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Mabo: Whistle blowing the State government on native title in Malaysia

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The wheel has been spinning — people of the land have been narrating their stories, weaving their fabric of evidence, asserting customary interest in land. While legal jurisprudence stitches and pokes holes, cases like *Mabo No 2* [1] continue to whistle blow on neo-colonial governments who take quiet enjoyment in the term *'terra nullius'*.

The claim for customary interest in land by the Orang Asli [2] of Malaysia is no different from claims made in other former Anglo-colonial states. Hence it was no surprise when the Federal Court of Malaysia [3] in the recent decision of *Superintendent of Land and Surveys Miri Division & 1 Lagi v Madeli bin Salleh* [4] (*'Madeli'*) stated that the proposition of law in *Mabo* represented the common law position on native title throughout the Commonwealth. More significantly, it affirmed *Mabo No 2*'s position, that there is an assumption the Crown intends the property rights of indigenous people to be fully respected.[5]

Madeli echoes the precedent set in the landmark decision by the Malaysian Court of Appeal in *The Selangor State Government & Ors v Sagong bin Tasi & Ors* [6] (*'Sagong'*). In *Sagong*, the Court of Appeal not only recognised the Orang Aslis' customary interest in land, but ordered compensation beyond mere usufruct [7] use of land. In April 2006 the Federal Court granted leave to appeal the decision of the Court of Appeal, and the matter is pending appeal in that court. As both *Madeli* and *Sagong* applied *Mabo No 2*, the aim of this paper is to look into the issues surrounding the concept of land ownership by Orang Asli in Malaysia, and the application of *Mabo No 2* principles to those concepts.

Orang Asli right to an interest in land: the historical misconception

The right to land of the Orang Asli sits on a slippery slope. There is 'convenient' uncertainty whether customary rights to land include a proprietary interest, or merely a usufruct right to land. The uncertainty continues as a result of the lack of understanding of the law and customs of the Orang Asli, with reference instead being made only to concepts of tenure of land and land ownership dating back to the era of traditional Malay rulers. It is this lack of understanding that has caused Malaysia's modern day codes, digests and legislation to provide the Orang Asli with an inferior right of enjoyment of land to that of society at large.

Historically, it was thought that the traditional Malay ruler owned the land or the soil, while the citizens were left only with a usufruct right of enjoyment.[8] This was based on the territorial possession of the ruler. Such historical view should be understood only in the context of political supremacy,[9] as there is no evidence, which identifies the nexus of the ruler's relationship with the village population based solely on an assertion that the traditional ruler was endowed with an 'absolute property in the soil.[10] As stated by Hunud Abia Kadouf:

> ... the mere absence of the notion of private ownership of land in the traditional Malay society would not in itself demonstrate the idea of the existence of 'radical and final title' of land in the sovereign, nor would it support the concept that the traditional Malay land-holder was left with a 'usufructuary' right in the land he occupied.[11]

While modern day land law in Malaysia provides for private ownership in land following the Australian Torrens system, there exists uncertainty in relation to the scope of ownership by the Orang Asli. This obscurity has been perpetuated by the deliberate assumption that customary property rights of the Orang Asli consist of merely a usufruct right to land, or something less.

Unfortunately this uncertainty has led logging tycoons to continue to bulldoze their way through the Orang Asli land. More alarming is the incessant attitude of state governments to ignore customary property rights of the Orang Asli, or offering paltry compensation when alienating land for various development projects.

This historical misconception was recognised in *Sagong* by Mohd Noor Ahmad J, judge in first instance where His Lordship observed:

> Since the establishment of the Selangor Sultanate in 1766, it was claimed that all lands in the state belonged to the Sultan, including those occupied by the aboriginal people since time immemorial.[12]

In addressing this historical misconception, His Lordship stated that:

> Although the Sultan owned the lands, they [Orang Asli] were left undisturbed to manage their affairs and way of life thereon in accordance with their practices, customs and traditions, except in those lands which attracted activities to enrich the Privy Purse, such as tin mining etc. In my view, if the aboriginal people are now to be denied the recognition of their proprietary interest in their customary and ancestral lands, it would be tantamount to taking a step backward to the situation prevailing in Australia before the last quarter of the 20th century where the law, practices, customs and rules of the indigenous people were not given recognition, especially with regard to their strong social and spiritual connection with their traditional lands and waters.[13]

REFERENCES

1. *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

2. The indigenous peoples of Malaysia who represent 0.5 per cent of the population.

3. Highest court of the land in Malaysia.

4. *Superintendent of Land & Surveys Miri Division v Madeli bin Salleh* Civil Appeal No 01-1-2006(Q). The judgment was pronounced on 8 October 2007

5. This position was initiated by Lord Denning in *Oyekan and Others v Adele (1957) 2 All ER 785.*

6. (2005) 6 MLJ 289. See also *Sagong bin Tasi v The Selangor State Government* (2002) 2 MLJ 591, the hearing at first instance, which was heard in the Malaysian High Court.

