GADING (Online) Journal for Social Sciences, Universiti Teknologi MARA Cawangan Pahang
Vol 25(01), July 2022

ABORIGINE RIGHTS TO LAND: MALAYSIAN AND INTERNATIONAL LAWS PERSPECTIVE

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Abstract

The aborigines in Malay Peninsula, which consist of three main tribes; Negrito, Senoi and Proto-Malay, from time in memory, had occupied and earned a living on land areas in the northern, central and southern regions of the Malay Peninsula. These aborigines can be divided into different tribe and sub-tribe communities, including, the Semai, Temiar, Lanoh, Bateq, Jakun, Kensiu, Jahai, Mendriq, Temuan, Semelai, Semai, Kintaq, Orang Kanaq, Orang Seletar and Mah Meri. Hence, they are entitled to all the rights vested upon them, including the right to land. The assimilation process to integrate them cannot be realized without consulting their respective needs, especially rights to land. Ignoring these rights is tantamount to a violation of human rights. Thus, this paper intends to examine the rights provided for the aborigine under Malaysian and international laws to land.

Keyword: aborigine rights, aborigine, international law, federal constitution, aboriginal peoples act 1954.

Introduction

The continuity of the aborigines' livelihoods and cultures, including their traditional ecological knowledge and crafts, depends on the land they have settled in. In the name of modernization, their integration into the dominant society in a country is supposedly done without ignoring the local and international law on the rights of aborigines to land.

Article 160 (2) of the Malaysia Federal Constitution simply defines "aborigine" as an aborigine of the Malay Peninsula. On the other hand, Section 3 (1) of the Aboriginal Peoples Act 1954 gives a clearer definition of aboriginal people. It defines the aborigine as:

a) Any person whose male parent is or was, a member of an aboriginal ethnic group, who speaks an aboriginal language and habitually follows an aboriginal way of life and aboriginal customs and beliefs, and includes a descendant through males of such persons;

b) Any person of any race adopted when an infant by aborigines who have been brought up as an aborigine, habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs, and is a member of an aboriginal community; or

c) The child of any union between an aboriginal female and a male of another race, provided that the child habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs, and remains a member of an aboriginal community.

An example of a bad assimilation process includes a force removal or relocation of an aborigine from the traditional land under the pretext of integrating an aborigine into the modernization. This has been done so many times without having a proper and adequate consultation with the respective aborigine community. In many cases, the aborigines were not sufficiently compensated whenever they were removed from their ancestral land for reasons that they do not own the land but only possess it. This is one of the predicaments for these people which has been ignored for many years and not properly consulted by the State Authority in the land acquisition process, like in the case of Lembaga Amanah Sekolah Bina Semangat v Pemungut Hasil Tanah Dinding (1978) and Sagong Tasi & Ors. v Kerajaan Negeri Selangor & Ors. (2002).

The local law and the Malaysian Torrens system relating to the aborigine rights to land should be revised and further developed to accord better protection. To achieve this, the authorities must be willing to work together with the aborigines, NGOs, International experts, and corporations that are ever interested in helping them advance their rights, especially to land.

Materials and Methods

This article is a descriptive and comparative analysis research that employs a library-based approach. The approach chosen is one of the commonly used methods to obtain the literature material such as books, decided cases, articles, and journals including the Acts of Parliament and any other legal materials. These texts are perused to develop the concept and scope of analysis.

Result and Discussion

The aborigine rights to land under International Law and its importance

The aborigines in Malaysia and advocates of their rights perceive land as of paramount importance to their survival. To them, land and its surrounding area, environment, forest, water, rivers and lakes, flora and fauna, insects, fishes, trees and plants, and wildlife are all the elements that represent parts of the lives and livelihoods (Sabri, 2008).

The indigenous peoples have articulated the ideas of communal stewardship over land and a kind of spiritual relationship with the land and its surrounding. This probably explains why they do not emphasize the idea of commercialization as they utilize the land only for the continuation of their life. They do not overfish, do not take part in commercial activities, or farm on a large scale. They, however, co-exist with the land they inhabit.

The International Covenant on Civil and Political Rights (ICCPR) mentioned in Article 6 that, “every human being has an inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. It entails that all indigenous peoples deserve the right to life. This includes the right to land. Advocates of the indigenous peoples' rights, as well as the indigenous peoples themselves, have long articulated the views that, the right to life is nothing without the right to land, for land provides the indigenous peoples natural resources for their daily subsistence.

