MONKEY IN A WIG: LOYARBUROK, UNDIMSIA!, PUBLIC INTEREST LITIGATION AND BEYOND

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I. Malaysia: A Brief Overview 587
   A. Malaysia's Constitutional System 587
   B. Attack on the Judiciary 589
II. My Introduction to Public Interest Work 592
III. LoyarBurok Evolves into the Malaysian Centre for Constitutionalism & Human Rights 596
   A. 2008: Everything Changes 598
   B. A Physical Center is Born 601
IV. Two Examples of Public Interest Litigation 602
   A. Test Case to End State of Emergency in Malaysia: The EO Trio 603
   B. Religious Freedom: A Mother Torn From Her Daughter - Indira Gandhi v. Muhammad Ridzuan 607
   C. Using the Cases and the Blawg to Create Greater Awareness 609
V. Beyond the Courts: UndiMsia! (VoteMsia!) 610
VI. International Influence 613
   A. Centre Funding 613
   B. The Rule of Law in Malaysia as Compared to Other Countries 616
VII. Why We Do It 617
   A. Motivations and Frustrations 617
   B. Moving forward 618

"Malaysia – Truly Asia!" This is the slogan proudly splashed in advertisements throughout the world in efforts by the Malaysian government to attract tourists. Split in two by the South China Sea, Peninsular Malaysia (or Malaya as it was then known) achieved independence from British rule in 1957. Sabah (formerly British North Borneo), Sarawak, and Singapore joined Malaya to form a Federation called Malaysia in 1963, with Singapore leaving the Federation less than two years later.

Malaysia's approximately 28.3 million people[1] are comprised of about 61.3% Muslim (most of whom are ethnic Malays). The rest of the population consists of 19.8% Buddhists (mainly ethnic Chinese), 9.2% Christians (consisting of ethnic Chinese, Indians, and natives of Sabah and Sarawak) and about 6.3% Hindus (almost all of whom are ethnically Indian or Sri Lankan). Malaysia is indeed a microcosm of the cultures and traditions of Asia. Yet, a government entrenched in power ever since independence - for more than fifty years - and the onslaught of a politicized form of Islam by politicians anxious to hide corrupt practices under a miasma of religiosity have caused many of the institutions of democratic governance in Malaysia to fail.

It is in this context that a group of friends and I - with the assistance of a much larger group of young, idealistic, and energetic people - are hoping to empower ordinary Malaysians to understand their rights and to force our elected representatives to be accountable to the people and govern according to the rule of law. We try to do this through a website / blawg called *LoyarBurok*, a body called the Malaysian Centre for Constitutionalism and Human Rights and a movement called *UndiMsia!*

I. MALAYSIA: A BRIEF OVERVIEW

A. MALAYSIA'S CONSTITUTIONAL SYSTEM

A federation of thirteen States and three federal territories, Malaysia's Federal Constitution expresses itself to be the "supreme law of the Federation."[2] The constitution also provides that Islam is to be "the religion of the Federation" but also guarantees that "other religions may be practised in peace and harmony."[3] Under the constitution, each of the States' legislatures (and the Federal Parliament for the federal territories) has powers to make Islamic laws that regulate the personal law of persons professing the religion of Islam.

Of the thirteen states, nine have hereditary rulers who form a Conference of Rulers. Every five years, they elect from amongst their

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[1] *Population Distribution and Basic Demographic Characteristic Report 2010*, DEP'T OF STATISTICS M'SIA., http://www.statistics.gov.my/portal/index.php?option=com_content&id=1215 (last updated Jan. 3, 2014).

[2] M'SIA. CONST. art. 4, § 1.

[3] *Id.* at art. 3, § 1.

number one person who acts as the constitutional monarch of the country as a whole. Always a Muslim male of royal lineage, the monarch is called the "Yang Di-Pertuan Agong" ("the Agong"), the Supreme Leader and sovereign head of the federation. His duties are very similar to those of the Queen in the Westminster Parliamentary system. The Agong's consent is necessary for legislation (but his power exists merely to delay and not to veto outright). The monarch is also entrusted with personal discretion to select as Prime Minister the person he considers to command the confidence of Parliament.

Malaysia's independence was negotiated rather than fought. Malaysia's first prime minister was a prince and a Cambridge trained lawyer. He led a political party known as the United Malays National Organisation ("UMNO"), and together with two other race-based political parties – the Malaysian Chinese Association ("MCA") and the Malaysian Indian Congress ("MIC") – formed "The Alliance." The Alliance, and its successor, the *Barisan Nasional* (*National Front*) ("BN"), have formed the federal government in Malaysia ever since independence.

The federal constitution was established in Malaysia after a report by the Reid Commission, a panel of distinguished jurists named after Viscount Reid consisting of eminent Commonwealth jurists but no Malaysians. A bicameral legislative assembly together with the Agong act as the parliament. Executive power is vested in the Agong who has to act on the advice of a cabinet, with the prime minister considered as being first amongst equals. The upper house was not elected, but consisted of a mix of senators appointed by state legislatures as well as the Agong on the advice of the cabinet. Over time, the constitution was amended such that federal appointments far outnumbered senators appointed by the states.

The third branch of government, the judiciary, consists of a Supreme Court entrusted with appellate powers and original jurisdiction in disputes between states and between the federation and a state. They also possess advisory jurisdiction in certain very rare instances. Judicial power, in the 1957 Constitution, however, was vested in the High Courts of Malaya and Borneo (later termed Sabah and Sarawak), which acted as both first instance courts as well as appellate courts from Magistrates and sessions courts (dubbed inferior courts).

B. ATTACK ON THE JUDICIARY

In 1988, the independence of Malaysia's judiciary was subjected to "a dramatic coup by the executive."[4] In what is widely considered to be the single biggest assault on Malaysia's constitutional system and on the rule of law, five of the country's top judges were suspended and three later removed from office.[5] In addition, substantive changes were made to the constitution effectively emasculating the judiciary of its constitutional position as a check and balance to the government.

The judiciary in Malaysia had long been considered fair and of high calibre, albeit with some criticism that they were "somewhat too deferential to government."[6] A series of decisions in the 1980s saw the beginnings of a court that became a little more assertive in its protection of the fundamental liberties enshrined by the federal constitution, and more amenable to the review of discretionary powers vested in government ministers.

In 1987 and 1988, the then Prime Minister of Malaysia, Mahathir Mohamed (who would serve twenty-one years as prime minister) was involved in a highly divided election for the leadership of his political party, UMNO. Although he won the election, "there were doubts as to the legitimacy of the results."[7] Eleven disgruntled party members filed a suit to challenge the election on procedural grounds. When the matter came before the high court, the lawyers for UMNO contended that the challenge was academic. They argued that their own client, UMNO, was an unlawful society since it had breached several technical requirements of the Societies Act 1966. The high court agreed and ruled UMNO an unlawful society. The rival faction immediately applied to register a new party called UMNO, which was rejected by the Registrar on technical grounds. Mahathir's faction applied and successfully registered "UMNO Baru" (*New UMNO*) as a party. "In due course the word 'Baru' was in practice dropped."[8]

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4 ANDREW HARDING, THE CONSTITUTION OF MALAYSIA: A CONTEXTUAL ANALYSIS 196 (2012).

5 *See* H.P. LEE, CONSTITUTIONAL CONFLICTS IN CONTEMPORARY MALAYSIA 56 (1995) (scholarly but readable analysis of the crisis in Chapter 3); Gordon Hughes, *Malaysia's 1988 Judicial Crisis Reviewed*, HONG KONG LEGAL CMTY. (Oct. 21, 2008, 4:50 AM), http://law.lexisnexis.com/webcenters/hk/Blogs—Analysis/Malaysias-1988-Judicial-Crisis-Reviewed; YVES DEZALAY & BRYANT G. GARTH, ASIAN LEGAL REVIVALS 162-68 (2010) (providing an overview of the crisis).

6 DEZALAY & GARTH, *supra* note 5, at 163.

7 HARDING, *supra* note 4, at 211.

8 *Id.* at 213.

The high court's decision provided such a neat settlement to the legal and political problems Mahathir faced, but the decision was up for appeal to Malaysia's Supreme Court. The highest ranking judge, the Lord President, empanelled a full panel of nine judges (rather than the usual five) to hear that appeal. However, before the appeal could be heard, the Lord President was suspended and later removed from office by an *ad hoc* tribunal appointed by the Agong on the prime minister's advice pursuant to the provisions of the federal constitution.[9] Five judges who sat to hear a challenge to the tribunal were themselves suspended, and two were later themselves sacked. The Malaysian Bar and lawyers around the world roundly criticized the sackings, but to no avail. In 1994, the Supreme Court was renamed the Federal Court. In lawyers' lore, the reason for this was because in Malaysia, only Mahathir could be considered supreme. An intermediate court known as the court of appeal was established (appeals to the Privy Council in England had been stopped in the 1980s).

