Indigenous Land Rights

An Overview, Four Cases Studies and Annotated Reading Recommendations

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Case-study three: Indigenous Land Rights in Malaysia

The Case of the Orang Asli

Introduction

The Orang Asli are the indigenous people of Peninsular Malaysia numbering about 149,000 people or ca. 0.6% of the general population. They are believed to be the first ever settlers on the Peninsula. Other indigenous groups (or Orang Asal) in Malaysia include the natives of Sabah and Sarawak. Unlike the small population of the Orang Asli, the Orang Asal of Sabah and Sarawak make up 60% of and 50% of the population in their territories respectively, accounting for ca. 13.0% of the national population. In 2003, the poverty rate among the Orang Asli was estimated to be as high as 77% with 37% of the population being extremely poor. Literacy rate is low, so is life expectancy.

The Orang Asli are treated differently from the other indigenous groups of Malaysia. First of all, they don’t enjoy the same degree of constitutional protection as an indigenous people and secondly, their land rights are not addressed in legislation as it has been done for the Orang Asal of Sabah and Sarawak. Subsequently they face more challenges in the realization of their indigenous rights including land rights.

Unlike the indigenous peoples of Australia or Canada, who are struggling with the effects of colonization by the Crown, the Orang Asli’s current problems have their source in what the Orang Asli perceive as “internal colonization”. Starting from the 17th and through to the 19th century, the story of the Orang Asli was marked by enslavement by the Malays, colonization by the British as part of the wider colonization of the Malaysian Peninsula and later through disturbances by Christian missionaries. During the Malayan Emergency of 1948 to 1960, the Orang Asli helped the Malayan army to fight the communist insurgency. Subsequently, two administrative initiatives were introduced, the ‘Department of Aborigines’ was established in 1950, and the Aboriginal Peoples Ordinance of 1954 was passed. In 1961 a policy was adopted to integrate the Orang Asli into the wider Malaysian society under the “One Malaysia Concept”.

Although these policies may have been adopted at the time with good intentions, the government disposition towards assimilation and integration of the Orang Asli “to better their lives” poses one of the major challenges in the Orang Asli’s struggle to realize their indigenous rights. In the 1970s and 1980s, Malaysia experienced a period of intense growth characterized by modernization, industrialization and land development, which resulted in encroachments on Orang Asli land. It also impacted the life of the Orang Asli and many of them have by now moved into urban areas.

After a court case that ended in 2003, about 23,000 ha (others say only 19,000) of the 127,698.54 ha of land to which the Orang Asli may have customary title rights have been registered as Orang Asli reserves; a mere 15%. The State persists in contesting Orang Asli claims to customary lands by pursuing paternalistic development policies.

Like other indigenous communities, the Orang Asli have endured a long struggle for their land. They have made some advances, certainly more than for example the Jummas in

2 ibid
Bangladesh, but there successes are a far cry from the successes registered in Canada and Australia. One reason may be that even though they registered a number of victories in court, these triumph never resulted in legislation (as for example in Australia)

In response to encroachments on their land, the Orang Asli formed the Peninsular Malaysia Orang Asli Association (POASM), which has given them a stronger voice and greater visibility. They staged substantial protests (ie in 2010), they tried to engage in the political process through petitions, they made use of various complaints mechanisms, most recently with the Malaysian Human Rights Commission triggering a National Inquiry. There biggest successes, however, are the results of taking disputes to the judiciary. Again, like in Australia and Canada, the courts have assisted in the enforcement of indigenous rights by applying the common law doctrine of native title and interpreting whatever legislation is available in the interest of indigenous people.

As the Orang Asli stated: “We can only hope that the courts will continue to guarantee these protections, not as an act of pity or charity, but because the Constitution and our political affirmations require it to be so.”

The Orang Asli experience is a useful case study for indigenous populations who are battling internal colonialism. The experience also shows that even if an indigenous group may not be safeguarded in the constitution or other laws, an application of common law doctrines is always an option in advancing indigenous land rights.

**Historical, Political and Legal Background**

Internationally, Malaysia voted for the 2007 'UNDRIP both at the Human Rights Council and General Assembly levels. Domestically, Malaysian courts have applied the doctrine of common law native title to Indigenous customary land rights claims, drawing inspiration from international jurisprudence including the landmark Australian High Court decision of Mabo v Queensland (No 2). Despite these developments, Orang Asli, continue to face formidable challenges in gaining due State recognition of their rights as indigenous peoples and to their land and resources. One major issue is the policy of assimilation that seems intent on moulding the 18 distinct Orang Asli groups into a homogeneous cluster of oil palm small holders.


4 ibid

**International Law**

Malaysia has ratified the UNDRIP and is a party to CEDAW and the CRC.