7. This merely provides the right to occupy the land, and not an interest in the land.

8. William E Maxwell, 'The Law and Customs of the Malays with Reference to the Tenure of Land' (1884) 13 JSBRAS 75. Cf Hunud Abia Kadouf 'The Traditional Malay Ruler and the Land: Maxwell's Theory Revisited' [1997] 1 MLJ cxxi.

9. David SY Wong, *Tenure and Land Dealings in the Malay States* (1975) 13, as referred to by Hunud Abia Kadouf, above n 8.

10. Wong, above n 9, 17–18.

11. Ibid.

12. *Sagong bin Tasi v The Selangor State Government* (2002) 2 MLJ 591, 601

13. Ibid 602.

It is here where His Lordship paused to recognise *Mabo No 2* and Brennan J's reasoning while referring to normative international rights is to protect the indigenous peoples' right to land.

For this reason, the High Court and Court of Appeal decisions in *Sagong* display an evolution of the customary right to land of the Orang Asli.

One would hope that the common law would run alongside political realities in respect of improving legislation. But no — while the Federal *Constitution* provides that indigenous peoples and persons who are descendants of the original inhabitants of peninsular Malaysia and Borneo enjoy the same constitutional rights as the rest of the society, in practice, federal laws indicate otherwise. This is evident as the laws pertaining to indigenous peoples vest almost total power in the minister responsible for indigenous peoples and state government to protect, control and otherwise decide issues concerning them. More often than not this usurpation of power leads to incapacity of the indigenous peoples to participate in decision making which concerns their livelihood.

In peninsular Malaysia, under the *Aboriginal Peoples Act 1954* ('the Act')[14] indigenous peoples who have been granted land on a group basis do not enjoy the co-relative right to own land on an individual basis, or receive titles to land. The greatest title that the Orang Asli can have to their land is one of tenant-at-will — 'an undisguised allusion to the government's perception that all Orang Asli lands unconditionally belong to the state'.[15] However, in 1996 the Social Development Ministry announced that the state government agreed to issue land titles to Orang Asli where decisions are made affecting their ownership right.[16] Such an announcement, whilst laudable, does not clear the cloud of uncertainty surrounding the scope of indigenous peoples' customary title to land. As a result, many reports continue of Orang Asli who have been cheated, misled, or otherwise exploited by land developers.

Weaving through the '*Sagong*' saga

Sagong involved the Orang Asli of the Temuan tribe in Sepang,[17] who were asked to vacate their land within 14 days, pursuant to acquisition of land notices by the Sepang Land Administrator. The land was acquired for the purpose of construction of a portion of the highway to the Kuala Lumpur International Airport. The proposed highway ran through land customarily occupied by the Temuan. It was therefore classified as an aboriginal area or an aboriginal inhabited place under the Act. Although compensation was provided for the compulsory acquisition, it did not include the value of the land lost. It only took into account the loss of crops, fruit trees and loss of homes. This meant that the land was acquired for far less than it was worth.

In an unprecedented judgment, not only did Mohd Noor Ahmad J find that the lands were customary and ancestral lands belonging to the Temuan, His Lordship added that the proprietary interest of the Temuan in their customary and ancestral lands was an interest in the land. However, in examining the Act in detail, and the value system of the Temuan, His Lordship held that the proprietary interest was limited only to an area that formed their settlement, and did not extend to the jungles at large where they foraged for their livelihood, in accordance with their tradition.

This marked a significant development for the Orang Asli, as it recognised the proprietary interest of the Orang Asli and at the same time provided a fair estimation of the scope of the customary right.