Although the judges who were removed from office received compensation for their loss of office in 2008 from the then prime minister (Mahathir's successor Abdullah Ahmad Badawi),[10] allegations of corruption in the judiciary continue to emerge.[11] Two structural changes made in 1988 to the federal constitution remain to this day: the emasculation of the judiciary by removing its "judicial power" and replacing it with power to act only in accordance with legislation, and the seeming elevation of the Islamic legal system and the Syariah courts which apply them.

The first structural change can be seen in the amendment to Article 121(1) of the federal constitution. Previously, the material part of

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[9] The Federal Constitution provides that the Prime Minister may represent to the Agong that a Judge should be removed from office for various specific, and rather vague, grounds. The Agong is then required to appoint a tribunal consisting of Judges or former Judges, or persons who have held equivalent rank in the Commonwealth [of Nations], and may on the recommendation of the tribunal remove the affected judge from office. M'SIA. CONST. art. 125, §§ 3-4.; *see* Report of the Tribunal established under article 125(3) and (4) of the Federal Constitution [1989] 1 MLJ lxxxix; Tribunal on the dismissal of Tun Salleh Abas [1988] 3 MLJ xxxiii.

[10] V. Anbalagan, et al., *Redemption: Ghost of 1988 put to rest*, NEW STRAITS TIMES (Apr. 18, 2008, 9:49 AM), http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/redemption_ghost_of_1988_put_to_rest.html?date=2009-06-01.

[11] *See, e.g.*, Commission of Enquiry on The Video Clip Recording of Images of a Person Purported To Be An Advocate and Solicitor Speaking on The Telephone on Matters Regarding The Appointment of Judges, *Lingam Tape Report*, http://www.scribd.com/doc/60920700/Lingam-Tape-Report (last visited Jan. 5, 2014).

this clause used to say "the judicial power of the Federation shall be vested" in the high court. After 1988, Article 121(1) now says that the high court "shall have such jurisdiction and powers as may be conferred by or under federal law." Thus, before 1988 the courts derived their powers from the constitution. Now, the courts are only meant to have those powers which Parliament decides to give them. As a majority of the Federal Court said in acceding to this judicial emasculation:

> After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. What it means is that there is no longer a declaration that "judicial power of the Federation" as the term was understood prior to the amendment vests in the two High Courts. If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law. If we want to call those powers "judicial powers", we are perfectly entitled to. But, to what extent such "judicial powers" are vested in the two High Courts depend on what federal law provides, not on the interpretation the term "judicial power" as prior to the amendment. That is the difference and that is the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent?[12]

The second significant amendment was the inclusion of a new clause (1A) into Article 121 that stated: "The [High court] shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts."[13] Ostensibly, this clause was inserted merely to avoid Muslims unhappy with decisions of the Syariah courts seeking a second bite of the cherry.[14] Now, many who are keen to expand the role of Islam in Malaysian political life interpret this clause as creating an alternative parallel court system administering Syariah laws.

The powers and jurisdiction of the Syariah courts and Syariah authorities have also slowly been expanded by the courts beyond the limits permitted by the Constitution. Syariah courts began to give orders dissolving non-Muslim marriages registered under civil law when only one spouse converts to Islam, give orders relating to the religion of deceased persons without hearing their next of kin (thereby disinheriting

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[12] Public Prosecutor v. Kok Wah Kuan, [2008] 1 MLJ 1, ¶11 (FC) (M'sia.) All references to cases that follow are cases from Malaysia.

[13] M'SIA. CONST. art. 121, § 1(a).

[14] M'sia Hansard, Official Statement of Parliament (House of Representatives, Seventh Parliament, Second Session) p. 1364.

those next of kin), and convert infant children to Islam without the knowledge of the non-Muslim parent.[15]

From sometime in the late 1990s, the civil courts increasingly began to defer to Syariah court decisions. Currently, a decision of the Syariah courts would ordinarily trump the civil courts whenever there is a dispute between the two courts. As pointed out by Professor Shad Saleem Faruqi, Malaysian courts are acting "creatively to rewrite the Constitution in order to strengthen and broaden the Islamic features of the basic charter," pointing out that the courts are "giving to syariah courts virtually absolute powers over any issue involving syariah law" and are "generally refusing jurisdiction in cases involving mixed questions of civil and syariah laws."[16]

II. MY INTRODUCTION TO PUBLIC INTEREST WORK

In 1988, when the judicial crisis occurred, I was just thirteen years old and had just entered secondary school. I took a passing interest in the events of the judicial crisis because my father was a lawyer. The significance of these events, however, did not dawn on me until much later, when I returned to Malaysia after completing my law degree at King's College, London and being called to the bar at Lincoln's Inn, England.

I returned to join my father in the legal firm he started in 1977 called Kanesalingam & Co ("the firm"). He began the firm as a sole proprietorship, and my cousin and I – both of whom qualified as lawyers

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[15] Subashini a/p Rajasingam v. Saravanan a/l Thangathoray, [2008] 2 MLJ 147, 162-66 (FC); (I was the solicitor for the wife who unsuccessfully sought an injunction against her husband seeking to prevent him converting a child to Islam, and seeking to prevent him moving the Syariah courts for relief regarding the non-Muslim marriage); Kaliammal a/p Sinnasamy v Pengarah Jabatan Agama Islam Wilayah Persekutuan (JAWI) dan lain-lain [2006] 1 MLJ 685, HC (a Hindu widow failed to stop the Islamic religious authorities from burying her deceased husband as a Muslim even though she claimed he had never converted to Islam – a Court order obtained in her absence and without her evidence was held by the High Court to be dispositive of the issue); A series of reported cases in Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah & Anor [2003] 3 CLJ 690, HC; [2004] 1 CLJ 505, HC; [2004] 2 MLJ 648, HC; [2004] 3 CLJ 516, HC; [2004] 3 CLJ 516, HC (The High Court refused to challenge the conversion to Islam of two infant children by the husband, but gave custody of the children to the Hindu wife with access to the husband, but held she could not expose the children to her Hindu religion. The wife sought asylum in Australia with her children, and the Federal Court refused to hear her appeals as she was in contempt of the Court order granting her custody by refusing to grant her husband access.).

[16] SHAD SALEEM FARUQI, DOCUMENT OF DESTINY: THE CONSTITUTION OF THE FEDERATION OF MALAYSIA 347-349 (2008).

at almost the same time – joined him in the late 1990s as partners of this small legal firm. One of the first cases referred to me as a young lawyer was by my uncle, A. Vaithilingam. My uncle, a teacher, who eventually retired as a senior civil servant in the Ministry of Education, became a civil society activist after his retirement. He soon became the leader of the Malaysia Hindu Sangam, a charity that is the leading umbrella body for Hindus in Malaysia. A number of people, who in reality professed and practised Hinduism, but were imposed an official Muslim identity, came to him for help as they could not "leave" Islam officially. Removing their official Muslim identity was important to them since they could not marry a person of their choice (in Malaysia, Islamic personal laws prohibited inter-religious marriages by Muslims). They were also subject to Islamic personal and criminal laws, and would be buried according to Islamic rites. He persuaded me to try and help these people. More than a decade later, we are still trying to resolve their problems.[17]

The Malaysian Bar has been widely recognized as being one of the most effective voices for civil liberties in Malaysia.[18] A body created by statute, section 46 of the Legal Profession Act 1976 requires the Malaysian Bar to, amongst other things, "uphold the cause of justice without fear or favour." All attorneys in private practice must be members of the bar, and obtain certificates to practice issued by the bar and the high court. Each year, the general body of the bar elects thirty-two members to form a bar council. The bar was one of the first to set up a legal aid program entirely from funds contributed by members of the bar itself, and have an active human rights committee.

Quite a number of young lawyers volunteered for the bar's human rights committee. It was originally through that committee and acquaintances in the bar that a group of six of us –five men and one woman – came together to set up a law blog (Blawg) called www.LoyarBurok.com. The Blawg's name literally means "bad lawyer," and is Malaysian slang for a person who is full of hot air. The tongue in cheek name was meant to attract a wider readership, and has proven a

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[17] *See* Zaina Abidin Bin Hamid @ S. Maniam v. Kerajaan Malaysia [2009] 6 MLJ 863, CA; *Is the definition of a Muslim unconstitutional?*, LoyarBurok (Feb. 2, 2012), http://www.loyarburok.com/2012/02/02/definition-muslim-unconstitutional/.

