

THE ABORIGINAL PEOPLES OF MALAYSIA:

OVERVIEW OF LITIGATION INVOLVING THE LAND RIGHTS OF THE *ORANG*

ASLI

Gregory Das

(Malaysia)

Partner, Messrs Steven Thiru & Sudhar Partnership

DISTINCTION BETWEEN INDIGENOUS & ABORIGINAL PEOPLES

- In Malaysia, there is a historical and legal distinction between the indigenous population and the aboriginal peoples.
- The indigenous population would generally be the Malay population in West Malaysia or Peninsula Malaysia and the native population of the Borneo States of Sabah and Sarawak called East Malaysia. They constitute the majority population in both territories.
- The aboriginal peoples are a societal group of their own.

WHO IS AN ABORIGINE?

- The aboriginal peoples of Malaysia are called 'Orang Asli' in Malay which by a literal translation means 'original people'.
- The statutory definition of an Aborigine – Section 3(1) of the Aboriginal Peoples Act 1954:
 - 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 customs and beliefs.
 - Person of any race adopted when an infant by aborigines and has been brought up as an aborigine, habitually speaks an aboriginal language, follows an aboriginal way of life and customs and beliefs and is a member of an aboriginal community.
 - Child of any union between aboriginal female and a male of another race, provided that child habitually speaks an aboriginal language, follows an aboriginal way of life and customs and beliefs and remains a member of an aboriginal community.

HOW TO DETERMINE?

- Based on public records at the Department of Orang Asli Development
- Identity Cards
- Orang Asli languages
- Acknowledgment and observance of the aboriginal laws and customs

THE SPECIAL POSITION OF THE ORANG ASLI

- The Orang Asli are recognised as having a SPECIAL POSITION in Malaysia's constitutional and legal framework.

- Article 8(5)(c), Federal Constitution:

“(1) All persons are equal before the law and entitled to the equal protection of the law.

...

(5) This Article does not invalidate or prohibit-

...

(c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service”

THE SPECIAL POSITION OF THE ORANG ASLI

- A fiduciary duty is owed by the State to the Orang Asli.
- The High Court in Sagong bin Tasi v. Kerajaan Negeri Selangor [2002] 2 MLJ 591:

“Under the constitution, the aboriginal people enjoyed a special position. Article 8(5)(c) of the Constitution provides:

...

The content of the fiduciary duties has been described in many ways. But in essence, it is a duty to protect the welfare of the aborigines including their land rights, and not to act in a manner inconsistent with those rights, and further to provide remedies where an infringement occurs ...”

THE PROBLEMS FACED

- It is generally recognised, especially by the rights groups advocating the cause of the Orang Asli, that the Aboriginal Peoples Act 1954 has not by its terms and implementation provided sufficient protection to the Orang Asli.
- It is a major bone of contention to this day that the provisions in the Act which provide for the gazetting of native customary land to give full protection against its encroachment is not fully exercised or implemented by the authorities.

COMMON LAW DEVELOPMENTS: THE SAGONG TASI CASE

- Malaysian case law has addressed these problems through reliance on leading principles from the Commonwealth: Mabo (No. 2) and the Wik Peoples case from Australia and the Delgamukw case of Canada.
- The principle was drawn from these cases that aboriginal land rights to hereditary land pre-exist any title system and should be recognised in present times to co-exist with alienated land under any land code subsequently introduced by modern government.

