge a police report on their disappearance until the third day. This resulted in the search and rescue operations commencing only on the fifth day after the pupils had initially gone missing. Valuable time was lost. To make matters worse, the school then wrote a letter to the anxious parents of the missing children warning them that their children would be expelled from their school if they were not "returned" to the school immediately. The school had obviously assumed that it was the parents themselves who had taken their children out of the hostel.

Search and rescue attempts were not conducted in earnest until the first remains were found, and it was only then that the police called in the Senoi Praaq, a unit of the General Operations Force of the Royal Malaysian Police who were experts in jungle tracking, to lead the search and rescue operations. The Senoi Praaq are best known for their service in the jungle war during the Malayan Emergency, but their services were called upon too late in the day.

No legal assistance can bring back the lives of the lost children, but the families of the deceased children, led by David Kuasan, the father of seven year old Juvina David, resolved that a case should be taken up to bring to account all parties in any way responsible for the tragedy.

The proceedings commenced in this case must be continued to ensure that such a tragedy will not happen again.

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Photo by Colin G Nicholas.

Postscript

Malaysia has ratified the International Convention on the Rights of the Child and has extensive legislation for the welfare and education of the children of its citizens. These measures do not reach the orang asli in any adequate way. Just to access primary school education, children in their tender years have to be wrested away from the care, nurture and protection of their families and put in the strange, cold and uncaring environment of the hostel.

Unless these fundamental shortcomings are addressed and remedied, the country, its government and its people must live with the conscience of having betrayed the constitutional rights and legitimate expectation of the orang asli, who are the original first peoples of this land.

Bukit Rok

The Semelai Struggle against FELCRA

Lim Heng Seng

The Semelai people in the Bera region of Pahang have for generations lived as an aboriginal community in their ancestral lands in Bukit Rok, which straddles the Bera River.

Sometime in the year 2000, due to an increase in population, their settlement was administratively reorganised into 2 cantons, namely, Kampung Bukit Rok and Kampung Ibam, each under its own headman. An area called Padang Kepayang, a part of the original Kampung Bukit Rok, continued under the Tok Batin, or headman, of Kampung Bukit Rok.

In December 2000, unknown to the Semelai villagers, the Pahang Government had decided that a substantial portion of some 202.3 hectares (500 acres) of land in Padang Kepayang be approved for development to be undertaken by the Federal Land Consolidation and Rehabilitation Authority (FELCRA), for the benefit of the villagers of the neighbouring Kampung Batu Papan.

Semelai men at an ancestral burial ground. Photo by Colin G Nicholas.

The villagers of Padang Kepayang continue their traditional hunting, fishing and gathering of jungle produce for their livelihood. The Padang Kepayang area provides sources of traditional medicine such as roots and herbal leaves, and forest produce such as Kruing and Jelutong, while the atap leaves and rattan of the forests are used for their homes and furnishings. Some of the villagers maintain small farms of rubber and oil palm which provide a source of income. The three ancestral burial grounds of the community are also located in Padang Kepayang.

It was four years later, in August 2004, that the Padang Kepayang villagers encountered land surveying works being carried out on their land. The Forestry Department of Pahang had licensed logging activities in certain quarters of Padang Kepayang. Land clearance started and this led to their oil palm and other crops being destroyed.

Another three years later, in March 2007, eviction notices were served on several of the villagers.

The natural boundaries of the homelands of the Semelai had come to be cut through with straight lines on a map, demarcating those parts of their ancestral lands that had been alienated to state agencies like FELCRA.

State government and the Federal government and their respective officers.

In June 2009, the High Court at Temerloh granted them leave to seek judicial review of the executive acts that now affected the land rights and livelihood of their community. At the same time the High Court ordered a stay of all actions in the FELCRA development project.

The villagers also applied for various reliefs, including declarations relating to their rights over their ancestral lands.

Mohamed bin Nohing, then in his fifties, is the Tok Batin of Kampung Bukit Rok. He is a storehouse of knowledge about the history of his people, their village and his own ancestry, and can trace them back seven generations. He is able to recount the customary rules of land use and tenure of their ancestral and customary lands. He knows in great detail the geographical boundaries of the ancestral lands of his people.

Semelai villagers at the Temerloh High Court. Photo by Colin G Nicholas.

Together with the Tok Batin of Kampung Ibam and four other community leaders, Tok Batin Nohing led his people to seek legal advice, and proceedings were soon commenced on behalf of the Padang Kepayang villagers against the Pahang

At the trial, over many days, Tok Batin Nohing gave evidence to prove that their ancestral lands were lands held under customary title. He identified the location, boundaries and the size of these lands by reference to historical and contemporary maps and other supporting documents. He also gave a detailed account of the oral history of his people.

Oral and documentary evidence were painstakingly adduced to show that the lands they had settled in were their common law customary land. The expert reports of Dr Colin G Nicholas were used to testify to the early Semelai presence and occupation in the Bera Drainage Area and in the Bukit Rok locality.

In December 2012, the High Court declared that the Semelai inhabited land in Kampung Bukit Rok and Kampung Ibam were lands over which they had customary community title and directed the State government to gazette these lands as an aboriginal reserve under the Aboriginal Peoples Act 1954.

The High Court also ordered that such of the Malay Reserve land as encroached onto the customary and ancestral lands of the Semelai be excised from the larger area that had been earlier gazetted as such. The High Court held that the customary land rights of the Semelai pre-dated and therefore prevailed over the declaration of the Malay Reserve.

Tok Batin Nohing (centre, with glasses) and other Semelai men with Mr Lim Heng Seng of counsel. Photo by Colin G Nicholas.

The present villagers had inherited these customary lands from their ancestors in accordance with custom and had lived as an organized society for generations. Their traditional connection with these lands has been maintained to this day.

The High Court also held that the Pahang State government and the Federal government were in breach of their fiduciary duty to protect the welfare of the Semelai, including their customary land rights.

Both State and Federal governments appealed against the decision contending that the FELCRA development was to "provide infrastructure to the general populace" and that "the larger interest of the people should be given precedence" over the Semelai. They also challenged the Semelai's claim over their ancestral land, raising doubts and demanding hard scientific evidence, despite the cogent evidence adduced by Tok Batin Nohing.

The Court of Appeal allowed the appeal in part limiting the customary title of the Semelai to the areas actually settled and cultivated by them and went on to order that these areas were to be alienated in favour of the Semelai. The Court of Appeal did not interfere with the order that the remaining areas be gazetted as an aboriginal reserve.

Postscript

The Aboriginal Peoples Act 1954, which dates back to the time of British Malaya, is "[an] Act to provide for the protection, well-being and advancement of the aboriginal peoples of [Peninsular Malaysia]".

The Jabatan Kemajuan Orang Asli (Department of Orang Asli Development), or JAKOA, established under the Ministry of Rural and Regional Development, is the government body entrusted to improve the lives of the orang asli. Prior to 2011, it was called the Jabatan Hal Ehwal Orang Asli, or JHEOA.

For the Semelai, JAKOA has proven to be a grave disappointment. Their request for assistance from JAKOA was brusquely brushed aside with a statement that government documents were confidential and could not be disclosed.

Such conduct is consistent with the criticism leveled at the department by an orang asli rights advocate and expert witness, Colin G Nicholas.

> The general conclusion is that, after five decades of intervention by the Department of Aborigines and later by the JHEOA, an unhealthy state of paternalism towards the Orang Asli has been created.
>
> The JHEOA sees itself as god-parents to these "wards of the state", taking care of the Orang Asli "from the womb to the grave".
>
> — Colin G Nicholas
> *Centre for Orang Asli Concerns*

It may be that JAKOA needs to re-examine their role and their assumptions around what would constitute "well-being" and "advancement" for aboriginal peoples, which certainly does not involve foisting on them the kinds of development designed for the non-aboriginal peoples in the rest of the country.

There is a crying need for the Federal government to seriously perform their constitutional, statutory and fiduciary duties for the protection, wellbeing and advancement of aboriginal peoples.