[18] Andrew Harding & Amanda Whiting, *Custodians of Civil Liberties and Justice in Malaysia*, *in* FATES OF POLITICAL LIBERALISM IN THE BRITISH POST-COLONY 247, 261 (Terrence C. Halliday et al. eds., 2012).

successful model in creating a wider awareness and interest in public interest matters.

The Blawg is supervised and inspired by His Supreme Eminenceness Lord Bobo Barnabus, the Wonder Typewriting Monkey who exists solely in cyberspace and runs the Blawg by mind-controlling his loyal Earthly minions. What we think may well be Lord Bobo's noble visage – a monkey said to look similar to the bonobo chimpanzees of the Congo wearing a barrister's wig - adorns the Blawg and the various tee shirts and other merchandize we sell to help us meet the costs of the website.[19] The logo of Lord Bobo in his wig has caused some controversy – we learned later that some judges thought we were making fun of them. Our protestations that we purposely used the short wig used by barristers in England rather than the longer wigs used by judges has apparently not convinced them otherwise. But with law students and younger lawyers, the furry, lovable Lord Bobo has a cult following, and serves its purpose of giving serious law and human rights issues a touch of humor.

Nothing in our backgrounds suggested that we would become active in human rights.[20] All of us are from middle class families, and all of us had our legal training overseas – traditionally a route to work in large corporate practices. Edmund Bon was a product of University College, London, a barrister who worked in a medium-sized corporate firm in Kuala Lumpur. Sharmila Sekaran graduated from Keele University, worked for a while in England as a barrister in shipping law and returned to work as an Intellectual Property lawyer in Malaysia. Amer Hamzah Arshad, the son of a senior police officer, was from the University of Leeds, and also worked in a medium-sized corporate firm in Kuala Lumpur. Both Edmund and Amer were trying hard to forge practices in criminal law. Fahri Azzat had graduated from the University of Bristol. Fahri and I knew each other as acquaintances since we were both fifteen years old and in neighboring schools. Edward Saw was from Monash University, Melbourne. Fahri, Edward, and I joined our fathers' law firms. In a happy coincidence, there were two Malays, two Chinese, and two Tamils (the three main ethnic groups in Malaysia) reflected in this founding group; as with all things in Malaysia, race was always seen

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[19] To find out more about the mythical and outrageous Lord Bobo, a character who the proponents of LoyarBurok insist is real but who lives entirely in cyberspace, check out the website. *See Raison D'être*, LOYARBUROK, http://www.loyarburok.com/raison-detre/.

[20] The original founders were Amer Hamzah Arshad, Edmund Bon, Edward Saw, Fahri Azzat, Sharmila Sekaran and Shanmuga Kanesalingam.

as a factor and the multi-racial group helped stem accusations that we were only interested in the rights of any particular group.

All of us began our legal careers in Malaysia sometime during 1996 to 1998. At that time, Malaysia was again in the throes of a political crisis. Mahathir Mohamed was still the Prime Minister, but felt he had too ambitious a deputy in Anwar Ibrahim. In a bizarre series of events, Prime Minister sacked Anwar as his deputy, detained him under a draconian preventive detention law for a few days before charging him with sodomy and corruption. Sodomy is still a crime in Malaysia, and one that was unforgivable in the eyes of traditional Malays who were mostly devout Muslims. The charge for corruption was essentially for using his influence as Deputy Prime Minster to cover up an investigation into the sodomy charges.[21]

The dismissal of Anwar caused widespread protests throughout Malaysia. Anwar founded a new political party, and their slogan of "Reformasi"[22] struck a chord amongst many young Malaysians. Anwar's supporters vented their anger with protests near the Kuala Lumpur Courts where he was being tried, some of which turned violent. The police reacted brutally to the protestors, and the Malaysian Bar's legal aid lawyers were in the forefront in representing those protestors who were unlawfully arrested or subjected to police violence. A generation of lawyers, disgusted at the behaviour of the police, prosecutors, and judges in the travesty of justice in the Anwar Ibrahim trials, became attuned to the needs of human rights protection. We could not miss the reformasi protests. Once, as I walked to work, I saw six of Malaysia's riot police (called the Federal Reserve Unit or FRU) beating an unarmed man with the sharp corners of their plexiglass shields; when the crowd watching this booed in an attempt to stop it, the police rushed the crowd to disperse them. Seeing the eyes of the police officers, one could see they

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[21] The sodomy conviction was eventually overturned by a majority of the Federal Court (when Mahathir was no longer Prime Minister, but with the presiding Judge commenting that the majority still found evidence Anwar had committed homosexual acts but there was insufficient evidence to prove the offence beyond reasonable doubt). *See* Dato' Seri Anwar bin Ibrahim v Public Prosecutor [2004] 3 MLJ 405, FC. The corruption charges, however, remained. *See* Dato' Seri Anwar bin Ibrahim v Public Prosecutor [2002] 3 MLJ 193, FC. The charge of corruption can be seen in the High Court judgment reported in 1999. Public Prosecutor v Dato' Seri Anwar bin Ibrahim [1999] 2 MLJ 1, HC. For an analysis of the book, and details of why the trials were widely considered as unjust, see the book by one of Anwar's lawyers. PAWANCHEEK MARICAN, ANWAR ON TRIAL: IN THE FACE OF INJUSTICE (2009) (an analysis and the details of why the trials were widely considered as unjust; written by one of Anwar's lawyers).

[22] Reformasi was the same word used across the Straits of Melaka in the protest movement in Indonesia which culminated in the ouster of General Suharto's military dictatorship.

would have no mercy if they caught us, and we all ran. I have no idea what became of that man being beaten up by the FRU.

Although I did not get directly involved in any of the Reformasi court challenges, I became more aware and more active in human rights work partly as a result of what I had seen and experienced. The six of us at that time began writing joint opinion pieces about the law, legal practice, and human rights in Malaysian Bar publications. At some point, we decided that we should band together to write regularly in a dedicated portal. Blogging was becoming popular, and we set up the Blawg. We created a private limited company, partly to get around the bar's strict publicity rules which at that time prevented us from writing articles and distributing them generally to the public unless it was in a legal journal. Hence, www.LoyarBurok.com to this day describes itself as an "online journal."

I set out this history to show how unlikely it was that we would get involved in public interest work. Most of our contemporaries were in big firms, doing high-end corporate work, and earning large amounts of money. However for some reason, all of us together with a number of other lawyers had a yearning to do work that went beyond the mere commercial. We were interested and passionate about the issues that confronted us in Malaysia, and appalled at the injustices done by the ruling government. We set up LoyarBurok as a medium for us to publish our articles, which we wrote individually or jointly on issues of civil liberties. At that time, we were quite fiery and enjoyed stirring up controversy – no one was outside our critical pens and we attacked the bar council and other lawyers, the judiciary, and the government. However, after the initial rush of enthusiasm, the realities of becoming slightly more senior in practice set in. Court work, office work, and a host of other activities meant that our writing took a back seat. We still did the public interest work, but there was little focus in activating LoyarBurok.

III. LOYARBUROK EVOLVES INTO THE MALAYSIAN CENTRE FOR CONSTITUTIONALISM & HUMAN RIGHTS

Twenty years after Malaysia's judicial crisis, most judges serving in the higher judiciary were appointed from the ranks of the government legal services. With some courageous exceptions, most judges seem to view themselves as extensions of the executive and

legislative branches of government rather than as a separate and independent branch of the government.[23]

There is a sense that judges in Malaysia view their primary task as assisting the other branches of government to preserve the cohesion of the "community," instead of recognizing the Judiciary's principal role of protecting the rights of minority from majoritarianism. Thus, arguments which have found favor in other jurisdictions in advancing human rights and which are logical progressions for the development of our system of law do not find favor with our judges. In addition, fear of government reprisals by victims of human rights abuse and a lack of funding to initiate and continue public interest litigation until its end is also a problem.

As Harding points out, after the "cataclysm" and "unmitigated disaster" of the 1988 judicial crisis, "the judiciary was tamed and trained to serve the needs of the developmental state, as if it were a department of the federal government answerable to the prime minister rather than the law. The decline of a once-proud institution into servility and corruption was dramatically precipitate. Within ten years, it had been completely transformed."[24] Only recently has the judiciary managed to get back some of its luster, and there are encouraging signs that the judiciary may well reassert itself.

The lack of a free mainstream media is also one of the greatest obstacles to greater protection of human rights in Malaysia. Injustices perpetrated by the government are thus not addressed by the judiciary, and are not exposed by mainstream media organisations which are owned (directly or indirectly) by the government and controlled through strict licensing laws. All print newspapers require a permit from the minister of home affairs under section 11 of the Printing Presses and Publications Act 1984. As its name suggests, printing presses must also be given a permit. Similarly, television and radio (be it terrestrial, satellite, or cable) all require licenses to operate.

