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# **Equitable Compensation for Orang Asli upon Eviction: The Malaysian experience**

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### **Abstract**

The Malaysian land law provides that the title shall be indefeasible upon registration and security of tenure is guaranteed. However, for the Orang Asli, the Aboriginal Peoples Act 1954 (Act 134) only declares a communal right to the native for them to live and the right to revoke the declaration is vested in the government. It is now left to the court's decision in case law to decide the fate of the Orang Aslis' rights to land. This article aims to examine the Orang Aslis' land rights and the involuntary resettlement compensation accorded to them by using a doctrinal approach.

Keywords: Registration; Aborigines; Revocation; Compensation

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### **1.0 Introduction**

The interest in land shall only be legally recognized upon endorsement of the proprietor's name in the Register Document of title. Land rights under the NLC only arise and are enforceable upon registration of the title or interest in land (Teo, 2012). The registration principle aligns with the property rights theory (Laslet, 2003; Sreenivasan, 1995). The registration offers the certainty of title and security of tenure as provided under Section 340(1) of the NLC. On the contrary, the Malaysian Parliament has enacted a particular statute for the Orang Asli, including the land rights suitable to their nomadic life. Act 134 is enacted for the protection, well-being, and advancement of the aboriginal peoples of Peninsular Malaysia. The Act protects the land inhabited by the Orang Asli by notification in the *Gazette*, declare any area predominantly or exclusively inhabited by Orang Asli as an aboriginal area or aboriginal reserve as provided in Section 6 and 7 of Act 134. Once the declaration is made under Act 134, the Orang Asli will be compensated if the State Authority later revokes it.

The State Authority may grant compensation and may pay such compensation to the persons entitled in his opinion. The Director-General shall hold as a common fund for such persons or such aboriginal community as shall be directed and administered in such manner as may be prescribed by the Minister as provided under Section 12 of Act 134. Act 134 is the manifestation of the protection accorded by the law that flows from the supreme law of the land, the Federal Constitution 1957. In brief, the declaration under Act 134 for the Orang Aslis' land rights is not based on individual land registration. Hence, the Orang Asli land rights are based on communal rights to land, unlike those who secure their land titles through the registration process under the NLC.

### **1.1 Research Questions**

1.1.1 To study the orang asli's land right under the existing legal framework; and

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- 1.1.2 To explore whether involuntary resettlement compensation for the orang asli upon eviction from their livelihood protects their right to land?

## 1.2 Research Objectives

- 1.2.1 To identify the extent of land rights accorded to the orang asli under the existing law; and  
1.2.2 To establish the types of the involuntary resettlement compensation accorded to the orang asli upon eviction that protects their right to land.

## 2.0 Literature Review

### 2.1 *The welfare of the Aborigines under the Federal Constitution*

The provisions of fundamental liberties under Article 8(1) of the Federal Constitution provide that all persons are equal before the law and entitled to the equal protection of the law. It also signifies that under Article 8(5) of the Federal Constitution, it does not invalidate any protection, well-being, or advancement of the Orang Asli in West Malaysia. Since the Orang Asli are still struggling to maintain their identity and control over their lands and resources, the responsibility for safeguarding the rights of the Orang Asli lies with the governments (Bulan, 2010). Relating to this issue, under Article 72 List 1 (Item 16) of the Federal Constitution, the welfare of the Orang Asli is provided under the Federal List. The Malaysian Court, in the case of *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi* [2005] 4 CLJ 169, on the other hand, has given a more comprehensive approach. In viewing the government's responsibility in safeguarding the welfare of the Orang Asli, that also includes protecting their land rights.

Article 13 provides that no deprivation of property except under the law and adequate for the deprivation of land. Revocation of the declaration provided under Act 134 may amount to the Orang Asli's deprivation of land rights. However, under Article 74 List-II (Item 2) of the Federal Constitution, the land is under the purview of the states. Thus, despite the decision of the court granting the Orang Asli of the land rights, it does not affect or supersede the power of the State Authority relating to "land" in cancelling or revoking any declaration made over aboriginal area or reserve in favour of the Orang Asli. The power vested to the state authority to revoke the declaration made under Act 134 is not in line with the property rights theory.

The Orang Asli's land right is only a declaration of aboriginal area or reserve, without any individual registration process. The right of occupancy within the aboriginal area does not confer on the Orang Asli any better title. The right is equivalent to a status of a tenant at will under Section 213 of the NLC. Section 12 of Act 134 explicitly provides that any aboriginal area or reserve land is acquired wholly or partly. The land declared for aboriginal or reserve may be acquired for public purposes as provided under Section 13 of Act 134. The rights of occupancy over the aboriginal area or reserve is communal right not individual, henceforth no indefeasibility of title is given to them. The State Authority may revoke the State Gazette of the aboriginal area under Section 6(3) and 7(3) of Act 134.