Up to 2020, 173 countries have become state parties while another 6 countries have been signatories to the ICCPR. Malaysia, however, so far shows no intention of becoming a signatory to this international covenant. This is due partly, to the issue of the aborigines not being given equal status compared to the other dominant races and communities. For example, the Federal Constitution itself does not provide any meaningful provision which, in clear term relates to the matters of the aborigine livelihoods. Article 153 of the Federal Constitution only mentions on the safeguarding of the special position of the Malays and natives of Sabah and Sarawak but falls short in providing the same status quo safeguard to the aborigines. Some might argue that the legitimate interest of the other communities is being safeguarded in the second limb of Article 153(1) and it may include the aborigines but further special safeguard mentioned in the other clauses of Article 153 not in *pari passu* provided for the other communities. From one point of view, the special safeguard for the Malays and the natives of Sabah and Sarawak are justified because they are lagging far behind in terms of economic, social, and educational well-being even though they are the dominant citizens in Malaysia compared to the other communities. But what about the aborigines who are also lagging in terms of economic, social, and education?

The issue of indigenous peoples' right to land is also significant as it relates to their cultural survival and self-determination. In Yanomami Indian Case of Brazil (1985), the Inter-American Commission on Human Rights viewed a series of incursions into the Yanomami ancestral land as a threat not only to their physical well-being but also to their cultures and traditions. The case concerned with the mass presence of foreigners and mining development on Yanomami ancestral land that occupied the Amazon Forest. Even though Brazilian law recognizes the land and human rights of indigenous people but a number of legislations and policies regarding land preservation, exploitation, and ownership often conflict with Yanomami's land rights.

The United Nations Human Rights Committee (1984) also acknowledged the importance of land and their resources to the survival of the indigenous peoples' cultures and by implication, to indigenous peoples' self-determination. In Ominayak v Canada (1984), the United Nations Human Rights Committee held the Ominayak Band's survival as a distinct cultural community that was bound up with the sustenance that derived from the land.

In Mabo v Queensland (No. 2) (1992), the High Court of Australia upheld the claims to tribal lands by the aboriginal peoples from Murray Island in the Torres Strait off Queensland, overturning the doctrine of terra nullius which assumed that Australia as an unoccupied land at the time of the British settlement. In this case, Mabo and four other aboriginal people challenged the 1879 annexation of their aboriginal land area based on communal native title. They sought a declaration that they have traditional land rights to this area. They argued that the island had been continuously inhabited and exclusively possessed by their people who lived in permanently settled communities with their social-political organization. The Court, by a 6-1 majority recognized and upheld the communal native title of Murray Island to them. The Court further agreed that this position applies also to the aborigines on mainland Australia as well as to the Torres Strait aborigines.

In a Canadian case of Calder v Attorney General of British Columbia (1973), the Nisgha Indian Tribal Council sought a declaration for an unextinguished aboriginal title to their traditional territories. The Supreme Court agreed that the aboriginal title existed in law, and where it was not extinguished, continued to have force. Calder's case remains as a landmark case that continues to be cited nationally and internationally in Australia and New Zealand in the modern aboriginal land claims.

Jose' R.Martinez Cobo, a special rapporteur of the United Nations subcommission on prevention of discrimination and protection of minorities in his study, Problem of

Discrimination against Indigenous Population (1986) accords clear acknowledgement of the important relationship between the indigenous peoples and land. He reported that:

> "... for the indigenous populations, land does not represent simply a possession or means of production...it is also essential to understand the special and profoundly spiritual relationship of the indigenous peoples with Mother Earth as basic to their existence and all their beliefs, customs, traditions and culture".

The issue of indigenous people's rights to land had been the core important agenda and assumed a high degree of interest to many delegates and groups at the 1981 Geneva International Non-Governmental Organisation Conference on Indigenous Peoples and The Land. The Australian Aboriginal Paper on Land Rights, for example, highlights the importance of land to the Australian Aborigines. It stated that:

> "land to... Aboriginals are the life and the continuation of that life forever. Land...is religiously observed by our people in our myths, legends, and laws...it provided all that was necessary to sustain life".