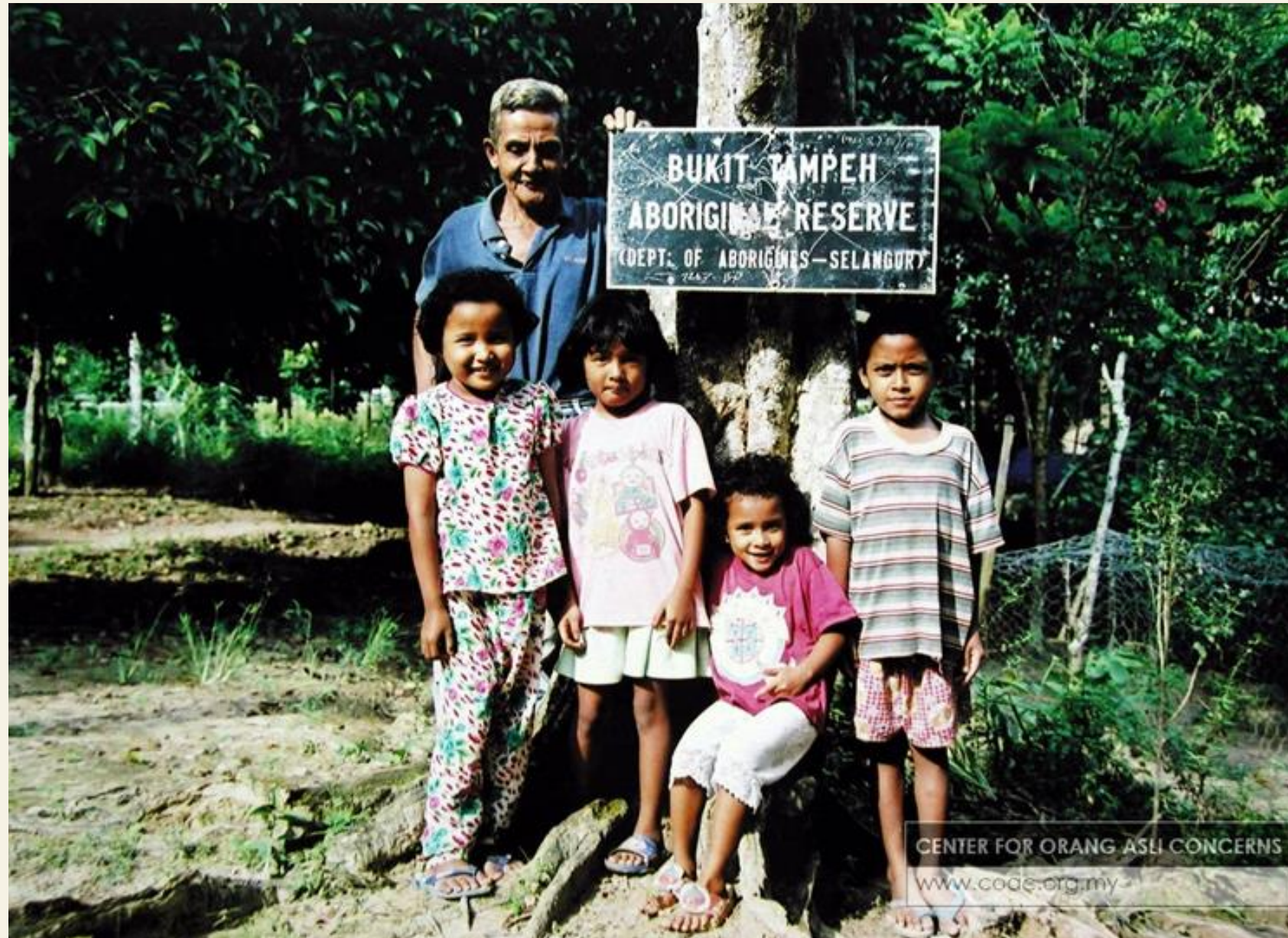
COMMON LAW DEVELOPMENTS: THE SAGONG TASI CASE

- In the landmark case of Sagong Tasi v. State of Selangor [2002] 2 MLJ 591, aboriginal land rights over the hereditary or ancestral land of the Orang Asli was given full recognition by the Malaysian court.
- A case involving the displacement of the Temuan aboriginal people from their village site to make way for the Kuala Lumpur International Airport.
- The question arose whether compensation should be measured solely on the loss of fruit trees and crops on the land or whether the community's proprietary interest in the land they occupied should be legally recognised so that compensation should be for the loss of the land.

COMMON LAW DEVELOPMENTS: THE SAGONG TASI CASE



COMMON LAW DEVELOPMENTS: THE SAGONG TASI CASE



COMMON LAW DEVELOPMENTS: THE SAGONG TASI CASE

- Two principles of importance were recognised in Sagong Tasi's case both inspired by Commonwealth precedents.
- First – The recognition that the oral histories of aboriginal societies are admissible in evidence to prove customary and historical occupation of the land.
- This is always a critical evidential factor because most of the aboriginal communities do not have a written script as proof of record of early occupation except for random hieroglyphic drawings or the recovery of ancient artefacts at site as proof of long occupation.