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Pos Belatim

The Temiar and the Plantations of Ladang Rakyat

Tan Hooi Ping

Since the earliest arrival of other communities, the aboriginal peoples in the Malay Peninsula, commonly referred to as the orang asli, who live mainly by hunting, fishing and foraging, have progressively been pushed further and further into the interior, unoccupied jungles, to make way for more powerful groups and their agricultural, industrial, infrastructural, residential and recreational needs. Like indigenous minorities elsewhere, they continue to face the relentless threat of displacement from their ancestral lands.

Pos Belatim is an aboriginal people's area encompassing seven villages or kampungs, each headed by a Penghulu, or headman, with some 500 villagers in residence. For generations, the Temiar have settled on and occupied this area of land in Gua Musang, Kelantan. They regard the Pos Belatim land as their ancestral and customary land, where they live, marry and bury their dead according to their traditional way of life and aboriginal customs and practices.

Pos Belatim sits on State land, over which

A Temiar settlement in Pos Belatim. Photo by Colin G Nicholas.

Being dispossessed of their traditional habitat is a default, given that laws governing land and land use cater to the urban majority. These laws operate on the basis of ownership and division while the orang asli live a communal life of shared resources. The case of the Temiar tribe in Pos Belatim is illustrative of this.

the Kelantan State government has full rights of disposal under the National Land Code. Private ownership of land exists only upon a disposal by the State government to an individual or a body. Such rights as the Temiar may have over the Pos Belatim land is not incorporated into any written law administered by the State government.

It is quite natural for the State to deal with State land without regard to any person who occupies any land without a title or other right recognised by written law. Aboriginal peoples are therefore treated in the same way as squatters who have no formal legal right of occupation.

Therefore, in September 2010, when the Kelantan State government approved the alienation of land, including the Pos Belatim land, to a statutory body called the Perbadanan Pembangunan Ladang Rakyat Negeri Kelantan ("Ladang Rakyat"), set up by a Kelantan State enactment, there was no written law requiring that the Temiar should be first consulted.

Thus it was only when they were approached by representatives of Ladang Rakyat, who attempted to obtain their thumbprint and identification documentation to consent to an agreement to participate in the development plans of Ladang Rakyat, that they knew that their land was being taken over.

The Pos Belatim villagers knew that the type of development envisaged by Ladang Rakyat was not to their benefit. They had heard that participants became no more than hired hands on their own lands, and therefore refused to have anything to do with it.

The Temiar of Pos Belatim coming together to protect their homelands. Photo by Colin G Nicholas.

In fact, the Auditor General's Report for the State of Kelantan in 2011 had severely criticized Ladang Rakyat for various weaknesses in its programmes, pointing out that foreign workers instead of locals were being hired to work in the plantations.

It was also reported that there had been destruction of farmlands and crops of the Temiar community resulting from the encroachment by a Ladang Rakyat contractor, Sigur Ros Sdn Bhd.

The elders of Pos Belatim convened and decided that they would seek legal assistance to protect their ancestral land and their way of life, which they did, having in their hands a few pages of a Ladang Rakyat document which included a plan showing where the lands had been approved for development.

also contended that the Pos Belatim villagers had no legal standing.

The State government refused to disclose relevant documents in the proceedings resulting in the case being dismissed by the judge. It took an appeal before the Court of Appeal which reinstated the case in 2014.

Temiars of Pos Belatim in court for their case against the Kelantan State government. Photo by Colin G Nicholas.

While an application in March 2011 to the High Court at Kota Bharu on behalf of the Temiar for judicial review was still pending, sign posts appeared in various places in Pos Belatim in November 2012, warning that the Pos Belatim land of 4,000 acres belonged to Ladang Rakyat and that trespassers would be prosecuted.

The Kelantan State government put up several legal obstacles. They denied that there had been any alienation or approval for alienation of the Pos Belatim land to the Ladang Rakyat and therefore the application to court was premature. They

The intransigence of the State government in the proceedings caused interlocutory matters to be escalated to the Court of Appeal five times before the hearing proper could take place in January 2017, some six years after the initial application.

The following year, the High Court quashed the decision of the State government to approve the alienation of the Pos Belatim land to Ladang Rakyat and issued several declarations on the constitutional, statutory and common law rights of the Pos Belatim villagers over their ancestral land.

The court held that the Temiar aboriginal peoples had aboriginal customary rights of usufruct over the Pos Belatim land. Such rights include the right to carry out their customary and traditional activities of hunting, fishing and foraging. In tandem with this finding, the court ordered the State government to gazette the Pos Belatim land as an aboriginal reserve.

In respect of the areas settled and cultivated by them, the court recognized that the Temiar had aboriginal customary title and ordered that title be granted to the Pos Belatim villagers over such land.

The State government strongly contended that all land in the entire State of Kelantan, save for those lands which have been alienated, was State land which had been gazetted as Malay reserve land. Notwithstanding this, the court ruled that the aboriginal customary land rights of the Pos Belatim villagers pre-existed the gazettal as Malay reserve land, and ordered that the gazettal over the Pos Belatim land be removed.

In arriving at its decision, the court placed much reliance on the oral evidence of the Pos Belatim villagers on their ancestry and aboriginal customs and practices over land.

Their evidence was supported by the report and evidence of an expert witness, Dr Colin G Nicholas, who was instrumental in providing extensive research on the history of the Temiar aboriginal peoples and their settlement and livelihood over the Pos Belatim land.

The boundaries of the Pos Belatim aboriginal lands, superimposed on Google earth

The Pos Belatim villagers also conducted GPS tracking activities along the boundaries of their aboriginal land in order to produce a map.

During their journey, they also took photos of areas where they had settled and cultivated, of forests where they hunted and foraged, of their burial lands, and of areas with history significant to the Temiar aboriginal peoples. Witnesses for the State government offered no rebuttal of all this evidence.

An appeal by the State government was settled between the parties in a consent order, substantially in the terms of the High Court order and in line with what the State government considered to be consistent with their own State land laws.

Under the consent order, the settled and cultivated lands was to be first reserved as a permanent settlement of the Pos Belatim villagers, and later to be alienated to them upon application.

Although the areas beyond the settlements were not declared as aboriginal reserve, the Pos Belatim aboriginal peoples would have the right to hunt, fish and forage freely over the entire forest reserve in which Pos Belatim is located.

Logging would also be prohibited on the areas previously approved for alienation and in 30 water catchment areas. The prohibition against logging in the water catchment areas was to protect their sources of clean water, and the rivers essential to their livelihood.

Postscript

The immediate predicament of the Temiar in this case was resolved, but it was not done in an ideal way. The solution arrived at was based on laws other than the written laws specifically enacted for the protection of the orang asli, namely the Aboriginal Peoples Act 1954 administered by JAKOA, the department for orang asli development under the Ministry of Rural Development.

This Act contained specific provisions enabling State authorities to declare areas exclusively inhabited by aboriginal people to be aboriginal reserves. Given its name and its responsibility for orang asli affairs under the act, JAKOA should be the primary source of protection for the orang asli, especially since it is a federal agency.

The objection by the Attorney General to the Temiar's application for judicial review is also troubling. It is time that JAKOA and the federal government consider themselves to be in a fiduciary position where the welfare of the orang asli is concerned, given the provisions of the Federal Constitution and the declared policies of successive governments.

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Pos Balar

The Preservation of Native Ancestral Lands

Jeremiah Vun

The Temiar are aboriginal peoples of Peninsular Malaysia who have settled in Gua Musang, Kelantan from time immemorial. In recent times, Temiar settlements have been identified in at least 83 locations in an area called Pos Dakoh, also known as Pos Balar, which is located within the Betis River Forest Reserve. Pos Balar is the ancestral land of the Temiar, having been settled, occupied and used by their ancestors for at least seven generations.

For approximately 240 years, Pos Balar has been a place where the Temiar built settlements, cultivated crops, and buried their dead. More than this, Pos Balar also represents the ecological, cultural and spiritual identity of the Temiar. Rivers and jungles in Pos Balar are where the Temiar forage, hunt and fish for their daily existence.

Foraged materials such as roots and leaves are used to make traditional medicine while bamboo and rattan are used to build their homes and furniture. While surplus herbal medicine and rattan are sold for cash, the Temiar have also learnt to cultivate bananas and rubber as cash crops.