Frequently, we see that human rights issues are manipulated in the print and broadcast media and presented in a way that removes public sympathy for the victim of the rights abuse and paints the victim as a threat to the community. For example, rather than reporting on the hardship of a person wishing to leave Islam, the mainstream media (particularly those from the Malay press) will instead spin it to suggest a

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[23] *See Kok Wah Kuan*, 1 MLJ at ¶¶17-18.

[24] HARDING, *supra* note 4, at 216, 223.

threat to the majority Muslim population and a threat to Islam itself by apostates and those supporting apostates. The monopoly of views from the print and mainstream media led to an opportunity for online media organisations to play a role, and LoyarBurok found itself in a peculiarly advantageous position in the next political upheaval in Malaysia.

A. 2008: EVERYTHING CHANGES

The events of 2008 are called by many a political "tsunami." Why this was so requires some explanation. Since independence, Malaysia's federal government was ruled by a coalition of parties who call themselves the BN. The BN was a successor to the "Alliance" coalition who negotiated independence from the British, and consisted of largely race-based political parties.[25] The Alliance and later the BN have never lost control of the federal parliament.

The closest they came to a defeat was the elections of 1969 when they lost their two-thirds majority in Parliament. The unexpected gains by the opposition led to one of the worst race riots in Malaysia's history, and caused the suspension of Parliament for two years. A state of emergency was declared, which continued for more than forty years even after the resumption of Parliament.

After the period when Parliament was suspended, the Alliance rebranded itself into the BN by incorporating more parties (including some of the parties previously in the Opposition). Until 2008, it never ceded control of Parliament nor lost its two-thirds majority in Parliament, which is necessary for amending the federal constitution. However, during the general elections in March of 2008, the BN lost its two-third majority in Parliament. For the first time, it ceded control of five State legislative assemblies to a coalition of political parties which called itself the Pakatan Rakyat (*People's Coalition*) ("PR").[26]

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[25] The Alliance at independence could legitimately claim a democratic mandate as they had won all but one of the seats in the pre independence legislative council in an election conducted two years before independence.

[26] The PR was formed through the efforts of Anwar Ibrahim, who had been released from prison. The coalition was an unusual one. It consisted of Anwar's own newly formed People's Justice Party (Parti Keadilan Rakyat) ("PKR"). This party had entered into a coalition with two of Malaysia's long standing opposition parties: the Pan Malaysian Islamic Party ("PAS") whose stated aim was to turn Malaysia into an Islamic State and the Democratic Action Party ("DAP"), consisting mainly of ethnic Chinese and Indians and who were mainly socialists with distinct republican tendencies.

Just a year after the 2008 general elections, a constitutional crisis happened in the state of Perak, one of the thirteen States that form the federation of Malaysia. The state was one of the largest geographically, and was a very rich state from its tin mining industry. The constitutional monarch of the state was Sultan Azlah Shah, a highly educated man who was well respected by lawyers and was the former head of Malaysia's judiciary.

Three state legislative assemblypersons from Perak mysteriously went incommunicado. They then appeared in a press conference announcing that they were resigning from their respective political parties within the PR to become independents. The chief minister of the state therefore sought an audience with Sultan Azlan Shah to seek a dissolution of the Assembly. Instead of acceding to the request, which would have resulted in statewide elections, the monarch asked the leader of the state opposition (a member of the BN) to form a government, which he was able to do with the support / abstention from voting of the three now independent assemblypersons.

The PR chief minister insisted that under the state constitution, the monarch had no power to do as he did. The legality of the monarch's action turned on whether or not the request was made because the chief minister thought he had lost the confidence of the House (which would have entitled the monarch to invite another assemblyperson to form a government), or was under a provision in the state constitution empowering the chief minister to advise the monarch to dissolve the Assembly at any time without attributing a reason (which, it was argued, meant the monarch has no option but to dissolve the Assembly). The litigation involving the dispute took over a year to resolve. The protagonists used the courts as a means to wrest back control of the State government.

The fact that the original trial judge ruled that the Sultan acted unconstitutionally caught the public's imagination. His decision was promptly appealed and an unprecedented stay of the declaratory order by the trial judge was granted by a single judge of the court of appeal in less than twenty-four hours from the high court decision. Numerous legal battles ensued and the case reached Malaysia's apex court, the Federal Court, several times. Finally, the case ended with the Court almost unanimously rejecting all the arguments made by PR and ruling that the Sultan had the power to act as he did.

The constitutional crisis in Perak saw a thirst for information and analysis of the fast moving court cases. The greater reliance on online

media is admittedly a worldwide phenomenon, and the online media can also be attributed as one of the main causes for the sea change in Malaysian politics in 2008. The Perak constitutional crisis was no different – the incident saw a rush of new writers and a huge increase in articles written for LoyarBurok. Many who had not previously written were shocked at what they saw as a clear political coup engineered by the federal government with the collusion of the monarchy to reject the people's choice of government. A small number of other commentators saw the monarch's action as the only responsible thing to do, where an alternative government was formed without the need to call a costly election. LoyarBurok provided a means for legal analysis of the events that transpired so quickly, while other online media provided minute by minute updates and news coverage.

LoyarBurok came into its own during that time, with numerous lawyers, academics, and even a retired and highly respected court of appeal judge weighing in and commenting on the ongoing proceedings. For the most part, the articles were timely. For example, in one article that I wrote, I analysed a decision that was rendered at 9:30 a.m. by 11:30 a.m. that same day. The legal issues at play were put in plain language. We eventually compiled a selection of the articles-together with further information on the cases and three fresh articles by three highly respected academics-and published our first book - "Perak: A State of Crisis."[27]

Although the Blawg articles and the book did not change the outcome of what most still consider as a coup, the ability of LoyarBurok to provide coverage in such a timely fashion with legal insights available to the layman meant a surge in popularity of the Blawg. The numbers of contributors increased, as did the number of people reading the Blawg. LoyarBurok grew from the six original writers to its current number of more than 400 writers (also known as "LoyarBurokkers") ranging from retired judges, journalists, engineers, accountants, students, and still quite a few lawyers.

Although we originally published only articles by a small group of lawyers, we now publish articles by anyone, on any topic. One of our popular taglines is "you don't have to be a lawyer to be a LoyarBurokker." We welcome young, inexperienced writers to publish their posts on the Blawg, and actively encourage people we meet to write for us, with the intention of creating a culture of open expression. Our

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[27] PERAK: A STATE OF CRISIS (Audrey Quay, ed., 2010).

hope is to put human rights in the mainstream of online discourse in Malaysia.

B. A PHYSICAL CENTER IS BORN

Another friend of ours, Ms. Long Seh Lih, was also a law graduate, but worked for the United Nations when the Blawg became popular. She suggested to us the idea of establishing a center for constitutional law and human rights in Malaysia which was not linked to a public university or other academic institution; such a center did not exist in Malaysia. The success of the Blawg prompted us to take up her idea, and we established a more formal and physical center which we hoped could complement our human rights work by coordinating advocacy efforts outside the courts.

We decided that for the Centre, we would need a more respectable sounding name in order to attract foreign funding, and to gain credibility with those in authority. We thus settled on the "Malaysian Centre for Constitutionalism and Human Rights." In an effort to retain our roots, we gave it a more popular name as well: the "*Pusat Rakyat LoyarBurok*" (the LoyarBurok People's Centre).

Another friend Ms. Lim Ka Ea, also a law graduate but who chose to work in the Bar Council and then also the United Nations, joined us as our "Chief Executive Minion" to co-ordinate the operations of the Centre. We now have approximately six employees running the Centre including Seh Lih and Ka Ea, who both sacrificed prestigious jobs with the United Nations to return to Malaysia to work on human rights and voter empowerment.

The Centre is meant to continue our task of empowering Malaysia's citizens with the tools necessary to understand the political process and the legal system. While continuing arguing cases in court and carrying out strategic litigation, the Centre and the writers in the Blawg work together to increase public awareness, lobby, and take on strategic litigation in order to address some of the human rights issues facing ordinary Malaysians. Through the Centre, the lawyers and non-lawyer activists can carry out other modes of activism, and not just litigation. Using social media networks, such as Twitter and Facebook, cases are reported live via the Centre's Twitter account and articles on the Blawg are shared on Facebook.