### 2.2 *Revocation of Natives Customary Land under Act 134*

In *Kerajaan Negeri Selangor & Others v Sagong Tasi & Ors* [2005] 4 CLJ 169, the Court granted the compensation under the Land Acquisition Act 1960 for loss of part of the customary land. The judge provides a liberal interpretation of the rights of the Orang Asli in this case:

*"The purpose of Act 134 is to protect and uplift the First Peoples of this country. It is, therefore, fundamentally a human rights statute. It acquires a quasi-constitutional status giving it pre-eminence over ordinary legislation. It must therefore receive a broad and liberal interpretation..."*

In *Bato Bagi & Ors v Kerajaan Negeri Sarawak & Another Appeal* [2012] 1 MLRA 1, the Federal Court rejected the argument on the absence of prior consultation before extinguishing the natives' customary land. There is no provision under the law to inform the natives that their lands would be extinguished or invite them to make representation to the government, it cannot be said that the provision is unconstitutional.

### 2.3 *Involuntary Resettlement Compensation Upon Eviction*

The government acknowledged the concerns of the Orang Asli people over issues relating to their claim to customary lands and in the 65th National Land Council meeting adopted the Alienation and Development Policy on the Agricultural and Residential Land for Orang Asli purposes. The Government has agreed to grant the orang asli's household with permanent housing and Agricultural lots in size from 2 to 6 acres (0.8 to 2.4 hectares), and each household received for their home and orchard, a quarter-acre (0.1 hectares) (dusun). However, this policy was commented by scholars as it does not reflect the land right of orang asli and it is questionable (Buang 2008). (Wan Daud 2020) opined that the Orang Asli community will not benefit from the planned Orang Asli Land Policy because it violates the Orang Asli right and does not recognising their legal claim to their traditional lands. As reviewed by (Wook 2016) lack of formal recognition results in uncertainty that resulted to no security of tenure. Without title, the Orang Asli are considered as occupying land at the discretion of the state.

## 3.0 Methodology

The paper employs doctrinal legal research by analyzing statutory provisions by applying the power of reasoning (K Vibhute and F

Aynalem, 2009). Even though it is less rigorous, it is in-depth and flexible, which provides room for critical analysis of the Orang Asli's rights to fair compensation upon eviction from their land and livelihood. The literature review is carried out on digital and non-digital libraries that comprise primary and secondary sources in this legal research.

A literature review from the digital and non-digital sources was steered to gather information relevant to answering the research questions. The collected information is drawn mainly from primary legal sources in the form of legislative texts such as statutes and regulations. In addition, information from the non-legislative texts consists of procedures, guidelines and reported cases are also collected. Apart from that, secondary legal sources from law textbooks and law journals were also collected. Finally, the primary and secondary legal sources analysis involved content and doctrinal analysis.

## 4.0 Findings and Discussions

### 4.1 The Judicial Cognisance of the Orang Asli's Land Right

The acceptance of the court on the issue of customary land rights is highly commendable. However, the court is still reluctant to decide against the right to revoke the aborigines' ancestral land declaration under Act 134. The Act is silent on any compensation payable to the Orang Asli upon eviction. Hence, they still need to enforce this right through court proceedings. In *Adong Bin Kuwau & Ors V Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 (H.C.), the court decided that Section 11 of Act 134 guarantees adequate compensation for land bearing rubber or fruit trees claimed by the aboriginal people that are alienated. The land on which those trees are planted is either a reserve land for the aboriginal people or an area where they had a right to access a jungle reserve. As such, adequate compensation must be made for these trees, not the land. In the present case, adequate compensation for the loss of livelihood and hunting ground ought to be made when the land where the plaintiffs usually went to look for food and produce was acquired. The compensation was not for the land but for what was above the land over which the plaintiffs had a right. The plaintiffs' rights, both under common law and statutory law, are proprietary rights protected by art 13 of the Federal Constitution. In awarding compensation under the Land Acquisition Act 1960 for titled lands, the court applies the similar compensable interest test or, in other words, the court compensates a land at its market value.

### 4.2 Compensation Payable upon Eviction from the Customary Land

The Court in *Bato Bagi* rejected the natives' appeal, alleging that the Government's extinguishment of the natives' customary land was unconstitutional based on a lack of criteria in calculating the amount of compensation. In claiming compensation, it was up to the appellants to furnish evidence supporting the quantum of compensation they were claiming. They could claim based on loss of livelihood, agricultural produce of crop, and loss of the right of way or burial sites.