A "shoot to kill" notice in Pos Balar.

The peaceful existence of the Temiar was interrupted in November 2012 when they found several signboards placed in various places on their land in Pos Balar. Some of the signboards featured the iconic shoot-to-kill image normally seen only around a security or military area. The signboards claimed the area belonged to the Perbadanan Pembangunan Ladang Rakyat Negeri Kelantan ("Ladang Rakyat"), a statutory body established by a Kelantan State enactment.

As the Temiar were to find out later, a large tract of their land in Pos Balar had been approved for alienation by the Director of Lands and Mines, Kelantan ("PTG Kelantan") to Ladang Rakyat, in what they discovered to be part of a land development scheme that featured a contract entered into two years earlier in 2010 between Ladang Rakyat and a private company called Sigur Ros Sdn Bhd for the development of oil palm plantations.

These steps affecting the Temiar ancestral land were taken without any notice to the Temiar of Pos Balar, certainly without any consultation or consent.

In August 2014, again unknown to the Temiar, the Director of Forestry, Kelantan, granted Ladang Rakyat logging rights for the extraction of timber from the Pos Balar area that had been approved for alienation.

The logging contract was granted to an individual named Rohaya binti Ali Haidar, trading as DZA Timber Trading and one Misran bin Sukadi was appointed Ketua Hutan, to be the person on-site carrying out the logging activities in the area.

The Temiar lodged a police report, and between 2013 and 2015 wrote four letters to the relevant government authorities informing them of their objection to these intrusions on their land. Two letters were addressed to the Chief Minister of Kelantan while the other two were addressed to Ladang Rakyat and the Kelantan Forestry Department. The authorities proved unhelpful.

In October 2015, the Temiar commenced legal action against Ladang Rakyat and the loggers and against the State of Kelantan together with its Director of Forestry and PTG Kelantan.

For the next two years, the case was delayed as the Temiar sought to compel the loggers and the State authorities to disclose relevant documents.

Destruction of the forest in Pos Balar by logging activities. Photo by Colin G Nicholas.

Meanwhile, in early 2015, having learnt that DZA Timber Trading had already begun preparations for logging works, several Temiar representatives met with Rohaya and Misran asking them to stop their activities, but to no avail.

In a desperate attempt to preserve their ancestral home, the Temiar set up blockades around Kampung Barong, a village in Pos Balar. This was a collective effort to prevent the loggers from encroaching on their land. The blockades stood for 43 days from 22 August 2015 and kept the loggers at bay.

At the commencement of the hearing in October 2017, both parties, upon the encouragement of the presiding judge, agreed to attempt a mutual compromise through negotiations.

The parties thereupon agreed on mediation with the learned judge as mediator. In the following two months, after four rounds of mediation sessions, the parties were able to report that a settlement had been achieved and this was then recorded in a consent order.

The Kelantan State Legal Advisor had in mind the issuance of land titles to individuals for the settled and cultivated areas. The four representatives of the Temiar named in the proceedings were given the chance to meet with the judge in chambers. They explained that the Temiar had lived and intended to continue living as a community and did not want to be separated by individual land titles.

other economic activities like logging were carried on.

The Temiar were also concerned about their rights to clean water. The State, through its Legal Advisor, gave an assurance that the logging permit over the forest areas would allow only selective felling of trees, which would be re-planted. The Temiar felt, however, that the logging

A Temiar blockade . Photo by Colin G Nicholas.

Prompted by the learned judge, counsel made a suggestion that title could be issued and held on trust by the two Tok Batin, or headmen, of the 11 affected settlements. Eventually it was agreed that land titles to these lands would be alienated upon the application of the Temiars at a time and in a manner appropriate to their needs.

In the areas outside the settled and cultivated areas, where they have usufructuary rights, the Temiar were concerned that they may not be permitted to engage in these traditional activities if

was unlikely to be limited and, even if it were, such logging would cause nearby rivers to be muddied and polluted, and the re-planted trees would take generations to grow back.

The Temiar asked, instead, for their hunting fishing, and foraging areas to be preserved and protected. The learned judge saw merit in their case and directed the Assistant Legal Advisor in attendance to find a way to secure the rights of the Temiar in this regard.

The result was that there was consensus—the State agreed that the hunting, fishing, and foraging rights of the Temiar over their traditional lands in the Perias and Betis Permanent Forest Reserve would be assured. In addition, the several compartments of land would be gazetted as water catchment areas within which logging activities would be prohibited.

The parties were therefore able also to settle an issue around the protection of water catchment areas which, if logged, would cause significant pollution to the main river.

Water catchment areas in Pos Balar

The resolution of the case was captured in December 2017 in a consent order which made the following provisions:

1. The permanent forest reserves of the Perias and Betis rivers around Pos Balar are declared areas in which the aboriginal people and the Temiar tribe have hunting, fishing and foraging rights.

2. The settled and cultivated lands of the Temiar are to be gazetted as land reserved as the permanent settlement of the aboriginal people of Pos Balar, to be later alienated to them on application.

3. The approval for alienation of, and the grant of logging rights over, the Pos Balar land are cancelled and such land is to be gazetted as a protected area, free from logging activities, and where the Temiar are to have the same hunting, fishing and foraging rights.

4. That logging activities be prohibited in 28 identified areas around the Betis, Jumpes and Telor rivers, of which 23 are water catchment areas which are to be gazetted as such.

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Postscript
The result of this case is to be celebrated as an all too rare occasion where the rights of an aboriginal people to their ancestral lands have received recognition and protection in legal proceedings. The Temiar in this case came very close to having their rights walked over by the State and business interests, in ignorance of how important ancestral lands are to the survival of aboriginal peoples and their way of life. Without empathy and understanding, a cut-and-dried legal system designed for the steel and concrete needs of an urban majority will naturally erode, if not destroy, the natural and soft ecology of an aboriginal people and their habitat.

The Orang Laut of Johor

Stomping on a Native Settlement

Jeremiah Vun

Historical records dating back some 1,200 years show that the Orang Laut, or “Sea Gypsies”, have played an important role in the Malay Archipelago, specifically in the Kingdom of Srivijaya and the early sultanates of Johor and Malacca. The Orang Laut were prominent as warriors protecting borders and sea lanes as well as international maritime traders.

Sometime in 1993, the tranquillity and security of their settlement came to a sudden end. They received a letter from the Johor Bahru City Council (MPJB) ordering them to vacate their homes in Stulang Laut on which they had lived all this while and to relocate to an area near the mouth of the Masai River. They were extremely reluctant to do so.

The Orang Laut settlement at Kuala Masai today. Photo by Colin G Nicholas.

The direct descendants of the Orang Laut are still alive today, having settled in organized tribal communities along the coasts of Peninsular Malaysia.

One such Orang Laut community is found in the Stulang area of Johor Bahru. This mainly Christian community have resided there for many generations. They carry on their traditional activities, including the harvesting of produce from the sea, which bring them a subsistence income. They had a chapel where they worshipped freely in accordance with the teachings of their faith.

Finally, persuaded by a promise made by the Director of Lands and Mines, Johor, that the land being assigned to them at the Masai River would be gazetted as an aboriginal reserve and that they would be free to rebuild their chapel, the Orang Laut community reluctantly agreed to move and to rebuild their lives and livelihood in the new place.

Meanwhile, their land at Stulang Laut eventually ended up as a duty-free shopping complex.

Their new settlement was named Kampung Orang Asli Kuala Masai. There, the newly settled families decided to build a chapel, acting on the promise given by the authorities. Before starting work on the building, they wrote to the Director General for Aboriginal Affairs asking if they could build the chapel. They were assured that they could. This, however, turned out not to be the case.

Six months after the notice to vacate, on 15 December 2005, as the community were busy preparing for their upcoming Christmas celebrations and the official opening of their newly built chapel, a group of nearly 300 men from the Department of Lands and Mines, Johor, entered the village with a bulldozer. These men broke into the church and dragged out the worshippers who were inside.

The Stulang Laut settlement before eviction. Photo by Colin G Nicholas.