Swepston (1978) viewed that "when the indigenous people lose their land, their cultures disintegrate or they simply die". This issue is also essentially important to the aborigines in Malaysia. Without land and ownership, the aborigines may eventually disappear together with their cultures.

The issue of aborigine peoples' rights to land under the ILO Convention on Indigenous and Tribal Populations, 1957 (No. 107)

The International Labour Organisation (ILO) Convention No. 107 is the first international instrument to address the human rights of indigenous peoples. Nevertheless, it emphasizes the integration of these people into the national community and some criticism was made by human rights advocates. Swepston (1990) argued that although the provisions of land rights in the ILO Convention No. 107 were designed to protect the indigenous peoples in the context of inevitable integration into the national society, it isis still not adequate as it is only a short-term protection measure. The integrationist language and scope of the provisions still do not strongly provide real safeguard to the indigenous peoples' rights to land.

Some experts are of the opinion that the indigenous peoples' rights to land should be settled in the form of group rights rather than on an individual basis. They viewed that the fact the indigenous peoples may have little conception of ownership, individual or collective, and may have been ripen for exploitation, was the very reason why collective ownership may be a better and more comprehensible concept for many indigenous populations. Swepston (1990) believes that a restrictive form of alienation of land to the indigenous groups may be more beneficial than conferment of the full title. This is so true in light of the present economic development where exploitation may be one of its treats.

On another note, some had pointed out that if the right to own, develop, control, use, conserve and protect traditional lands and resources is justified because the indigenous peoples have suffered from colonization and the dispossession of their lands and resources, this right should not be restricted. The difference of opinions highlighted above is not without any basis as former views appreciate the importance of the indigenous peoples' rights to land to their survival and life.

Substantial changes in the ILO Convention No. 107 were made as a result of the detrimental integrationist approach that is obsolete and does not reflect the current thinking. The revision to the Convention was made in 1989 affording the indigenous peoples as much control as possible over their communities, economic, social, and cultural development within the framework of the nations in which they live.

The aborigine rights to land under Malaysian law

Generally, Article 153 of the Federal Constitution, which promotes special privileges for Malay and natives of any of the States of Sabah and Sarawak, does not confer the same to the aborigines in the Malay Peninsula (Faruqi, 2003). However, the position of the aborigines has been recognized by different provisions in the Federal Constitution. First, under Article 8 (2) of the Federal Constitution, any State or Federal Government can enact a law concerning the reservation of land and position in the public service of the aborigines. Nevertheless, according to the Federal List, only the Federal Government can enact the law concerning the welfare of the aborigines in the Malay Peninsula. Second, the Yang di-Pertuan Agong is allowed to elect a senator who, in his opinion, represents the interests of aborigines.

Regarding property rights, Article 13 of the Federal Constitution recognizes the right of a person within the territory of Malaysia in two aspects: (1) no person shall be deprived of property save under the law and (2) the government must enact the law that entitles the land owner to adequate compensation if the property is being subjected to a compulsory acquisition or use. The word "property" can be understood in ordinary and natural meaning, including all moveable and immovable property (Faruqi, 2008). The Interpretation Acts 1948 & 1967, existing law under the Federal Constitution, further defines "immovable property" includes land, benefits to arise out of the land, and things attached to the earth or permanently fastened to anything attached to the earth and "moveable property" as all property other than immovable property. For the definition of "law", the Federal Constitution & Interpretation Acts further define law includes written law, the common law, and any custom or usage having the force of law in Malaysia. Therefore, the land rights for the aborigines in the Malay Peninsula are recognized from three sources; written law, customary law and principles of common law. In Adong Bin Kuwau v Kerajaan Negeri Johor (1997), the Court recognizes the existence of aborigine peoples' rights under the common law in the Malaysian legal system such as "the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers." The recognition of the aborigine rights to land can be seen in the case of and Sagong Tasi v Kerajaan Negeri Selangor (2002) & Ketua Pengarah Jabatan Hal Ehwal Ehwal Orang Asli v Mohamad bin Nohing (2015).