**Domestic Legislation**

**Constitution**

Much debate evolves around the lack of clear constitutional protection of the Orang Asli. While equal constitutional treatment would definitely benefit the Orang Asli, it is questionable, if granting the Orang Asli the same status as the other indigenous groups in Malaysia would necessarily result in more effective protection of their land rights. Despite possessing better statutory protection than Orang Asli, native customary lands in Sabah and Sarawak are regularly encroached upon and expropriated.

The provision under discussion is Art. 153 (1) of the Federal Constitution, which obliges the government to safeguard the special position of the Malays, natives of Sabah and Sarawak and
the legitimate interests of other communities. The Orang Asli are not mentioned within this provision, neither is the word "land". Malay reservation lands are constitutionally protected by article 89. In Sabah and Sarawak, there are explicit legal provisions recognizing native customary land rights. Art 89 of the Federal Constitution, however, grants the Orang Asli a special status. It enables the government to enact laws for "the protection, well being or advancement of the aboriginal peoples of the Malay peninsula, including the reservation of land..." without offending the principle of equality."

Despite the powers bestowed to the government under this clause, the Government so far has not been inspired to legislate and act effectively for the protection and recognition of Orang Asli customary lands.

**Land Rights of the Orang Asal of Sabah and Sarawak**

The Malaysian Constitution protects the Orang Asal of Sabah and Sarawak in its constitution as indigenous people and makes special provisions for their native customary rights and lands in the constitution as well as several pieces of legislation such as the National Land Code 1965, several state land codes and the Aboriginal People's Act 1954. The Orang Asli who live on the Malay Peninsula are not governed by the National Land Code or other specific legislation.5

**Aboriginal Peoples Act**

The closest thing to statutory legal recognition of Orang Asli land rights can be found in the Aboriginal Peoples Act 1954 which is widely regarded as a paternalistic and outmoded piece of legislation that grants the state excessive control over Orang Asli and their lands in the name of ‘protection, well-being and advancement of aboriginal peoples of West Malaysia’. The government agency entrusted to oversee the affairs of the Orang Asli is the Department of Orang Asli Affairs.

However, for now it is the only law that specifically refers to the Orang Asli. The Act provides for the setting up and establishment of Orang Asli areas and reserve land. It also makes the Orang Asli tenants-at-will of the Malaysian state in that it grants the state authority the right to order any Orang Asli community to leave and stay out of an area. If at any such time the state wishes to re-acquire the land, it can revoke the status at any time. In addition, not all inhabited Orang Asli land have been declared aboriginal reserves or areas, leaving them unprotected from governmental acquisition or third party encroachment.

In spite of the preamble of the Act, which specifically states that this was to be, “an Act to provide for the protection, well-being and advancement of the aboriginal peoples of West Malaysia”, the provisions of the Aboriginal Peoples Act have been narrowly interpreted and applied by the government in favour of the authorities’ interests.

**Doctrine of Native Title**

The so called Rajah's Order IX of 1875 recognized aboriginal title and Malaysia has passed statutory laws that protect native title for the natives of Sabah and Sarawak - not, however, for the Orang Asli- before its courts acknowledged the independent existence of common law aboriginal title.

**Judicial Decisions**

Nevertheless, the court in matters concerning Orang Asli rights to their traditional land and resources have interpreted the Act and the federal Constitution in a manner that is favorable to the Orang Asli. They applied the doctrine of native title to confirm and expand their rights and have thus far been proactive as far as the recognition of Orang Asli rights is concerned.

5 for a detailed discussion see Chapter 4 of SUHAKAM, Human Rights Commission Malaysia, Report of the National Inquiry into the Land Rights of Indigenous Peoples, 2013
However, recognition of common law native title by the courts in cases of Orang Asli has not seen legislative intervention for the recognition of Orang Asli land rights.

Malaysian court decisions from the 1950s on have held that customary lands were inalienable. In the 1970s, aboriginal rights were declared to be property rights, as protected by the Federal Constitution. Decisions in the 1970s and 1980s blocked state-sanctioned logging on customary land.

In 1992, the Ipoh High Court held that the State Government of Perak had breached the APA 1954 when it accepted a tender to log certain areas which have been approved by the State Government as Aboriginal Reserves. and that only Orang Asli as defined in Aboriginal Peoples Act had the right to the forest produce in these reserves.