Instead, the Department of Lands and Mines, Johor, issued a notice ordering the community to vacate the land on which the chapel was being built. They replied to the letter, saying that they had been relocated from Stulang Laut, where they had legitimate rights of livelihood and worship, and were promised the liberty of building a new chapel. In addition, the State had promised that their new settlement would be gazetted as an aboriginal reserve. The name given to their settlement, Kampung Orang Asli Kuala Masai, would have been consistent with that.

The church was then razed to the ground.

The community took legal action against the Director of Lands and Mines, the Johor Bahru City Council and the Director General for Aboriginal Affairs The court gave an order declaring that:

1. the community were the rightful occupiers by custom of the Stulang Laut lands and whose rights could not be limited or extinguished without adequate compensation;

2. the order of October 1993 requiring the community to vacate the Stulang Laut area did not limit or extinguish their rights over the land;

3. the acquisition of the Stulang Laut land was unlawful and a gross violation of the Federal Constitution, the National Land Code and the Land Acquisition Act 1960;

4. the community had freedom to practise their religion in peace and harmony under Articles 3 and 11 of the Federal Constitution;

5. the acts by the authorities were a breach of the legitimate expectations of the community and of the rules of natural justice;

6. the authorities, in destroying the new chapel at Kampung Orang Asli Kuala Masai, was a trespass.

The court also ordered the authorities to pay damages for the unlawful relocation of the community and the destruction of their newly built chapel, and that Kampung Orang Asli Kuala Masai be gazetted as native customary land.

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Living quarters in an Orang Laut home. Photo by Colin G Nicholas.

SIB

The Sidang Injil Borneo and the Name of God

Tan Hooi Ping

For centuries, the Malay language has been the lingua franca in the *Nusantara*, or the Malay Archipelago, in which Malaysia and Indonesia are found, transcending the hundreds of languages distinguished by tribal groups and geographical locations. The Christian communities scattered across the Nusantara use the *Alkitab*, a Malay version of the Bible.

When Sabah became part of Malaysia, the Malay language already in use there became identified as the national language, which later came to be called Bahasa Malaysia. The implementation of the national education system served to entrench further the use of Bahasa Malaysia in all aspects of life, including religious life. Meanwhile, the Malay language in Indonesia came to be called Bahasa Indonesia.

A Sidang Injil Borneo (SIB) church at Sapong, Sabah. Photo by CEphoto, Uwe Aranas

Malay-speaking Christians in South-East Asia have used *Allah* to refer to God in their prayers and *Allah* has appeared consistently in their holy scriptures as early as in the printed version of the Gospel of Matthew in Malay by A C Ruyl in 1629. The Malay translation of the entire Bible was completed by 1677.

The Sidang Injil Borneo, or SIB, is an organisation of Christians incorporated under the Sabah Trustees (Incorporation) Ordinance.

The congregation in SIB churches in Sabah, who comprise primarily of Sabah natives from diverse indigenous tribes, use Malay in all aspects of their faith—from birth, to baptism, to marriage and to final rites.

Since the founding of SIB in 1958, the congregation have been using the Malay language in their worship, prayers and religious instruction. This extended to using Christian books and literature printed in Malay and Bahasa Indonesia.

In August 2007, Ms Kinambo binti Gaduan, a Sunday School superintendent in SIB brought with her three boxes of Christian educational materials for children all the way from Surabaya, Indonesia, for the Sunday School. While she was on transit at the Low Cost Carrier Terminal (LCCT) in Sepang, Selangor, the educational materials were seized by a customs officer.

SIB asked for the return of their Sunday School materials but was told that the materials had been handed over to the Ministry of Home Affairs. SIB then wrote a letter to the Ministry asking for their confiscated materials to be returned but their request was denied. Over several letters, the Ministry explained that their decision to withhold the materials was based on Section 9(1) of the Printing Presses and Publications Act 1984 which granted them a discretion to withhold the release of the materials.

In a later letter, the Ministry stated that the discretion had been exercised in line with a government directive that was issued in 1986 which prohibited the use of four religious terms, including the word *Allah*, in any non-Islamic publication. The directive stated that the prohibition was for the purpose of ensuring public order and to avoid misunderstanding and confusion between Muslims and Christians.

SIB, led by its president, Pastor Jerry Dusing, filed an application for judicial review in December 2007 against the Minister of Home Affairs and the Federal Government of Malaysia, seeking to quash the decision of the Minister and for an order that the Sunday School materials be returned to them.

Also sought were several declarations that the general ban on the word *Allah* was in fact unconstitutional and unlawful.

About a month after the filing of the judicial review application, a meeting was convened by the Attorney-General's Chambers with SIB's solicitors. In this meeting, SIB and the Ministry came to a mutual compromise.

The Ministry agreed to release the Sunday School materials on the condition that a stamp bearing the "cross" sign along with the words "Christian publication" must be endorsed on the front page of each piece of material returned. SIB then withdrew their application to quash the Minister's decision and for the release of the materials seized, but persisted in seeking to declare the 1986 directive unconstitutional and unlawful.

In May 2014, the High Court refused to grant leave for judicial review, as it considered itself bound by the *Herald* case where the Court of Appeal had decided that the word *Allah* was not an integral part of the faith and practice of Christianity and that the prohibition by the Minister was therefore not unconstitutional. SIB filed an appeal against the decision of the High Court.

In the meantime, the Federal Court in the *Herald* case ruled that the views expressed by the Court of Appeal on the use of the word *Allah* were mere *obiter*—not a ruling which was binding on other courts.

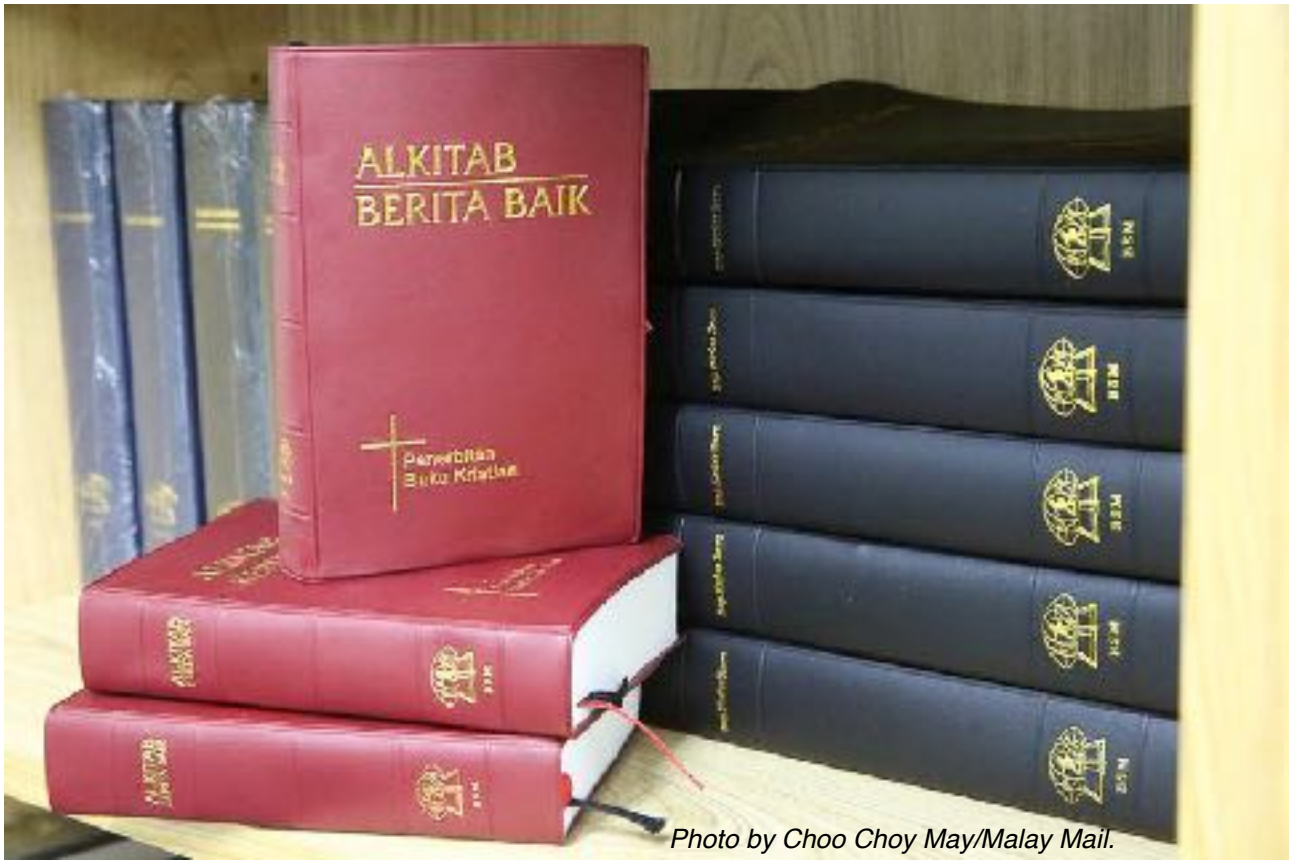

Photo by Choo Choy May/Malay Mail.