The Centre was intended to complement the public interest litigation we did. In order to achieve real change, we decided that the

litigation must be seen as a focal point. A variety of other measures can and must be taken to gather support for the plight of the victim of the human rights abuse. Institutional change was required, rather than randomly "firefighting" cases as they came up. In order to increase awareness, we felt that the online and mainstream media must report the cases so as to get public sympathy for the victims of these human rights abuses in order to achieve law reform. At the same time, the Centre must also gather resources and research materials in order to be effective in lobbying for law reform on crucial human rights violations. We decided that it was only in this way that we could try and obtain reform and, more importantly, build up a group of people in Malaysia who would become human rights activists.[28]

IV. TWO EXAMPLES OF PUBLIC INTEREST LITIGATION

In pursuing strategic litigation, our primary and overriding duty to the client takes precedence. I can think of no example where legal action purely for its strategic purpose is undertaken when it was not strictly necessary to solve the client's problem. Conversely, clients are not turned away because their particular case does not have a great strategic value.

Most public interest lawyers in Malaysia hold the English barrister's credo of the "cab rank rule" close to their hearts. That rule provides that a lawyer must act for any person who comes to them, notwithstanding the popularity of their case, so long as the case comes within the lawyer's expertise and the lawyer is not otherwise professionally precluded from acting. The additional condition that the client must be able to pay the lawyer's usual professional fee is replaced in pro bono cases with a rule of thumb that the lawyer must have the time to take up the case.

Most public interest lawyers in Malaysia do not turn away clients because their facts are not suited for use as a strategic case. The Centre

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[28] For the most part, litigation was done for want of any other viable option and without any real expectation of success. The litigants were put in impossible positions and were forced to litigate. Strict and very short time limits in the law require prompt challenges to decisions of a public authority failing which legal challenges would fail. Time limits were traditionally not extended for extra judicial activities or attempts at negotiation, with very rare exceptions. Thus, if a litigant did not go to court immediately, he or she could never go to court. Thus, even if in reality the litigation was not expected to yield much direct success given the institutional weaknesses in the Malaysian system, lawyers would still file a case in the courts on behalf of these litigants for fear that they would not be able to do so when other means of persuasion failed.

assists in linking clients to lawyers, and identifying cases that may have a greater strategic impact. When the cases are identified, the Centre uses the resources at its disposal in order to create a larger impact by getting press coverage, writing articles on the legal and human rights issues raised by the case and covering the case through social media channels.

A. TEST CASE TO END STATE OF EMERGENCY IN MALAYSIA: THE EO TRIO

Malaysia's Federal Constitution allows its constitutional monarch to declare a state of emergency when "the security, or the economic life, or public order" in Malaysia or any part of it is threatened.[29] During the period of emergency, the executive is allowed to make laws and thereby bypass the legislature. Moreover, these laws were not subject to the Constitutional protections against encroachment of fundamental liberties.

In 2011 Malaysia had in force three concurrent proclamations of emergency; a nationwide emergency since 1969 and two states of emergency for two particular states dating from 1966 and 1977 respectively. As Harding and Whiting put it, "it is no exaggeration to say that Malaysia had been legally in an almost perpetual state of emergency" since independence giving rise to "what could be seen as a parallel legal system."[30]

In Teh Cheng Poh v. Public Prosecutor,[31] the Privy Council[32] held that an emergency was deemed automatically dissolved when Parliament reconvened. A constitutional amendment in the late 1970s overturned the effect of this decision. Two mechanisms to end the emergency were introduced: the emergency continued until either the constitutional monarch himself ended it or resolutions were passed by both Houses of Parliament ending the emergency.

Three young men (between the ages of eighteen and twenty-one), who were detained under the Emergency Ordinance ("EO") in March 2011, approached the Centre for help. The three allegedly stole

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[29] M'SIA. CONST. art. 150.

[30] Harding & Whiting, *supra* note 18, at 252.

[31] [1979] 1 MLJ 50 (PC).

[32] Until the mid-1980s, in common with many other former British colonies in the Commonwealth, the Privy Council in London was Malaysia's highest court of appeal. Criminal appeals to the Privy Council were abolished shortly after this decision, and civil appeals followed soon after.

five different motorcycles at various locations between December 2009 and March 2010. All three complained of assault and torture during their detention by a group of policemen, and were forced to sign blank documents confessing to the motorcycle thefts. When their families and lawyers were given a limited amount of time to visit the three - under heavy supervision - injuries were clearly visible on their bodies, and all three appeared nervous and fearful. In their legal challenge, the three insisted they were merely scapegoats used by the police to show that they were taking action against crime; they maintained their innocence.

We in the Centre thought that this would be an ideal case to test if the perpetual state of emergency in Malaysia could be shaken. The timing seemed to be rights as well. This was because since the Privy Council decided the case in the late 1970s, Malaysia grew and developed economically. Numerous promotional campaigns ran by the Ministry of Tourism portrayed the country as an idyllic paradise despite the state of emergency the country was notionally in. We ratified three human rights conventions, and Malaysia made commitments in the international sphere in order to gain admission to the United Nations Human Rights Council in 2006.[33] These commitments were recently affirmed in 2010.[34]

Lawyers in Malaysia who work for a non-governmental organisation cannot appear in the courts; thus all of the volunteer lawyers for the Centre have full time day jobs. My legal firm represented the three boys. However, I was assisted by a team of about fifteen volunteer lawyers (all from other legal firms, but all interested in doing human rights work pro bono). These volunteers were relatively junior lawyers, who were pupils undergoing a form of apprenticeship before being called to the bar. Junior associates or partners in medium to large firms, who wanted to do some public interest work, helped as well. Working tirelessly, we managed to file habeas corpus applications and get an early hearing date.

However, prior to the court hearing for the habeas applications, the boys were "released." They were released from the detention centre,

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[33] Permanent Mission of Malaysia to the United Nations, Aide-Memoir dated Apr. 28, 2006 from the Permanent Mission of Malaysia to the United Nations addressed to the Secretariat, U.N. Doc. HA 24/06, *available at* http://www.un.org/ga/60/elect/hrc/malaysia.pdf (last visited Mar. 31, 2013).

[34] Permanent Representative of Malaysia to the United Nations, Letter dated Apr. 23, 2010 from the Permanent Representative of Malaysia to the United Nations addressed to the President of the General Assembly, U.N. Doc. A/64/765 (May 3, 2010), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/64/765 (last visited Mar. 31, 2013).

but served with restriction orders under the EO restricting their movements to three distinct areas. Those areas were rural or semi-rural areas at least five to six hours away from their family homes. The restriction orders prevented the three from leaving those particular districts. No housing or accommodation was provided for them – one was told to go and sleep in the mosque by a policeman when he complained. The three had to each report to the nearest police station every day. They were not allowed to leave their homes in those districts between 8:00 p.m. and 6:00 a.m. The restriction order limited their movements for a period of two years, and was signed by the country's deputy minister of home affairs. As is usual in such cases, the prosecution could not provide any evidence to prove the allegations.

It was strange, however, that these three were targeted for events that happened more than a year before their arrest. The three had never previously been arrested, detained, or even called in for questioning to assist in inquiries before the sudden detention and subsequent restriction. Nevertheless, it was clear to us that, even if the three were involved in motorcycle thefts-which they of course denied, the use of the EO for situations such as this was a gross abuse of emergency powers. We therefore decided to try and use this case as a strategic piece of litigation in order to try and force the Government to end the state of emergency (or at least to raise awareness of the issue by litigating).

We wrote to Malaysia's prime minister as lawyers for the three boys. We said that unless he and his cabinet advised the Agong to issue a proclamation to end the state of emergency, we would seek an order of mandamus from the high court compelling the prime minster and his cabinet to do so. We received no response. Thus, in the fresh application for judicial review seeking to quash the restriction orders, we also asked for the order of mandamus.

While the lawyers were working, our newly employed director of the Centre was also busy. Working together with Malaysia's leading human rights group SUARAM (*Suara Rakyat Malaysia,* which translates to the Malaysian People's Voice), a great deal of news coverage was given to the plight of the three boys. The "EO Trio" or "the boys" were covered not just in the new online media (which was more receptive to human rights infringements), but also by Malaysia's mainstream media organisations. This was heartening given that most print newspapers were owned directly or indirectly by the political parties that formed the ruling government. Moreover, newspapers were subject to stringent conditions, and were required to get a permit before they could publish.

Malaysian editors therefore were prone to a culture of self-censorship, where news and opinion contrary to the interests of the ruling government were often stifled or distorted.

Nevertheless, it became clear that the Centre pushed this particular issue at an opportune time. The sympathetic news coverage was followed by another surprise: the prime minister made a bold announcement announcing the repeal of numerous laws long vilified as being infringements of human rights. In addition, the prime minister announced that the Government would repeal the state of emergency, which was eventually done by the two Houses of Parliament.