In providing legal recognition to native customary rights to land and the extent of the indigenous peoples' full rights under the law, Mohd Noor Ahmad J made a pertinent observation, by stating that the indigenous rights under common law and statute had to be looked at conjunctively. This is because the rights are complementary, and the Act did not extinguish the rights enjoyed by the aboriginal people under the common law.[18] In view of this, His Lordship held that the compensation granted was inadequate within the meaning of Article 13(2)[19] of the Federal *Constitution*. It is interesting to note that in determining adequate compensation, recognition was given to the 'adat'[20] of the Orang Asli.

It was found that the land was continuously occupied and maintained by the Temuan to the exclusion of others in pursuance of their culture, and that they inherited the land from generation to generation in accordance with their custom. Therefore, it fell within the ambit of 'land occupied under customary right' as per s 2 of the *Land Acquisition Act 1960*. This made it necessary for the Temuan to be compensated in accordance with the *Land Acquisition Act*.

In claiming for adequate compensation, *Sagong*'s case tested the extent and context in which the respective provisions of the *Land Acquisition Act* were to be applied. Counsel for the Temuan submitted that the compensatory provisions within the *Aboriginal Peoples Act* were ultra vires. It was argued that the Act failed to provide adequate compensation for acquiring a proprietary interest in land, thereby offending Article 13 of the Constitution. Secondly, the provisions were submitted to be an affront to Article 8 of the Constitution[21] in that there was discrimination in terms of process and compensation between the acquisition of aboriginal land, and acquisition of land under the *Land Acquisition Act 1960*.

Justice Mohd Noor Ahmad, though empathising with the Temuan, ruled against this submission. Instead, His Lordship read the provision of the *Aboriginal Peoples Act* in conjunction with the *Land Acquisition Act 1960* and the customary rights of the Temuan and held:

> The lands were customary and ancestral based on (i) the 'adat' of inheritance and succession of the lands; (ii) their usage for dwelling purposes and cultivation of subsistence and economic crops, hunting and fishing, as resting places of their deceased members of the community and to practice their way of life and (iii) the recognition of individual or family ownership.[22]

Crucially, the point was made that a proprietary interest in land is more than the right to enjoyment and occupancy. This observation allays any discomfort with the strict interpretation of the *Aboriginal Peoples*

14. Amended in 1974.

15. 'The Context of Orang Asli Poverty: Orang Asli Social Indicators' in Colin Nicholas, *The Orang Asli in the Malaysian Nation State*, (Ph D thesis, IPSP, University Malaya, 1998).

16. The then Finance Minister Tun Daim Zainudin announced in May 1999 that a total of 314 715 acres of land would be reserved for Orang Asli.

17. Sepang lies just south of Kuala Lumpur on peninsular Malaysia. Formerly a sleepy town, its proximity to the coast and international airport, and the construction of an F1 car racing circuit has seen a change in Sepang's fortunes over recent years.

18. His Lordship referred to the case of Adong bin Kuwau v Kerajaan Negeri Johor (1997) MLJ 418.

19. Malaysian *Constitution*, Part II Fundamental Liberties, Art 13

20. Native customs.

21. Malaysian *Constitution*, Part II Fundamental Liberties, Art 8

22. *Sagong bin Tasi v The Selangor State Government* (2002) 2 MLJ 591, 599.

Act. Such judicial interpretation can also be seen in the Supreme Court decision of British Colombia in the case of *Delgamuukw v The Queen* in the right of British Columbia where it was held, inter alia:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights.[23]

The implication of the *Sagong* decision is that, while it preserves the compensatory provisions of the *Land Acquisition Act 1960*, it does implicitly indicate the need to amend the Act to take into account compensation for loss of a proprietary interest. However, it is clear from the decision that even if an amendment is not forthcoming, the courts will not hesitate to cross-refer to the *Land Acquisition Act 1960* to compensate for loss of the Orang Asli's proprietary interest in land.

When *Mabo* blew the whistle and *Madeli* played the tune — was *'sui generis'* born?

Mabo blew the whistle on the Selangor State government, when the High Court in *Sagong* stated that the Crown had an obligation to ensure that traditional land title was not impaired or destroyed without the consent of, or otherwise contrary to, the interests of title holders. Mohd Noor Azman J seems to have viewed this obligation with greater force than the Australian courts, by stating the Selangor state government does have a fiduciary duty to protect the welfare of the aborigines, including their land rights. His Lordship extrapolated from Brennan J's observation on fiduciary duty in the *Wik* case,[24] stating that the fiduciary (state government) must act consistently with its duties to protect the welfare of the aboriginal people. The remedy, where the government as trustee or fiduciary has breached its duties, is in the usual form namely by declaration of rights, injunction or a claim in damages and compensation.