In the 2002 Sagong Tasi case, the High Court ruled against the state of Selangor and order monetary compensation paid to the plaintiffs. The court recognized the plaintiffs as the customary owners of the land according to the common law. The state government had used the powers conferred by the Aboriginal Peoples Act 1954 to evict the Temuan tribe from gazetted Orang Asli Reserved Land at Bukit Tampoi village in Selangor. They were given only 14 days' notice to vacate the land area which they inhabit. Compensation was offered for their destroyed homes, fruit trees, and crops but not for their ancestral land. The High Court ruled in favour of Sagong Tasi and other Temuan people. This case went to appeal, however the Court of Appeal upheld the decision of the High Court in 2005.

In Mohamad bin Nohing, two issues are involved. The first issue is whether the claim for customary land can be extended based on hunting, roaming, and foraging activities. Secondly, whether Malay reserve land takes precedence over any customary title. In the first

issue, the Court answered the negative, which means merely roaming in one territory would not extend the claim for customary land. The aborigine must show that they have sufficient control to prevent others from accessing one's territory for the Court to recognize the claim for customary land. While in the second issue, the Court affirmed that the customary land rights of the aborigine could only be overruled by legislation that clearly expressed such intention or any executive decision which its power derived from the said legislation. In this case, the Court ruled that neither the 1913 Enactment of the Bera Malay Reservation nor the Malay Reservations Enactment 1933 expressly eliminated the status of customary land. Therefore, the Court partially recognized the aborigine customary land claims.

The above cases represent an important historical precedent in the area of indigenous peoples, natives, and aborigines' rights to land and represent a newly emerging norm that needs to be appreciated and enforced. However, despite several legal provisions offering a measure of protection to aborigine's land, an individual state authority possesses the power to declare an area as an aboriginal reserve by a gazette notification. These protections, therefore, provide relatively limited security as the existence of these rights is wholly dependent on the state executive.

Apart from that, monetary compensation for compulsory land acquisition is also purely up to the state authorities to decide on its quantum. There are no fixed guidelines. The authorities' intervention in acquiring land for various state developments is exercised under the power stipulated in Land Acquisition Act 1960, and provided under Article 13 of the Federal Constitution. Regards to Section 11 and 12 of the Aboriginal Peoples Act 1954 is to be made for the compensation payable to the aborigines.

Section 11 provides for compensation on alienation of state land upon which fruit or rubber trees are growing: (1) …then such compensation shall be paid to that aboriginal community as shall appear to the State Authority to be just; (2) any compensation payable under subsection (1) may be paid in accordance with Section 12; and Section 12 gives compensation: …..any aboriginal area or aboriginal reserve granted to any aborigine or aboriginal community is revoked wholly or in part, the State Authority may grant compensation therefore and may pay such compensation to the persons entitled…..'. The compensation is only for the loss of growing trees, fruits, buildings, and land activities. There is no provision for compensation for the loss of ancestral land.

Concluding Remarks and Recommendation

A state must protect the rights of its minority subject at equal footing with the majority subject. From the above discussion, it shows that Malaysian law has recognized the rights of aborigine to land. Even though Malaysia is not a state party to the ICCPR or any other international instruments related to the rights of aborigines and indigenous peoples, it should not be the reason for the local law to ignore and disregard their rights to land for the sake of modernization. The way forward in dealing with the aborigine rights to land in Malaysia should neither through assimilation nor pure integrationist approaches but rather on protectionist approaches. Direct consultation with the aborigines themselves together with the help from national experts so far seems to be the best practice for the government, state, and local authorities as well as other stakeholders in reaching an advantageous and worthwhile decision. Experience drawn from United Nations Convention and International Conferences on indigenous peoples' rights is also an important reference for Malaysia in balancing between the need for development and the aborigine rights to land.

Understanding the importance of land to the aborigines and their life, it is recommended that:

- Concerted efforts and positive responsive actions must be put into force to secure the rights of the aborigine to land.
- The aborigines must not only be given communal possession to land but more importantly a right to freehold communal ownership as well as individual land ownership.
- Their ancestral land area must be safeguarded and registered as part of national heritage.
- A protectionist and precautionary approach should be the better way forward rather than an integrationist approach in dealing with the indigenous peoples right to land be it the aborigines of Malay Peninsula or the natives of Sabah and Sarawak because through this approach, their real need, livelihoods, and cultures can be better protected.
- Article 153 (1) of the Federal Constitutions should be amended to include safeguards to the special needs of the aborigines.

Conflict of interests

The author(s) declared no potential conflicts of interest concerning the authorship and/or publication of this article.

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