I was very happy with this – the continued state of emergency was an affront to common sense and to basic norms of human rights and constitutionalism. Naturally, the Centre – tongue in cheek - sought to seek credit for the end of the emergency. But we knew the truth that the ending of the emergency was part of a concerted campaign for many years by civil society in Malaysia, led by the bar council, to ensure the end of the emergency. The evolution of the media, with the prevalence of new media and the consequential expansion of information and opportunities for Malaysians to express themselves, was far more instrumental in ending the emergency than our litigation. In the end, the government realised that in order to remain relevant they had to embrace a culture where human rights protections were at least given lip service. The old tired refrain of human rights being a Western concept alien to Malaysia's culture and sentiments could no longer hold water with an increasingly sophisticated electorate who were exposed to the realities of human rights infringements through news available on the internet.

What of the three boys? Although the emergency had ended, laws enacted under the emergency remained valid for six months under the constitution before they became void. The Government did not release all those detained or restricted under the EO immediately, but were doing so gradually. The three were therefore still stuck under the restrictions, and unable to move freely and to live with their families. The deputy minister finally released the three on March 6, 2012 after a simple letter and a few telephone calls to the government lawyers. The three boys lived for eleven months under the restriction order (and two months before that in detention), all without facing a charge or a trial, for five isolated incidents of motorcycle theft. Their education had been interrupted, and they now face psychological problems from their enforced estrangement from their family and friends. But they are glad they are at least free.

B. RELIGIOUS FREEDOM: A MOTHER TORN FROM HER DAUGHTER - INDIRA GANDHI V. MUHAMMAD RIDZUAN

Indira Gandhi is a Hindu woman, who was married to Pathmanathan Krishnan according to Hindu rites. Their marriage was registered under Malaysia's Law Reform (Marriage and Divorce) Act 1976 – a law relating to marriages and divorce of non-Muslims only.[35] The couple had three children, the youngest of whom was eleven months old when the father converted to Islam and adopted the Muslim name Muhammad Ridzuan. He converted in secret, and also purported to convert all three children to Islam as well without the mother's consent. Those conversions were registered with the Islamic Religious Department, and legislation provided that upon this registration the person who converted was "for the purposes of any Federal or State law, and for all time, [to] be treated as a Muslim."[36] The husband then went to the Syariah courts and obtained, again in secret, an order purporting to dissolve his Hindu marriage and granting him sole custody of all three children.

The mother approached the member of Parliament (MP) for her constituency, a lawyer from the opposition DAP. He immediately filed an application in the civil high court for custody of the three children. Fahri and I were asked to act as counsel, and would argue the case in court. We drove up to the town of Ipoh to represent the mother in the custody battle. The father was represented by a group of lawyers. More importantly, a group of Islamist activists also attended court all in solidarity with the father; they were determined to show that the Muslim community fully supported their new "brother" in Islam and his now "Muslim" children.

Fahri and I were approached because we acted for the wife in the earlier *Subashini* case with a similar fact pattern.[37] That case had gone all the way up to the Federal Court, where the mother was then represented by senior counsel Malik Imtiaz Sarwar and Haris Ibrahim. Imtiaz, Haris,

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[35] Law Reform (Marriage and Divorce) Act (Act 164/1976) § 3(3).

[36] Administration of the Religion of Islam (Perak) Enactment 2004, § 102(1) (2004)(M'sia).

[37] The decisions of the Courts are reported as follows:- High Court: *Subashini a/p Rajasingam v Saravanan a/l Thangathoray* [2007] 2 MLJ 798, HC; Court of Appeal: *Saravanan a/l Thangathoray v Subashini a/p Rajasingam* [2007] 2 MLJ 205, 2 AMR 540, 2 CLJ 451,CA; *Subashini a/p Rajasingam v Saravanan a/l Thangathoray (No. 2)* [2007] 3 AMR 370, 3 CLJ 209, 4 MLJ 97 CA; Federal Court: *Subashini a/p Rajasingam v Saravanan a/l Thangathoray,* [2008] 2 MLJ 147, FC.

and Fahri are Muslim, as is Justice Wan Afrah. I noticed from my interactions with the lawyers for the other side that it was easier for them to deal with a Muslim lawyer in cases such as these. It was also important for the public to see that this was not a simple case of "us vs. them" – that there were members of the majority Muslim community in Malaysia willing to stand up for the rights of minorities. It was thus a cruel irony that in Malaysia, even when dealing with human rights litigation, race seemed to play an integral part and the religion and race of the lawyer arguing a particular case seemed to have an impact on the manner in which the litigation was played out in the public eye.

Indira's case, and Subashini's case before it, attracted a great deal of publicity in Malaysia. There were numerous articles in the press, and the non-Muslim community was very distressed by what had happened. The Malaysian Consultative Council for Buddhism, Christianity, Hinduism, and Sikhism (and later Taoism) issued numerous press statements and several memoranda on the issue. As legal adviser for them, I assisted in drafting those press statements and memoranda. As such, Indira's case – with the involvement of a politician who could more readily engage with the media – was a good way of trying to push the issue and to try and get some clarity in the law.

After several court hearings in Indira's case, Her Ladyship Justice Wan Afrah binti Wan Ibrahim granted the mother custody of all three children. The application for custody was purely on the issue of custody, with no mention of the religious upbringing of the children. By concentrating solely on the issue of custody, the judge was able to ignore the religious aspect of the case and in the process overrule an objection by the husband that the civil court should defer jurisdiction to the Syariah courts.[38]

The elder two of the three children were physically with the mother, but the youngest baby was still with the father, who took her away from the mother even though the baby was still being breastfed. The mother had not seen the baby for almost a year by the time the court's decision was handed down in her favor. Alas, it has now been four years and she still has not seen the baby – the husband has evaded service of the court order and has disappeared. The police and other authorities refuse to provide any assistance to the mother claiming that, as it is a civil case, it is up to the mother to find the father. The mother,

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[38] Indira Gandhi a/p Mutho v. Patmanathan a/l Krishnan (Unreported, Ipoh High Court Originations Summons No. 24-513-2009, dated 3rd November 2010).

who works in a kindergarten and earns about RM400 (about US $135) a month has no means to employ a private investigator to find her estranged husband and her baby.

The order made in the mother's favor was only in respect of custody of the three children where the opposing side was only the father. A separate challenge was mounted against the actions of the father and the Islamic authorities in registering the conversion. This challenge is being fought very hard by not only the father's lawyers, but also by the government's lawyers. The government takes the position that one parent's consent is sufficient to effect a conversion to Islam. The difficulty in the Malaysian context is that conversion to Islam is effectively a one way street with conversion out of Islam next to impossible. The challenge to the conversion certificate was heard,[39] and a decision in the mother's favour also granted by another high court judge, who gave a judgment which applied Malaysia's international human rights commitments. This decision is being appealed to the Court of Appeals.

C. USING THE CASES AND THE BLAWG TO CREATE GREATER AWARENESS

I wrote about the background to problems such as this in an article published in LoyarBurok called "Law Reforms when one spouse converts to Islam: The Problem."[40] In it, I tried to explain to the population at large the ramifications of these cases. As I explained there, it was relatively easy to get a divorce if one party to a non-Muslim marriage converts to Islam. It was especially attractive for husbands to convert to Islam, given that in non-Muslim law a husband who divorces his wife must pay maintenance to his former wife until her death or remarriage and must pay child support to the wife since custody of young children generally went to the mother. However, many (especially husbands, but wives as well) found an exception to this difficulty by

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[39] Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak (Director of Perak Islamic Affairs Department) [2013] 5 MLJ 552, HC. See also Malaysian Centre for Constitutionalism & Human Rights, *Landmark Indira Gandhi Judgment*, LOYARBUROK (July 31, 2013), www.LoyarBurok.com/2013/07/31/landmark-indira-gandhi-judgment (last visited Aug. 16, 2013) (grounds of decision dated July 25, 2013).

[40] Shanmuga Kanesalingam, *Law reforms when one spouse converts to Islam: the Problem*, LOYARBUROK (June 18, 2009), http://www.loyarburok.com/2009/06/18/law-reforms-needed-convert-to-islam-problem/.

converting to Islam. Under Malaysia's constitutional system, Muslims were entitled to have their personal law applied on them. Thus male Muslims found it easy to divorce their wives since they only had to pay maintenance to the wife for three months. As in Indira's case above, one parent could unilaterally convert his or her children to Islam and in a previous case, successfully persuade the court to ensure that the children could not be "exposed" to the mother's religion.[41]

In another article,[42] I tried to explain, in easy to understand language, the legislative reforms I assisted in drafting for the non-Muslim religious groups. Thus far, discussions on those reforms have been done behind closed doors in meetings with Muslim groups and the attorney general's chambers. All proposals emanating from the attorney general's chambers were classified as official secrets. Our proposals were not secret, but I felt it was wrong for all this to be done without the public knowing about it. I also did not trust the attorney general's chambers and the ruling government to put forward proper reforms. There was a serious thrust to "Islamize" the law reforms, and to put in place a separate code so that the dissolutions of marriages in these situations would be subjected, through the back door, to a form of Islamic law. Until today, these necessary law reforms have not been implemented.