When SIB's appeal came to be heard in October 2014, the Court of Appeal finally gave leave for judicial review. The case was sent back to be heard in the High Court.

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Postscript
The Majlis Agama Islam Wilayah Persekutuan, or MAIWP, is established under the Administration of Islamic Law (Federal Territories) Act 1993 and charged with the duty to advise the Yang di-Pertuan Agong on Islamic matters and to promote the socio-economic development of Muslims in the Federal Territories consistent with Islamic Law.

MAIWP applied to be a party and to oppose the SIB case. The High Court allowed the intervention, but the Court of Appeal eventually refused to allow it on the grounds that the duties of MAIWP under the 1993 Act did not confer any express or implied power to intervene and that they had no rights over non-Muslims.

When SIB sought to resume the case after the MAIWP interruption, the Ministry refused to disclose relevant documents and SIB has since filed an appeal to compel disclosure, and that is now holding the case in abeyance.

Kassim Ahmad

Religious Prosecution Bordering on Persecution

Ahmad Fadhli Umar bin Aminolhuda

In March 2015, the late Kassim Ahmad, then aged 82, was arrested at his home in Kedah by officers of JAWI, the Federal Territory Islamic Affairs Department, who brought him to the Syariah Court in Putrajaya where he was charged with insulting Islam and violating a fatwa issued by the Federal Territory religious authority.

Kassim was then charged for statements he had made in a speech delivered at a seminar organised by the Perdana Leadership Foundation* in Putrajaya, on views he had expressed in his writings over the years which had been banned by a fatwa of the Islamic Affairs Department.

His views challenged the orthodox position on how the Prophet, the modesty of women and the hadiths ought to be regarded.

His application to mount a legal challenge against JAWI's action was dismissed by the High Court and he had to resort to the Court of Appeal to obtain, in December, some nine months later, a declaration that his arrest and prosecution were unlawful and an order for damages and costs to be paid to him.

In quashing the case brought by JAWI against Kassim Ahmad, the Court of Appeal made several important rulings, that:

*The Perdana Leadership Foundation was chartered in January 2003 as a non-profit organisation, founded with gifts from people who supported the vision of a thriving research and learning institution dedicated to the study of Malaysian leadership and nation-building: www.perdana.org.my

1. the civil courts retain supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties including State religious authorities, such as JAWI;

2. the Syariah courts are State courts and have no powers of judicial review;

3. breach of fundamental and constitutional rights by public authorities will not be immune from judicial review; and

4. State Syariah laws meant for Muslims did not take away the jurisdiction of the civil courts to interpret them.

Even after the prosecutor's attempt to appeal to the Federal Court had failed, two years after the arrest, the charges against Kassim Ahmad were not withdrawn and it was only several months later, on 7 August 2017, that the Syariah High Court finally dismissed the case and released Kassim Ahmad and his bailors.

About two months after the charges against him were dismissed, Kassim Ahmad passed away on the morning of 10 October 2017.

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Postscript
The vindication of Kassim Ahmad by the Court of Appeal is a sterling example of the role of the court in upholding the constitutional rights of the individual against institutional abuse, beautifully expressed in the words of Salleh Abas LP in Lim Kit Siang v Dato Seri Dr Mahathir Mohamed:

1. The courts have a constitutional function to perform and they are the guardians of the Constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review - a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both.

2. The courts are the final arbiter between the individual and the State and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action.

Marina Mahathir

Defamation by Demonisation

Arief Iskandar bin Hamizan

The Universal Periodic Review, or UPR, is a global mechanism that examines the human rights record of each Member State in the United Nations. It is a process by which States provide each other with constructive, human rights-related recommendations. Civil society organisations, usually NGOs, play an important role in the UPR process. Not only is the State encouraged to consult NGOs, the NGOs themselves can be directly involved in the UPR process.

In Malaysia, a coalition of NGOs, called COMANGO, has, since its establishment in 2008, worked actively in preparing the human rights report to be submitted in the UPR process.

One of the more than 50 NGOs in COMANGO is Sisters in Islam, or SIS, a civil society organisation committed to promoting the rights of women within the framework of Islam and universal human rights. It was co-founded in 1988 by seven prominent muslim women: Zainah Anwar, Amina Wadud, Askiah Adam, Norani Othman, Rashidah Abdullah, Rose Ismail, and Sharifah Zuriah Aljeffri.

Among the directors of COMANGO is Datin Paduka Marina Mahathir, writer, human rights activist, and daughter of Prime Minister, Tun Dr Mahathir Mohamad. Through SIS, Marina has championed the cause of justice and equality for muslim women.

Marina Mahathir with her BERSIH compatriots. Photo from http://rantingsbymm.blogspot.com.

Her heroic efforts were internationally acknowledged in 2012, when she was named the UN Person of the Year.

She had also been named among the 100 Most Inspiring People Delivering for Girls and Women by WomenDeliver.org in conjunction with the 100th International Women's Day.

As COMANGO worked on the human rights report to be submitted for the UPR in 2013, it encountered a particularly severe reaction from Ikatan Muslimin Malaysia, or ISMA, an Islamic NGO established with the avowed goal of defending Islam as the national identity of the country.

Through key ISMA figures including its President, Abdullah Zaik bin Abd Rahman, ISMA actively issued statements and articles in support of their "fight" against COMANGO.

On 8 November 2013, ISMA distributed 70,000 pamphlets at mosques around Kuala Lumpur, and various cities and suburbs across the country. In this pamphlet, ISMA labelled Datin Marina Mahathir as the "liberal mastermind" behind COMANGO, painting her as anti-Islam and disrespectful of the Federal Constitution.

In January 2014, ISMA having refused to retract the article when asked, Marina commenced an action in defamation, naming 16 ISMA leaders including its President, Abdullah Zaik bin Abd Rahman as defendants.

More than a year into the legal proceedings, ISMA admitted that their publication was false and defamatory of Marina, and in August 2015, the case was settled when ISMA read a statement of apology in open court.

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Postscript
Civil society can all too easily be eroded by irresponsible statements designed to vilify civil society leaders by demonising them in the eyes of the public. The responsible legal practitioner must consider when called upon, whether to take a stand against such attacks in defense of civil society.

Jill Ireland

Language and the Freedom of Religion

Tan Hooi Ping

Jill Ireland binti Lawrence Bill is a Malaysian native from the Melanau tribe of Sarawak. Brought up in the Malaysian national education system, she speaks Bahasa Malaysia, the primary medium of instruction in school. She comes from a committed Christian family and is active in church, speaking and writing in Bahasa Malaysia, which was also her language for all aspects of her profession and practice of her Christian faith.

Jill and her co-religionists in Sarawak use Bahasa Malaysia in their worship, prayer and religious instruction. In their Bible in Malay, the *Alkitab*, and in their other Bahasa Malaysia and Bahasa Indonesia Christian publications, the word *Allah* is used in reference to God.