As for the recognition of the doctrine of native title for the Orang Asli, in 1997, the Johor High Court in the Adong case awarded compensation for the loss of 53.273 acres of ancestral lands. The Johor High Court, acknowledging common law aboriginal title for the first time in acase involving the Orang Asli, cited the Federal Constitution and the Aboriginal Peoples Act, and importantly, decisions from the Privy Council, Australia, Canada, New Zealand, and the United States. That case was the first one in which the Orang Asli expressly challenged a state taking of their land. The opinion held that: "the aborigines’ common law rights include, inter alia, the right to live on their land as their forefathers had lived." The case was upheld on appeal, but unfortunately, the Federal Court did not write an opinion setting out its reasons. Later High Court and Court of Appeal decisions built upon the foundation of Adong as for example in another high profile case that followed soon after, the Sagong case (1995-2002) where the principles of Adong were reiterated and other issues clarified. The Orangs Asli had claimed a breach of the The Aboriginal Title Act and under the Federal Constitution, they claimed proprietary rights in the land and alleged that the State of Selangor breached its fiduciary duty. The judge confirmed native title. Other cases followed that were decided in the same spirit (ie Khalip Kachik Case) The High Court of Kuching held in 2010, for the first time, that customary land may be transferred for consideration between members of the same community, as long as such transfers are not contrary to customary law. This is an important exception in favor of indigenous rights to other common law jurisdiction.

In 2007, the Federal Court of Malaysia for the first time finally wrote an opinion endorsing common law aboriginal title for the first time in Superintendent of Lands v. Madeli bin Salleh case. Very importantly, the Federal Court on that occasion formally endorsed Mabo and Calder (no2) of Australia, stating that "the proposition of law as enunciated in these two cases reflected the common law position with regard to native titles throughout the Commonwealth.

Most recently, in 2014, the Federal Court ruled unanimously to set aside the findings of a high court which had dismissed the rights of 82 Orang Asli over their ancestral land spanning about 300 ha, thereby confirming previous court rulings.

All of these judiciary decisions have been supportive of Orang Asli land rights. The Orang Asli were deemed to be in possession of titled rights to their traditional lands despite claims by the authorities to the contrary. This goes to show that like in any other country, the judicial system may be the most effective way in securing indigenous land rights.

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6 see Lim Fiona Lim for case summaries in Orang Asli’s Right to Land at http://www.academia.edu/3647704/Orang_Aslis_Right_to_Land_Fiona_Lim
7 ibid
Recommended Reading

Indigenous Land Rights Malaysia


From December 2010 to June 2012, The Human Rights Commission of Malaysia (SUHAKAM) conducted a National Inquiry into the Land Rights of Indigenous Peoples in Malaysia in response to numerous and persistent complaints received by the Commission over many years from the Orang Asli of Peninsular Malaysia and the natives of the States of Sabah and Sarawak. This report is probably one of the most substantive, comprehensive, informative and most current pieces of information on the question of indigenous land rights in Malaysia. It is also a heartfelt account produced on behalf and for the benefit of the Orang Asal, in particular the Orang Asli’s indigenous rights to land.

The Commission stresses that the National Inquiry “should have dealt with the subject of the indigenous peoples of Malaysia holistically, encompassing a whole gamut of issues faced by them, but due to time and other constraints, the Inquiry … deals essentially with the issue of their land rights, specifically, the increasing and incessant infringements or violations of these rights in the wake of the country’s rapid transformation from an agricultural country upon independence to a middle-income nation that is rapidly becoming a high-income one in the not-too-distant future.”

The report is divided into 10 chapters. Chapter 1 explains the concept of a National Inquiry, its legislative basis, procedure and scope of a national inquiry. Chapter 2 focuses on the indigenous peoples of Malaysia, the Orang Asal including the Natives of Sabah, of Sarawak and the Orang Asli of Peninsular Malaysia. Chapter 3 discusses the indigenous peoples’ perspectives on land. Chapter 4 provides an analysis and practical application of the legal foundations of indigenous land rights in Malaysia including Sources of International Law on Indigenous Peoples’ Rights to Lands, Territories and Resources and their Authority, Recognition of Land Rights under Malaysian Laws, Relevant Statutes in Sabah, Sarawak and Peninsular Malaysia and Indigenous Land Rights and the Federal Constitution. Chapter 5 introduces the judicial developments on native Customary Land Rights in Sabah, Sarawak and Orang Asli Land Rights in Peninsular Malaysia. Key Features of Aboriginal and Native Customary Rights are explained. In Chapter 6 – 8, the findings of the inquiry in Sabah, Sarawak and Peninsula Malaysia. They are organized into issues related to native land rights, constraints that natives’ Right to Land as well as effectiveness of responses to native land claims. Chapter 9 describes the impact of recognition and non-recognition of indigenous peoples rights to land and chapter 10 issues recommendations calling for the recognition of indigenous customary rights to land, the remedy of Land Loss, addressing land development issues/imbalances, prevention of future loss of NCR land, the addressing of land administration issues and the recognition of land as central to indigenous peoples’ identity.

The Commission concludes that “with the benefit of hindsight, much of this problem [the land problem of the Orang Asli] might not have arisen, and it would have reflected so much better on us as a nation, if the drafters of the Federal Constitution had incorporated specific provisions to safeguard the Orang Asli as the indigenous peoples of Peninsular Malaysia in Article 153 of the
Constitution, including a specific mention of land reservation for them, as it has done for the Malays and the natives of Sabah and Sarawak.”