V. BEYOND THE COURTS: UNDIMSIA! (VOTEMSIA!)

The growth of the internet allowed access to information never before seen. Malaysians are a talented people, most of us are trilingual, and many Malaysians seem to be finding employment abroad. In fact, another public interest case the Centre was working on involved the right for Malaysians living overseas to vote in national elections.[43] Thus, we decided that it was only by empowering and educating young people, and

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[41] *Sathiyaseelan*, 2 MLJ 648, 656.

[42] Kanesalingham, *supra* note 40.

[43] At that time, only those who were overseas because of full time education or were serving in the military or civil service were allowed to cast a postal ballot. This was reformed by virtue of the Notification under paragraph 3(1)(e) of the Elections (Postal Voting) Regulations 2003 [P.U.(B) 9/2013] while the case was ongoing, and we eventually withdrew the challenge which had become academic. *See MyOverseasVote and Global Bersih Call on Overseas Malaysians to Vote in the 13th General Election, and Press the EC to Allow Postal Voting Observers*, MYOVERSEASVOTE (Jan. 28, 2013), http://myoverseasvote.org/2013/01/28/myoverseasvote-and-global-bersih-call-on-overseas-malaysians-to-vote-in-the-13th-general-election-and-press-the-ec-to-allow-postal-voting-observers/.

future voters, that we could build a culture in Malaysia where the people themselves spoke out against injustices. The aim was to create a community of people all of whom were actively seeking to engage in the democratic process, rather than just having a small number of activists within the community.

To that end, the Centre recently embarked on a long term civic education project which is unique in Malaysia. For the first time, we attempted to educate voters on issues by employing a strictly non-partisan approach. Ordinary citizens were given the tools to allow them to question their elected representatives and hold them accountable for their promises. The initiative aimed to gather all civil society organisations in Malaysia working on human rights and public interest issues together and focus on educating voters with the ultimate objective of getting voters to vote in elections based on issues rather than personalities.

We received a huge and very encouraging response - in less than six months, more than 400 people volunteered (also known as "community movers"), most of whom are still in college and cannot even vote, and more continue to join this effort. *UndiMsia!* (the Malay words for "Vote" and the acronym for Malaysia, with the intentional exclamation point) was launched and tested in just one semi-urban marginal parliamentary constituency called "Hulu Langat" in 2011 – 2012. The program used infographics, on the ground events, online media, and all the youthful energy harnessed from our movers. The intention now is to refine and roll out the program throughout Malaysia. Visits are made to the constituency almost every week by a team of dedicated volunteers.

We created an "MP Report card" – the first of its kind – a simple and easy to fill in report card, where the individual voters set out their opinion on their MPs' stance on various issues. Although touted as a means of finding out about the views of MPs on various issues, it was also a tool to assist the voter to ask the right questions in assessing their performance. By asking questions about the MPs' stance on issues that affected them personally, we hoped the voter would realize that the MP was answerable to them, and that they had to start questioning their MPs on issues rather than on who their friend was or who gave the best dinner come election time. The report card asked the voter to state if they knew their MPs' stance on issues as diverse as the state of the woeful public transport in the locality, crime, corruption, the education system, how

often the voter sees the elected representative in the constituency, and so on.

As its name suggests, and shamelessly harnessing the popularity of the "American Idol" reality TV show, UndiMsia! ideated a unique workshop (identified as "GameShops") which we called IdolaDemokrasi or "Democracy Idol."[44] The Gameshop is made up of five key modules that are methods to encourage youth to analyse current national and local issues faced by their communities and train them on how to take actions that would cause an impact. Crucially, the youth were themselves involved in the initial phases in designing the GameShop. They then took the Gameshop to a different level by setting up "Youth Action Groups" in their individual communities, particularly colleges. More than forty GameShops have been conducted since September 2011. UndiMsia! developed and distributed a toolkit for do-it-yourself activism and democratization to enable groups anywhere in Malaysia to set up an action group and start activating themselves on their own.

Aside from focusing on the one pilot constituency, UndiMsia! also reached out through the Internet and printed materials. UndiMsia! distributed fun and easy to read infographics on a variety of social and political issues giving facts and figures. Again, the intention was not to campaign for either party, but to give facts and figures and to ask voters to ask questions on the issues that actually affect them as voters come election time. For example, infographics were created on the right to education – they pointed out Malaysian universities' slipping worldwide rankings, the number of Malaysians who were educated, and their highest level of education.

A key challenge to the UndiMsia! initiatives was achieving its stated aim of being non-partisan. By asking challenging and difficult questions about Malaysia's performance in various issues, those from the ruling government perceive UndiMsia! as a challenge to them. There is a significant amount of animosity from many individuals in the ruling government. Crucially, however, we were able to persuade some more liberal members from the government that UndiMsia!'s intentions were truly non-partisan. Thus, UndiMsia! was able to host at least two cabinet ministers thus far at the Centre, and moves are afoot to continue with this engagement with politicians from both sides of the divide. We were also

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[44] *See UndiMsia!*, LOYARBUROK, http://www.loyarburok.com/category/pusatrakyatlb/undimsia-pusatrakyatlb/ (last visited Mar. 31, 2013) (a list of articles published on the experiences of the volunteers and other aspects of UndiMsia!).

able to persuade many of the mainstream media organisations to publicise our events for us, which also helped to build momentum for the initiative and to create greater grassroots awareness and empathy.

Even more exciting are the plans we have in the next few years, where the UndiMsia! program will be expanded to two villages of Orang Asli (Malaysia's aboriginal people), where again the youth in those villages will be targeted. The end result will be to educate and train the Orang Asli youth to understand how the government works and to give them the tools to interact and demand their rights. This will be done by training them to identify a public amenity which is lacking in their village and to lobby a government department to ensure that the public amenity is either built or upgraded.

The program is still in its early days. Progress has been overwhelming and gratifying, but it is not clear yet if the enthusiasm of our volunteers will be sustained. The impact of the project cannot be assessed yet, especially in the case of the on the ground activities in Hulu Langat. What is certain is that a large proportion of the youth volunteers had their outlook on life permanently changed. As a result of their experiences in UndiMsia!, these youth are definitely more active in terms of civil and political rights, and have more tools on how to gauge the effectiveness of their political leaders. By establishing the mechanics and the infrastructure, it seems certain that new generations of youth volunteers will continue to emerge and take over the system, which we hope will, in the long run, bring real change to the way civil society in Malaysia works.

VI. INTERNATIONAL INFLUENCE

A. CENTRE FUNDING

The sad reality is that like most other human rights organisations in Malaysia, the Centre could not operate without foreign funding. There are insufficient local funds available to maintain proper offices and campaigns, and local donors are often too scared to give money. Frequently, local human rights NGOs are not even able to get proper registration as an entity recognised by law by the governmental

authorities (since Malaysia also has laws requiring registration for a society of associations of more than seven people).[45]

Although they offer funding, which is crucial, the more important and useful tool that international organisations bring is the transfer of knowledge and expertise. A number of international organisations offer courses, trainings, and workshops which create opportunities for Malaysians to educate ourselves of new strategies and increase our knowledge on the development of human rights law and similar issues. The legal challenges and strategies employed overseas are adapted by Malaysian practitioners. The law that is being developed overseas serves as a vital catalyst for domestic change, and we are able to show developments overseas to local judges and policymakers in order to advance re-interpretations or reforms to Malaysian law.

It is the glare of international publicity which seems to me to be most important in reaching out to policymakers. Malaysian leaders are proud of their reputation as a model Muslim nation, and the sorry state of human rights (and religious freedom in particular) in Malaysia is a source of much embarrassment. For example, the Indira Gandhi case mentioned above was publicised in the New York Times.[46] Occasionally, therefore, human rights advocates in Malaysia have seen some positive outcomes, especially when it affects trade relations between Malaysian and more developed countries. This is often the rationale to explain why we ratified the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women, and more recently expressed our intention of ratifying the Rome Statute for the International Criminal Court. The influence of the European Union and the United States, in insisting on compliance with international human rights norms as part of international trade deals, is also often cited as a reason for the loosening of restrictions on human rights in Malaysia.