In May 2008, while Jill was returning home from Jakarta, Indonesia, she had with her 8 audio CDs containing Christian educational materials, which were for her personal use and edification. These CDs, which carried titles containing the word *Allah* were detained by a Customs officer at the former Low Cost Carrier Terminal in Sepang, Selangor, who issued her a notice of detention of goods.

Two months later, in July, Jill received a letter from the Ministry of Home Affairs, informing her of a decision to withhold the return of her CDs purportedly in the exercise of its powers under the Printing Presses and Publications Act 1984. The reasons given were curt, merely stating the words “Prohibited Terms”, “Public Order” and “Breach of JAKIM Guidelines”.

It only became clear later in the course of court proceedings that “Prohibited Terms” referred to four words, including *Allah*, which had been prohibited from use in non-Islamic publications under a government directive issued in 1986, which the Ministry was responsible for implementing under the 1984 Act.

One month later, in August 2008, Jill applied to the High Court for leave to apply to invalidate the decision of the Customs officer and the Ministry and for the return of her CDs. In doing so, she was challenging the constitutionality and validity of the 1986 directive banning the use of the word *Allah*.

She also sought a declaration from the High Court affirming her constitutional rights and legitimate expectation on the use of the word *Allah* in general, and specifically, in Christian publications.

In her sworn statements to the High Court, Jill showed that, in addition to the use of *Allah* in Bahasa Malaysia and Bahasa Indonesia, the word was used in other Christian literature in such tribal languages as Iban, Lunbawang, Tagal, Kayan, and Kenyah. She pointed out that there had never been any prejudice or threat to public order arising from the use of the word *Allah*.

Jill’s pastor holding the recovered CDs

Photo by Choo Choy May/Malay Mail.

Supporting her claim on the basis of legitimate expectation was the fact that Sarawak Christians, together with their co-religionists in Sabah, had been given solemn assurances that they would continue to enjoy complete religious freedom in the enlarged Federation of Malaysia notwithstanding Islam being declared to be the official religion of the country.

In May the following year, the High Court granted leave to proceed.

Jill's predicament occurred in the wake of the *Herald* case, where the Court of Appeal had ruled that the word *Allah* could not be used in a Christian publication as it was not an integral part of the religion of Christianity. Jill's case was deferred pending an appeal to the Federal Court in the *Herald* case. In June 2014, the Federal Court refused to grant leave to appeal, but held that the views expressed by the Court of Appeal on the use of *Allah* was merely *obiter dictum*.

Hence, it was six years after her application that, in July 2014, the High Court quashed the decision of the Minister to withhold delivery and ordered the return of the CDs to Jill. The High Court held that the decision was unlawful, having been made by an officer who had, in fact, no power to do so.

The High Court, however, declined to address the larger issues regarding Jill's constitutional rights and legitimate expectation on the use of the word *Allah*, regarding the statements of the Federal Court in the *Herald* which held that the question on the use of *Allah* could not be considered in isolation without taking into account the validity and constitutionality of other State enactments on the issue.

A year later, in June 2015, the Court of Appeal allowed an appeal by Jill and directed that her case be sent back to the High Court for a decision on two issues—her right to freedom of religion under Article 11 and her right to equality and freedom from discrimination under Article 8 of the Federal Constitution - which could and ought to have been decided by the High Court.

Two years after that, in October and November 2017, Jill's case was re-heard by a different judge in the High Court and is currently awaiting a decision from that hearing.

During the proceedings, there were attempts by the Federal Territory Islamic Council, MAIWP, and the Selangor Islamic Council, MAIS, to intervene to be parties in opposition to Jill's case. Both the High Court and the Court of Appeal dismissed their applications, holding that neither MAIWP nor MAIS had any direct interest to intervene in cases involving a non-Muslim claiming a violation of her personal rights under the Federal Constitution, as Jill was challenging a decision of the Minister and not of MAIWP or MAIS. In any event, there was nothing in the laws constituting the two bodies which authorised or empowered them to intervene.

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Postscript
Soon after the case started, Jill stopped turning up at court hearings, especially after a series of arson attacks on several churches all over Malaysia. She now avoids contact beyond a small circle of family and trusted friends.

Infant G

Father Retains Custody of Child Against All Odds

Jeremiah Vun

On 19 July 2000, a baby boy, Infant G, was born to a non-Muslim couple, H and W. Sometime in 2006, when he was 6 years old, his parents went through a bad patch in their marriage which ended up with the father, H, moving out of the matrimonial home in the hope that things would cool down and that W would change her mind about getting a divorce.

About a month later, W asked her husband, H, to take over the care of Infant G, saying that she was too busy and unable to supervise and take care of their son. Shortly thereafter, W moved out of the house and H moved back in to take care of his son. Father and son lived together in peace for several months.

At about the same period of time, in August 2006, W, through her solicitors, sent H a letter requiring him to agree within 14 days to a joint application for divorce, failing which W would apply for the divorce herself and claim custody of their child. H did not reply to the letter as he did not want a divorce and continued to hope for reconciliation.

One day, in February 2007, while he was waiting for his son outside his school, H was approached by W who handed him what appeared to be an order from a Syariah High Court requiring him to surrender custody of his son to W.

The court order also contained a direction to the Police and the two Selangor religious authorities to render whatever assistance required to ensure compliance with the order, together with a warning that non-compliance would be a contempt of court punishable with imprisonment.

Internet photo.

It was at this time that he first learned that his wife had converted to the religion of Islam several months earlier. She had obtained this order from the Syariah Court, ex parte, without giving him any prior notice.

In the face of the harsh terms of the Syariah Court order, H was so terrified of the possibility of imprisonment and what that might do to him and his son that he reluctantly handed his son over to his wife in accordance with the order.

To placate him, W promised him that he would be able to see his son over the weekends. However her promises turned up empty, and she ignored all his phone calls to set up the weekend appointments.

To make matters worse, W transferred his son to a different school, moving him from Kajang to Kuala Lumpur, without his knowledge or consent. H was left with no choice but to meet his son during his short periods of recess at school, between about 3.10pm to 3.30pm every weekday.

In those brief meetings with the boy, H discovered that his wife had been cohabiting with another man. Both of them, together with a group of other male companions, had brought the boy along to a snooker center at night.

W and her companion had also taken him with them to places like Genting Highlands and Port Dickson with the same group of friends. On one occasion, his son was made to sleep on the floor while W and her male companion occupied the bed. His mother had also encouraged him to call her male companion *Abah*, meaning “Father". W’s male companion had also told Infant G that, in due course, his name would be changed to a Muslim name.

H continued to ply his wife with almost daily phone calls. After more than a month of ignored calls, she finally called back and told him that if he wanted to meet his son, he should go to a restaurant in Cheras and meet her at the parking area. He did so and his wife brought his son and asked him to bring the boy back at 7pm the following day.

Worried, and disturbed by the conditions under which his son was being brought up by his wife, H decided to risk keeping his son with him.

Under the apprehension that the Syariah Court order could be enforced and that he might be imprisoned for disobeying it, H took his son with him to Singapore. While there, he learned from a friend that his wife was threatening to take custody of the boy and convert him to Islam.

After about a week, H returned from Singapore and continued to keep his son away from his wife, still fearing that she would enforce the Syariah Court order for custody and take his son to the religious authorities for the purpose of converting him to Islam.

At a meeting between H and W, in the presence of their respective siblings, to discuss the issue of custody of Infant G, W asserted that she need only seek recourse from the Syariah Court which, in her own words, "would not rule against her", and need have nothing to do with the civil High Court.

Still fearing the threat of imprisonment under the Syariah Court order, and now also the unilateral conversion of his son, H finally sought legal advice.

His legal advisers acted immediately to secure an ex parte injunction in the High Court to prevent his wife from enforcing the Syariah Court order and from converting Infant G. This step was critical for two reasons:

1. There was every possibility that W may take active steps to enforce the Syariah Court order, and H would have no right to be heard in the proceedings, although, as a matter of law, the Syariah Court had no jurisdiction over H, a non-muslim, in any case.

2. If W were to gain custody and succeed in converting Infant G, H's rights could be compromised by the possibility of the High Court declining to intervene in the welfare of a muslim child.