Book “The Orang Asli and the UNDRIP: From Rhetoric to Recognition”, Colin Nicholas, Jenita Engi and Teh Yen Ping Center for Orang Asli Concerns and Jaringan Orang Asal SeMalaysia, (2010)30

for a book review see: Yogeswaran Subramaniam, INDIGENOUS LAW BULLETIN May / June 2011, ILB Volume 7, Issue 24


The reviewer, who also draws lessons from the Malaysian situation for Australia, comes to the conclusion that “despite its self-acknowledged limitations in terms of strict legal analysis … this book nonetheless provides a concise, informative and practical depiction and assessment of the multidimensional challenges Orang Asli face in realising the aspirations in the UNDRIP within the Malaysian context. In addition, there are two lessons that Australians can draw from this book.”

The book introduces the background of the current situation of the Orang Asli – that is before the National Inquiry by the SUHAKAM, and critically examines the domestic application of the UNDRIP to Orang Asli. The principal author, Dr Colin Nicholas, is a renowned researcher on a wide array of Orang Asli matters and the coordinator of the the Center for Orang Asli Concerns (’COAC’), a non-governmental organisation that facilitates initiatives ‘at Orang Asli self-development and in defence of their rights’.

Chapters 2, 4 and 5 of the book provide the context and background of Orang Asli within the nation state. Also in Chapter 2, there is an introduction of the complex dynamics of indigenous identity in Malaysia. The authors contend that “while Orang Asli fulfill all criteria for the various definitions of indigenous peoples at international fora, the majority ethnic Malays in Peninsular Malaysia, credited with special rights under the Malaysian Constitution fall short of this criteria. In the same spirit the authors assert in chapter 9 that the non-recognition of Orang Asli as Indigenous peoples by the State and disparate treatment of Orang Asli compared to the Malays in practice and under the Malaysian Constitution are the root causes of their predicament. In Chapter 3, the authors argues that while many Orang Asli continue to enjoy a special attachment to their traditional lands, this enjoyment is challenged by internal and external factors outside the control of the Orang Asli. Chapters 4 and 5 trace and evaluate the impact of each flux of immigrants, British colonialism and the State with regards to the Orang Asli and discuss their relegation from meaningful participants and actors in early Malayan civilisations, to their present status as marginalized and impoverished Malaysians, subject to State control and constantly threatened by integration with the Malay section of society. Chapter 6 reviews the various state development policies and strategies on Orang Asli, contending that these policies set the manner by which Orang Asli communities are to be developed. This is followed by an examination of the provisions of the Malaysian Constitution, national laws and judicial decisions involving Orang Asli in Chapter 7. The authors argue that the common law recognition of Orang Asli customary land rights in the cases of Adong bin Kuwau and Sagong bin Tasi have not realised their full potential, as subsequent cases ‘display a lack of knowledge of these precedent-setting decisions or... are based on arguments that appear to go against the grain of these decisions’.

The Book has been criticized for failing to attempt an analysis of the the gap between common law Orang Asli customary land rights and the UNDRIP. It falls short of being a piece of legal analysis.

Fiona Lim, Orang Asli’s Right To Land
Helpful short legal paper with a good introduction of legislation, summaries of cases brought by members of the Orang Asli and interpretations of legislation and common law doctrines by the Malaysian courts. It is unclear, when the paper was written.

(Note that the author is pursuing a doctoral thesis on the reform of Orang Asli Land Rights at the Law Faculty of the University of New South Wales, it may be worth it to look up any further publications by his author)

Interesting website by legal advocates, articles explains the challenges arising from a lack of clear constitutional protection of the Orang Asli, their rights and as a consequence their land rights

Center of Orang Asli Concerns

Speech discussing questions such as The State and Orang Asli Wellbeing, Are there Protections for the Orang Asli in the Constitution? Missing Protections: and importantly The Orang Asli Land Situation Today

Outsiders in their Own Land, Talking points presented at the Judicial and Legal Training Institute (ILKAP)'s, National Law Conference on 'Law and Social Order: Current Challenges in Malaysia' Putrajaya International Convention Centre, 11-12 November 2014

A talk on the theme of the Orang Asli in their role as outsiders in their own land. It discusses the concept of outsider from different angels such as the Orang Asli as outsiders in their customary land, outsiders In the nation state a.o. It incorporates perceptions and feelings of the Orang Asli as it regards their land and their standing in Malaysian society

Zurairi AR, Orang Asli more ‘special’ than Malays, deserve better treatment, says ex-judge, Malay Mail, December 24, 2013

Public appeal by a high ranking judge to the Putrajaya to “treat the indigenous people in Peninsular Malaysia better as they hold a “more special” constitutional position than do the country’s Malays, a former high-ranking judge said today”