This legal analysis has opened a window in Malaysian jurisprudence asserting customary interest in land must be protected by state governments. Such a finding was not specifically made in either *Mabo No 2*, or *Wik*, or any other Australian case concerning aboriginal proprietary rights in customary lands. In *Wik*'s case, Brennan CJ (McHugh and Dawson JJ concurring) held that the establishment of a fiduciary duty between traditional landholders and governments must be determined on a case-by-case basis. There must be some identifiable act or function which gives rise to the duty. It is apparent that the legal force of *Mabo No 2* and similar Commonwealth cases applied in Malaysian jurisprudence is crafting out a *'sui generis'* legal realm for the Orang Asli to claim customary interest in land and be justly compensated if the need arises.

In *Madeli*,[25] the Federal Court did not hesitate to explore this *'sui generis'* realm. The Federal Court held that where the Crown grants land in trust or reserves and dedicates land for a public purpose, the question whether the Crown has revealed a clear and plain intention to extinguish native title will sometimes be a question of fact, sometimes a question of law and sometimes a mixed question of fact and law. Thus, if a reservation is made for a public purpose other than for the benefit of the indigenous inhabitants, a right to continued enjoyment of native title may be consistent with the specified purpose — at least for a time — and native title will not be extinguished.

In setting the scope, *Madeli* also crafted the proviso in that, if the land is used and occupied for the public purpose, and the manner of occupation is inconsistent with the continued enjoyment of native title, native title will be extinguished. Accordingly, a reservation of land for future use as a school, a courthouse or a public office will not by itself extinguish native title: construction of the building, however, would be inconsistent with the continued enjoyment of native title, which would thereby be extinguished. But where the Crown has not granted interests in land, or reserved and dedicated land inconsistently with the right to continued enjoyment of native title by the indigenous inhabitants, native title survives and is legally enforceable.

The future of native title in Malaysia

Mabo No 2 epitomises social outcomes from having the laws and traditions of the indigenous culture recognised as worthy of equal respect to the dominant culture. The impact in cases like *Sagong* and *Madeli* not only creates economic outcomes from giving Orang Asli control over land, it also emancipates the Orang Asli politically by recognising the traditional decision-making structures. This undeniably gives recognition for native title to achieve no less than a transformation of the social, economic and political relationship between the Orang Asli and the rest of Malaysian society.

As a bundle of inherent rights, native title can deliver social, economic and political outcomes through agreements in which the owners of social, economic and political capital engage with native title holders' parties in a manner consistent with principles of human rights. This may be achieved by attaching a right to negotiate within the native title, which creates the capacity to generate agreements and provide the Orang Asli with processes to enable their effective participation in management of their traditional lands.[26]

Though the pace of change through legislative process is slow in Malaysia, the courts appear to be proactive in lending support from other Commonwealth cases. We have already witnessed an implicit juridification of native title in *Madeli*, and hopefully in the appeal of *Sagong*.

As *Mabo No 2* weaves its way through Malaysian jurisprudence, the wheel spins and the fabric of evidence of Orang Asli interest in land strengthens. At least now, it is (to some extent) settled that the deprivation of Orang Asli livelihood may amount to a deprivation of life itself, and state action, which produces such a consequence, may be impugned on well-established grounds.[27]

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23. [1997] 153 DLR (4th) 193.

24. The *Wik Peoples v The State of Queensland* (1996) 187 CLR 1. Chief Justice Brennan's decision formed part of the dissenting judgments. The majority did not make a specific finding in relation to governments owing Australian Aborigines a fiduciary duty in relation to their customary proprietary rights.

25. *Superintendent of Land & Surveys Miri Division v Madeli bin Salleh* Civil Appeal No 01-1-2006(Q).

26. This was the approach by the Aboriginal and Torres Straits Islander Social Justice Commissioner, *Native Title Report 2001* hreoc.gov.au at 10 November 2008.

27. An observation by Gopal Sri Ram, JCA, Court of Appeal decision in *Adong bin Kuwau v Kerajaan Negeri Johor* 15 (1997) 1 MLJ 418.