Because the ex parte injunction was for a limited time, the status quo had to be preserved with an ad interim injunction until September 2007 when the High Court, after hearing both parties, ordered the injunction to remain in force, in substantially the same terms, until the trial of the case. At the same time the High Court granted W weekly access to Infant G from Friday evening until Saturday evening.

The case was finally disposed of two years later, in November 2009, after the court had heard the matter on the merits.

On the issue of custody, the main consideration has always been the welfare and best interest of the child. The High Court felt that it would be undesirable to disturb the life of Infant G who was then with his father, H, with whom he had a common faith. On the other hand, the moral climate in W's living arrangements did not appear to be conducive to the upbringing of Infant G. When asked, the boy said that he was happy to live with, and wished to continue to stay with his father.

The High Court made several orders to address the different legal aspects of the case:

First, the High Court declared that it was the civil court that was vested with the jurisdiction to decide the custody dispute and that the Syariah Court's ex parte order, requiring H to surrender custody of his son, had no effect and was not binding on H.

The Syariah Court, which had jurisdiction only over persons who professed the religion of Islam, had no such jurisdiction over matters arising out of a non-muslim marriage.

Second, the High Court ordered that the custody and guardianship of Infant G be given to H, the father of the child and declared that H was to have the right to decide on matters relating to the religion, education and upbringing of Infant H.

The order included an injunction restraining W from converting Infant G to the religion of Islam without the consent of H.

Thirdly, an anti-suit injunction was issued to restrain W from continuing with her case in the Syariah Court and from commencing any other proceeding in the Syariah Court in relation to or arising from the marriage between H and W.

Along with this was a further injunction restraining W from enforcing the ex parte Syariah Court order that was declared invalid.

The anti-suit injunction was necessary, for it would have been oppressive and unconscionable if the legal proceedings in the Syariah Court had continued against H who, not being a Muslim, had no right to be heard in his own defence in that court. W had herself gloated over the advantage she felt she had in the Syariah Court.

The Syariah Court case was commenced in disregard of the Administration of the Religion of Islam (State of Selangor) Enactment 2003, which confers jurisdiction on the Syariah Court only in respect of disputes where all parties concerned are muslims.

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Postscript
In 1988 a new Clause (1A) was inserted in Article 121 of the Federal Constitution, in terms declaring that the civil courts were to have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

Unfortunately, on many occasions, the High Court had, as a matter of course, read that provision as preventing it from entertaining any applications relating to divorce and child custody involving a Muslim spouse or parent. One such case was *Subashini*.

In the judicial climate overshadowed by *Subashini* and other cases, it was against all odds that H and his son managed to obtain from the High Court the remedies that they did.

Afendy Balan

In Defence of a Vulnerable Employee

Amardeep Singh Toor

Afendy Balan, a native Sarawakian from the Kenyah tribe, hails from a remote village along the Baram River. In his late teen years, he moved to Kuala Lumpur to find work and settled there. He now lives with his wife and four young children aged 3 to 9 in Shah Alam, Selangor. His wife teaches in a primary school in Taman Cheras, Kuala Lumpur.

For about 10 years, since 2005, Afendy worked as a crane operator for a construction company in Kuala Lumpur. He operated crawler cranes from Monday through Saturday with Sunday as his rest day. His Sundays were spent with his young family and at church.

However, in November 2015, his employer sent him to work in Alor Setar where his employer had obtained a contract. Every Saturday night after work, Afendy would catch a night flight back to Selangor to be with his wife and children for his Sunday rest day. He would then fly back to Alor Setar early Monday morning in time to report for work.

Afendy's problem with his employer began one Saturday in December 2015. As he was leaving after work, he told his employer that he was going home to his family and would return for work on Monday morning as usual. His employer however insisted that he come in to work that Sunday without giving any reason why he should work on his rest day although employees may be called upon to work on their rest day if needed for good reason.

Afendy, on the other hand, explained to his employer that on that particular weekend, he needed to send his wife and children to the airport as they had planned to return to his wife's hometown in Ranau, Sabah, to celebrate the Christmas season. After hearing his explanation, his employer told him not to return to work and also to turn in his employee punch card so that his final wages for that month could be calculated.

Afendy and his crane. Photo by Afendy Balan.

A day or two later, his employer took back the company car and also his punch card.

To add to his troubles, when he managed to find another job, his new employer was persuaded by his former employer to dismiss him.

On advice, Afendy lodged a complaint with the Labour Court, claiming termination benefits and an indemnity in lieu of notice of termination. Despite difficulties with language and a lack of documentation, Afendy won his case. On the evidence, the Labour Court held that Afendy had effectively been dismissed by his employer and that there was no merit in the employer's allegation that Afendy had walked out of his employment. For his 10 years of service, the employer was ordered to pay Afendy RM29,349.54 and a further RM6,141.93 as an indemnity in lieu of eight weeks' notice of termination.

Afendy's ordeal did not end there. The employer refused to comply with the judgment, claiming inability to pay. Finally, instalment payments over a period of 12 months was agreed between parties.

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Postscript
Cases like Afendy's are commonplace, and due to a lack of an awareness of employee rights and of resources, many cases are left unaddressed and the employee deprived of any remedy.

The constitutional right to life includes the right to work and an employer cannot dismiss an employee on a whim.

Employees like Afendy deserve to be legally represented.

BERSIH

Electoral Reform in the Face of Police Brutality

Marco Insidor Tan Kee Keat

Dr Wong Chin Huat is a political scientist, activist and newspaper columnist. He is a Fellow at the Penang Institute, a think tank linked to the Penang State government. He is most known as a leader in the electoral reform movement, widely known as BERSIH 2.0.

A Bersih rally. Photo by KH Koh.

On 4 April 2012, the Steering Committee of BERSIH 2.0, of which Dr Wong was a member, issued a press statement in response to the report of the Parliamentary Select Committee on Electoral Reform, and addressed issues and allegations of fraud with the electoral roll and other aspects of elections in Malaysia.

The statement also called upon Malaysians to express their deep disappointment with the government by joining the Steering Committee in a sit-in protest in the country and around the world. The sit-in, or Duduk Bantah, took place at the Dataran Merdeka in the afternoon of 28 April 2012. It was dubbed BERSIH 3.0 by the public.

The sit-in attracted a turnout in the tens of thousands. After the end of the protest at 4pm, before the crowds had completely dispersed, the police fired tear gas and Dr Wong took refuge at a budget hotel nearby. At about 7.30 in the evening, as he went to retrieve his car parked nearby, he was arrested by someone in a police uniform without a name tag or ID number. When Dr Wong asked for the reason for his arrest, the officer merely shrugged off his request and told Dr Wong to speak to his supervising officer.

He was taken to an open space, sandwiched between Jalan Parlimen and Jalan Raja, that had been turned into a temporary detention centre by the police. There, he was made to walk between two rows of police officers, none of whom were wearing any ID. Dr Wong, together with others arrested were then made to run the gauntlet of kicks and punches by the officers.

The assault stopped only after a blow had caused Dr Wong to fall to the ground. He was later herded together with others into a police truck and brought to the Police Training Center (PULAPOL).

Dr Wong was wrongly assaulted and wrongfully arrested and detained by the police for about six hours before being released without any charge at about 1.25 in the morning. Later the same day, Dr Wong lodged a police report on the assault he suffered at the hands of police officers.

Within a month of the sit-in, the government brought an action against the members of the Steering Committee, claiming compensation for alleged damage to public property based on the Peaceful Assembly Act 2012. Dr Wong made a counterclaim against the government, seeking compensation for assault, breach of constitutional rights, unlawful arrest and detention. He also sought aggravated damages.

Some three years later, on 30 January 2015, the High Court dismissed the government's action and awarded Dr Wong on his counterclaim a sum of RM51,000 as damages for assault, breach of constitutional rights, unlawful arrest and detention, and a further sum for aggravated damages and costs of RM30,000.

On appeal, the government managed to dismiss the award of RM6,000 for breach of constitutional rights, and unlawful arrest and detention. Both the High Court and the Court of Appeal held that the Peaceful Assembly Act 2012 did not give the government any right to claim damages in a civil action.