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[45] Societies Act (1966). In fact, the Centre was asked to do a report on these laws that restrict civil society organisations from operating freely. *See Defending Civil Society – Report on Laws and Regulations Governing Civil Society Organisations in Malaysia*, LOYARBUROK (Apr. 26, 2011), http://www.loyarburok.com/2011/04/26/defending-civil-society-%E2%80%93-report-on-laws-and-regulations-governing-civil-society-organisations-in-malaysia/.

[46] *The New York Times: Clearer Limits Sought in Malaysia for Shariah Courts' Role*, LOYARBUROK (Mar. 15, 2010), http://www.loyarburok.com/selected-exhortations/the-new-york-times-clearer-limits-sought-in-malaysia-for-shariah-courts-role/; *The New York Times: Malaysian Custody Dispute Lost Between Courts*, LOYARBUROK (Apr. 4, 2010), http://www.loyarburok.com/selected-exhortations/the-new-york-times-malaysian-custody-dispute-lost-between-courts/.

On the other hand, the receipt of foreign funding is sometimes used as an excuse for the authorities to attack human rights organisations. For example, the Centre received funding from the National Endowment for Democracy, a funding agency which also receives money from the US State Department to fund human rights activities overseas. We made the front page news – along with many other, slightly more prominent, organisations and movements – as being tools apparently for the overthrow of the government.[47] While some other groups took legal action to clear their name,[48] we decided that we would not do so. We instead merely issued a statement explaining our policy on receiving foreign funding and pointing out that an application by us to a Malaysian government agency for funding did not even get the courtesy of a reply. Naturally, our response suited our *raison d'etre* of taking all things less than seriously: we pointed out that our real intention was not just to overthrow the Malaysian government, but to continue to world domination.[49] Funders do not dictate our work or the areas which we want to cover. Rather, we decide what we want to do, and the funders decide if that is acceptable to them. In the past, offers were made to give us funding to do certain types of work, but we had to reject the funding because that work was not in line with the Centre's objectives.

In a bizarre twist of fate, we were soon again in the news, but this time showing what might be considered (as we strained to do) as an endorsement by the Prime Minister of one of our activities. With election fever running high in Malaysia, we had put a gimmick at a booth we were given at the International Malaysia Law Conference in September 2012. Conference participants were asked to guess when the election would be and write their answer on a sticky note pasted to the wall of the booth. The prime minister, who was the guest of honor opening the conference, stopped by the booth. He wrote down his answer, which proved to be a very photogenic moment captured by most news media. The photograph appeared on the front page of the New Straits Times the next day – the same newspaper which had just branded us a part of an

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[47] A blog post criticized the original news report in the New Straits Time. *NST Says Malaysiakini, CIJ & LoyarBurok in Anti-Govt Coup Plot*, LOYARBUROK (Sep. 21, 2012), http://www.loyarburok.com/2012/09/21/nst-malaysiakini-cij-loyar-burok-anti-govt-coup-plot/.

[48] *Bersih sues NST for defamation*, FREE MALAYSIA TODAY (Feb. 7, 2013), http://www.freemalaysiatoday.com/category/nation/2013/02/07/bersih-sues-nst-for-defamation/.

[49] *Lord Bobo Rants: Onwards World Domination!*, LOYARBUROK (Sep. 22, 2012), http://www.loyarburok.com/2012/09/22/lord-bobo-rants-onwards-world-domination/.

anti-government coup plot! And what was the Prime Minister's coy answer to our query on when were the elections? "Coming soon."

Having said that, we do hope to get ourselves away from a business model dependent on funds from foreign aid agencies; hence, we have set up independent revenue arms.[50] This model is slowly taking root, and we hope in a few years to have weaned ourselves away from foreign funding and be purely self-sustaining.

B. THE RULE OF LAW IN MALAYSIA AS COMPARED TO OTHER COUNTRIES

To my mind, the United States, Europe, and Australia all have a relatively free and fair judiciary and judicial system. More importantly, they have a free press. Thus, shortcomings in the judicial system are picked up by the media while overzealous media frenzies can be controlled by independent judges (for the most part). Because of the free press, and greater levels of civic awareness on the rights of individuals and on the rule of law, the public is generally informed about human rights issues and public support can relatively easily be gathered for a particular public interest issue. It is highly unlikely that any high school student in Malaysia would assert constitutional rights to free speech in order to complain about school discipline as I have read students in the United States doing from time to time.

As for the United States in particular, the impression I get is that almost all Americans have respect for the rule of law and for the US Constitution as a concept, though how that translates in practice I am not sure. The fact that governments change regularly and peacefully with no chaos, and that the US electorate appear able to vote for different parties for local, state, and federal elections where debates on issues of concern invariably touch on the US Constitution shows a far greater level of understanding of the rule of law. This emphasis on the Constitution is not seen, I feel, in any other country. As Justice Stephen Breyer points out:

> when Benjamin Franklin was asked what kind of government the Constitutional Convention had created, his famous reply, "A republic, Madam, if you can keep it," challenges us to maintain the workable democratic Constitution that we have inherited. In a democracy, enduring institutions depend upon the enduring support

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[50] To date, these include a legal training business, and an online store at www.loyarbarang.com to sell merchandize.

> of ordinary citizens. And citizens are more likely to support those institutions they understand. Thomas Jefferson pointed this out. Even under the "best forms" of government, he said, "those entrusted with power have, in time . . . perverted it into tyranny"; the "most effectual means of preventing this" is "to illuminate . . . the minds of the people at large."[51]

VII. WHY WE DO IT

The group of us who started the Centre are all primarily litigation lawyers, who slowly became disenchanted with the litigation process as a means of achieving real social change. This was a result of the bitter experiences in the majority of our public interest cases. Government lawyers came with technical and petty objections on procedure, which were upheld by judges reluctant to deal with the real subject matter of the controversy. International human rights protections were not respected and extensive arguments on them were summarily dismissed as being irrelevant and not binding in Malaysia. It was clear to us, then, that taking matters to court would never really solve real problems. However, as explained above, the individual client had no choice but to go to court.

A. MOTIVATIONS AND FRUSTRATIONS

Thus, I continued to do public interest work because not many other lawyers were willing to do this work, especially in cases which were deemed "sensitive" for they involved a conflict with the state religious authorities. Most of the people caught in these predicaments were poor. Moreover, it annoyed me that they were being abused by the government in this way, especially in something so personal and basic as being denied their right to live according to their religious convictions.

There is an emotional reward in being of use to those in need. There is a sense of satisfaction in knowing that you are fighting a battle, with the odds stacked against you, in a bid to make life better for someone who does not have anyone to speak for them. Also, perhaps unique to public interest work, there is an ability to actually shape developments of the law and policy by both litigation and extra-legal lobbying efforts.

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[51] STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 217-18 (1st ed. 2010) (internal footnote omitted).

Ultimately, public interest lawyers seem to do this work because we can, and because if we do not do it, nobody else will. One of the most infuriating comments I hear is by other lawyers who exclaim "Wow! It's very good that you do these human rights cases. I don't know how you find the time to do it." I always want to wring their necks and say, "I find the time by working more hours, and sacrificing fee paying work at times. Why don't you do that as well?"

I also continue to do public interest work because I find it interesting. It offers a wonderful counterpoint to the rather more sedate corporate and commercial work that pays the bills. It is more intellectually challenging, as you have not only the might of the state against you, but also must frequently do battle with an unsympathetic judge. As a lawyer, your professional skills are sharpened as you fight government lawyers and a powerful bureaucracy. More often than not, even the judge is clearly against you.

You appreciate small victories a great deal more than is probably justified. And you walk away with the satisfaction that you have at least tried to use your training and your gifts in the law for a higher and better purpose than the mere accretion of wealth for a soulless corporate entity. You also meet a diverse array of people from communities you would not ordinarily meet, which helps you develop a much broader outlook on life generally. Many young lawyers are also attracted to human rights work, and I find it easier to find recruits to what would otherwise be a very small law firm that I run with my father and cousin.

B. MOVING FORWARD

With the formidable talents and energy of the volunteers of the Centre and UndiMsia!, I feel that the work in court that I do is not all to waste; and I sense that the litigation we do achieves greater impact by creating awareness and generating public discourse about the underlying infringements of human rights.

To my mind the comment by Justice Breyer, on the need for society to respect the Constitution for it to survive, encapsulates exactly what we hope to achieve through the Centre, LoyarBurok, and UndiMsia! By educating Malaysians about the constitution, and about the main political issues in the country, it is hoped that they understand they are able to question these matters and have a say in how their elected representatives govern them. By giving ordinary citizens the tools to hold their elected representatives accountable, it is hoped that

Malaysians will start insisting on their rights. It is only with that mechanism will our systemic failures be addressed, and a slow and painful reform of our institutions of government be fully implemented.