COMMON LAW DEVELOPMENTS: THE SAGONG TASI CASE

- Second – The recognition that the land rights of the aboriginal people are proprietary rights in the land and not merely usufructuary rights.
- The Court tabulated 6 principles drawn from Commonwealth precedents:
 - 1) it is a right acquired in law and not based on any document of title;
 - 2) it does not require any conduct by any person to complete it, nor does it depend upon any legislative, executive or judicial declaration;
 - 3) native title is a right enforceable by the courts;
 - 4) native title and interest in aboriginal land is not lost by colonization, instead the radical title held by the sovereign become encumbered with native rights in respect of the aboriginal land;
 - 5) native title can be extinguished by clear and plain legislation or by an executive act authorized by such legislation, but compensation should be paid; and
 - 6) the aboriginal people do not become trespassers in their own lands by the establishment of a colony or sovereignty

COMMON LAW DEVELOPMENTS: THE SAGONG TASI CASE



ESTABLISHING NATIVE CUSTOMARY RIGHTS

- Native customary title acquired in areas where Orang Asli have been residing for time immemorial (see Adong bin Kuwau [1997] 1 MLJ 418; [1998] 2 MLJ 158).
- Occupation is not required to be actual physical presence – sufficient measure of control to exclude strangers is sufficient (see Madeli bin Salleh [2008] 2 MLJ 677).
- Oral evidence and genealogy of Orang Asli.
- Fruit trees on the land.
- Clearing of virgin forests.
- Physical evidence of connection with the land (e.g. graves, structures and artefacts).
- National records and archives and historical records and monographs

COMMON ISSUES

- Failure to gazette land as Orang Asli land – However such failure does not deprive the status of the land as native customary lands (see Kerajaan Negeri Selangor v. Sagong bin Tasi [2005] 6 MLJ 289, Khalip Bin Bachik's case [2013] 1 MLJ 799). Failure to gazette land as Orang Asli land amounts to a breach of State's fiduciary duty (see Bato Bagi's case [2011] 8 CLJ 766).
- Mode of challenge – Propriety of eviction of Orang Asli from native customary lands must be determined at trial and not by way of summary proceedings for the possession of land (see Hajemi bin Din v. Elite Agriculture Sdn. Bhd. [2022] MLJU 747 – Court of Appeal decision against which leave to appeal was recently refused by the Federal Court).
- Compensation for acquisition of Orang Asli lands – Dispossessed Orang Asli must be paid adequate compensation under Article 13(2), Federal Constitution and the Land Acquisition Act 1960.

COMMON ISSUES

- Resettlement of dispossessed Orang Asli – Recently, a precedent was set where a tribe of Orang Asli in Johor were relocated by the State to alternative lands that are to be gazetted as Orang Asli reserve lands (see Eddy Bin Salim's case).
- Evidence – Self-serving evidence from Orang Asli claimants require corroboration from other credible evidence (see David bin Mahadus v. Sabah Forestry Development Authority [2022] MLJU 1683). Self-serving statements carry little to no weight in the absence of other corroborative evidence (see Nor Anak Nyawai's case [2005] 3 CLJ 555).
- Evidence – Subsequent case of Abu Bakar Pangis [2014] 5 MLJ 384 agreed with Nor Anak Nyawai, but observed that it was necessary to show that the self-serving testimonies were in fact “*unreliable in that it has or shows concern only about his own needs or interests, in disregard of the truth or the interests of others*”.

COMMON ISSUES

- Extinguishment of customary land by State through legislation.
- Problem has arisen due to rapid development and limited land space.
- It is recognised that extinguishment is possible where legislative intent is “*clear and plain*” (see Mabo’s case).
- In the recent decision of TH Pelita Sadong Sdn. Bhd. v. TR Nyutan & Ors. [2018] 1 MLJ 77, the Federal Court seems to have held that an act of alienation of state land to a third party in respect of which customary land rights are claimed could be regarded as extinguishment of the customary rights. The Federal Court held that the remedy for the loss would be due compensation or the allotment of alternate replacement land.
- The decision has generated controversy on whether extinguishment could be achieved by the executive process of alienation as opposed to a deliberate legislative act.

COMMON ISSUES

- In Bato Bagi & Ors v. Kerajaan Negeri Sarawak [2011] 6 MLJ 297, the Federal Court upheld the extinguishment of the native customary rights of two tribes that were effected by way of Ministerial directions.
- It was ruled that the Ministerial directions were in accordance with a provision of the Sarawak Land Code that permitted the alienation of lands for specified purposes.
- The Federal Court held that the extinguishment of native customary rights over lands can only be effected for a “*public purpose*” and is subject to challenge on grounds of bad faith or abuse of power.
- It was also held that the compensation payable for the extinguishment of native customary rights “*must be reflective of the long term effect which the extinguishment is going to inflict upon the natives*”.

CONCLUDING VIEWS