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Postscript
Dr Wong deserves sympathy for the ordeal he suffered. The firm is happy to have been able to vindicate him and his cause in the courts.

Wangsa Maju

Contamination of Electoral Roll by Fraud and Corruption

Gokul Radhakrishnan

On the cusp of the eagerly anticipated 14th General Election in Malaysia, a dark cloud hung over the Wangsa Maju parliamentary constituency. In the nine months leading up to March 2017, there was a sudden spike of 13,462 new names appearing in the electoral roll for the constituency. Of that figure, 7,408 were newly registered electors and the other 6,054 were electors whose names had been transferred to the Wangsa Maju constituency from elsewhere.

In the 13th General Election, the opposition had won the parliamentary seat by a majority of 5,511 votes, a margin of 9.5%. Consequently, the addition of 13,462 electors represented an opportunity for the ruling party to swing the vote in their favour.

Raveentheran Suntheralingam, a registered voter in Wangsa Maju, together with several other registered voters and volunteers conducted data analysis of the quarterly supplementary electoral rolls issued under the Election (Registration of Electors) Regulations 2002. They also went from house to house to check on the addresses of electors newly transferred to Wangsa Maju. To their consternation, they found that a significant number of these electors were not resident at the addresses appearing in the roll.

There were two non-residential premises with dozens of electors registered:


Mengapa polis tak siasat pengundi hantu?

KEADILAN mempersoal mengapa tiada tindakan serius oleh pihak polis mengenai cubaan merakar pusat mengundi dengan menggunakan alamat rumah palsu seperti dilapor mereka sebelum ini.

Pengundi Alamat Palsu
POLIS WAJIB SIASAT!

Photo by Raveentheran Suntheralingam.

- A warehouse had an address with 39 new electors registered under it, of which 25 appeared as newly registered electors and 14 appeared to be existing registered electors transferred from a neighbouring constituency.
- A workshop accounted for 48 new electors,, of which 21 were new and 27 were transferred from a neighbouring constituency.

A similar irregularity appeared even with residential addresses. In one house in Kampung Puah, there were 48 new electors registered who were not resident there, and in an apartment in Section 1, Wangsa Maju, there were 21 new electors registered who were not resident there.

In the course of tracing the whereabouts and meeting some of the people whose names were newly registered under Wangsa Maju, Ravee managed to record, on video, admissions by several individuals that they had received financial incentives for falsifying their addresses in their identity cards.

the Criminal Procedure Code for a report on the status of investigations into the police reports filed earlier. No response was received from the police although the law required a status report to be given within two weeks of the request.

To be registered as a new elector in any particular constituency, one must be and must show that one is resident within the constituency. This is done by showing particulars of his residence in his identity card, which is taken from particulars declared to and registered with the National Registration Department.

Protest by residents of Wangsa Maju. Photo by Raveentheran Suntheralingam.

In an effort to prevent the integrity of the election process in his constituency from being compromised, Ravee lodged a total of five police reports setting out the details of these offences.

With the 14th General Election looming and as time was not on his side, Ravee, as the complainant, followed up on these reports with two official requests to the police under

Quite clearly, false addresses must have been furnished to the National Registration Department for those electors newly registered under Wangsa Maju but who were not resident there. The provision of false information in such circumstances would amount to an offence, not only under the National Registration Regulations 1990 but also under the Election Offences Act 1954.

It would also have constituted the general offence under the Penal Code of furnishing false information to a public servant. Electors having received financial incentives to falsify their addresses show that offences may also have been committed under the Malaysian Anti-Corruption Commission Act 2009.

The irregularities on the roll, together with the criminal behaviour uncovered by Ravee and his friends were acts that could be construed as being detrimental to parliamentary democracy, yet another offence under the Penal Code. Over and above all this, there was clearly a blatant violation and disregard of the Federal Constitution in relation to the election for the Wangsa Maju parliamentary sonstituency.

The Election Commission did not respond when Ravee wrote to them to draw their attention to the irregularities.

When questioned by the media, the police said that they had not acted on the reports but had forwarded them to the Election Commission, whom they had expected would investigate the matter.

The Election Commission, in turn, through a media statement stated that they had left the investigation to the police as the reports concerned criminal offences under the Penal Code and the National Registration Act 1959.

They made no mention of the prospect of electors who were not constitutionally qualified to vote in the Wangsa Maju parliamentary constituency casting their vote in the 14th General Election soon to take place. The police when questioned on the this statement said that they "were also in the dark" and only learned that they have the green light to conduct investigations pursuant to the reports made.

Ravee applied to the High Court for several reliefs against the Police and the Election Commission to compel them to comply with their statutory and constitutional duties, functions and responsibilities.

Against the Police, Ravee sought to establish that the Police had the duty to complete criminal investigations into his police reports, to submit a report of their investigations to the Public Prosecutor without delay and to respond to Ravee's requests for status reports on their investigations, and to so honestly and diligently.

Against the Election Commission, he sought a declaration that they have failed their constitutional duties to exercise due control and supervision over the registration of electors on the electoral roll-in particular, in not taking all necessary steps to ensure that only qualified electors residing in the Wangsa Maju parliamentary constituency would be permitted to be entered in the electoral roll and not ensuring that non-qualified persons would not be permitted to vote in the 14th General Election.

The High Court rejected Ravee's application principally because of the provision in the Elections Act 1958 that the electoral roll, once gazetted was to be final and not subject to review by any court.

Ravee's appeal against the decision of the High Court remains pending.

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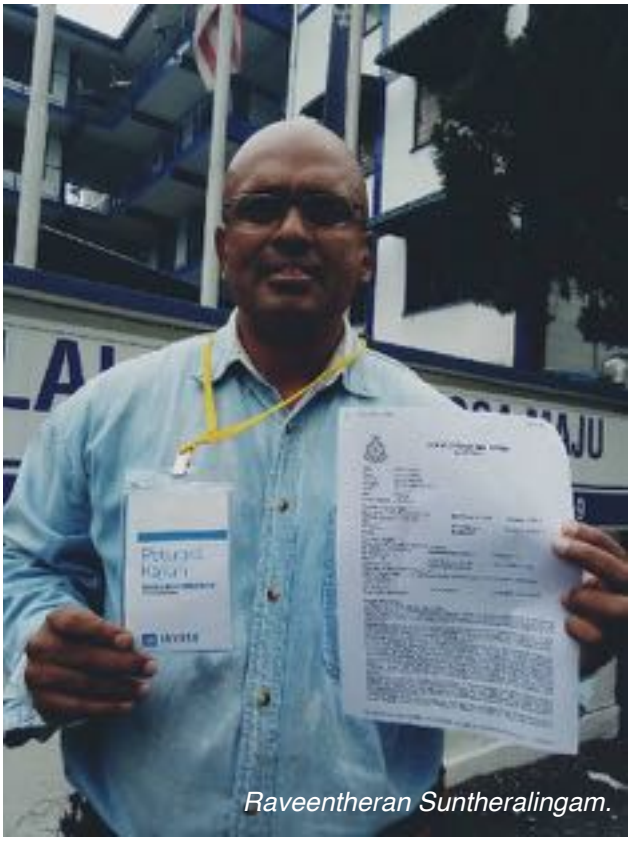
Postscript

It remains to be seen how the Court of Appeal will consider the issue whether the Election Commission, in relying upon the provision in the Elections Act 1958 that the electoral roll is to be deemed final and not subject to review by any court, can do so in disregard of the constitutional provisions prescribing the qualifications for a person to vote in any particular constituency.

At the heart of this critical issue lies the fundamental question whether this statutory provision can override the constitutional duty of the Election Commission to conduct elections in accordance with the Federal Constitution, which is the supreme law of the land.

With regard to the Police, the Court of Appeal will need to consider whether the remedies sought against them to complete and to then forward investigation papers to the Public Prosecutor and to do so honestly and diligently would amount to interference with police investigations. The other question is whether the Police are obliged to comply with their statutory duty to provide status reports on investigations.

At this stage, where the application is for leave to commence judicial review, all that Ravee needs to show is that the issues he has raised are arguable.



Raveentheran Suntheralingam.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