In deliberating the rights to get compensation upon extinguishment, the honourable Richard Malanjum JCSS in *Bato Bagi* opines as follows:

*"In considering the quantum of compensation, the relevant authority should not evaluate natives' customary rights purely from the monetary aspect. All relevant factors must be taken into account. The natives who belong to the land are part and parcel of it instead of being the owners, their total dependency on the land and its surroundings, and how their livelihood depends on the land. These are factual issues, and most importantly, the amount of compensation must reflect the long-term effect the extinguishment will inflict upon the natives. In my view, the compensation should not be merely adequate. It should also be sufficient and reasonable based on a long-term scale."*

In relation to the loss of customary land, *Eddy bin Salim & Ors v Iskandar Regional Development Authority & Ors* [2017] MLJU 2308 *Teo Say Eng J*, the judge made the following statements when granting the Plaintiffs application:

*"When we speak about aboriginal title, we must distinguish it from "normal" proprietary interest. The Privy Council has explained 'aboriginal title' in St. Catherine's Milling and Lumber Co v. The Queen [1888] 14 A.C. as sui generis interest in land. The idea that aboriginal title is sui generis has 3 dimensions: namely, one dimension is its inalienability, meaning that lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the owner and, as a result, is inalienable to third parties. Another dimension is its source that is, it arises from the prior occupation by aboriginal peoples, and the 3rd dimension is the fact that it is held communally, meaning that the aboriginal title is a collective right to the land held by*

### 4.3 Quantum of Compensation

Concerning calculating the quantum of compensation payable upon extinguishing the natives' customary land, there is no precise legal method provided by Act 134. As noted above, Sections 11 and 12 of Act 134 merely provide compensation as the State Authority thinks just and fits. Article 10 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which the General Assembly adopted in 2007, pre-consultation with the aborigines before any legislation or administrative action is decided on payment of compensation. The court rejected using "international norms" in interpreting local law in *Bato Bagi*; by stating that International treaties do not form part of the national law unless it has been ratified and introduced at the national level. This view aligns with the principle of transformation, where international law does not transform into federal law unless enacted in national law as prescribed under the principles of international law, where states can only adopt any international law or treaty if incorporated into their domestic law (Kelsen 2003). In brief, the unfettered discretion to revoke under Act 134 is valid because UNDRIP is not adopted under any domestic law Malaysia. Another relevant treaty for recognising the aborigines' land rights is the World Commission Dam, which in brief proposed that before any land

designated to the aborigines could be taken away, the aborigines should be consulted before the process.

#### 4.3.1 Compensation Payable upon Eviction from the Customary Land

The compensation payable to the aborigines is based on the case of *Adong bin Kuwau*, where the court decided that compensation should be paid on deprivations of:

- (i) heritage land;
- (ii) freedom of habitation or movement;
- (iii) forest produce; and
- (iv) future living.

In *Sagong bin Tasi*, the court ordered 'market value' compensation to acquire the natives' customary land. Taking into consideration of the special attachment that Orang Asli have with their customary lands in assessing compensation, the following factors should be taken into account in assessing compensation for the loss of Orang Asli customary land:

- a. Market value: the price that a willing buyer will pay and what a willing seller will accept;
- b. Highest and best use: valuation according to the most advantageous use of the property;
- c. Special value to the owner: this refers to a particular feature of the land that involves a financial advantage to the owner;
- d. Severance: where land has been severed from the balance of the owners' land, then compensation is allowed for the reduction in the market value of the land retained by the owner;
- e. Injurious affection: where part of the property is acquired, compensation will be allowed for loss that is caused to the balance of the land;
- f. Reinstatement: the cost of reinstating the disposed owner in a comparable land;
- g. Disturbance: costs directly incurred as a consequence of the acquisition; and
- h. Special compensation or solatium: for hardship, inconvenience, and injured feelings.

#### 4.3.2 Claims Against Legitimate Expectation

In *Pendor bin Anger & Ors v Ketua Pengarah Jabatan Alam Sekitar & Ors [2011] MLJU 1522* judge Mohd Zawawi Salleh states that the law does not protect every expectation but only those which are "legitimate". Generally, a legitimate expectation arises when there has been a representation of a certain outcome by the public authorities to an individual. Simultaneously, court recognizes traumatic, psychological and socio-cultural consequences on the Orang Asli in the process of relocation program. Hence, the Orang Asli concerned have to be consulted prior to finalization of the project on their lands. They are "affected persons". After all, "they have the right to live on their lands as their forefather had lived and this would mean that even the future generation of aboriginal people would be entitled to this right".

#### 4.4 Compensation for Future Generation

In *Adong bin Kuwau (1998)* considered a deprivation of 'heritage land' and 'future living' in assessing compensation for the loss of Orang Asli lands. A possible method to compensate for such loss would be to factor an appropriate multiplier for the base amount of compensation assessed. In *Adong bin Kuwau (1998)*, the court ordered a multiplier of 25 years for loss of 'future' living. However, in *Bato Bagi (2012)*, the Federal Court believed that the multiplier should be 20 years and not 25 years.

## 5.0 Conclusion

Since no provision gave details on the computation of compensation payable to the aborigines when their land was extinguished for a public purpose, it is left to the court to interpret what is considered fair and adequate. The compensation must be clarified to compute the amount (Peter, 2005). Above all, despite the Malaysian court's vigorous interpretation of the Orang Asli's land rights in the case of *Adong bin Kuwau and Bato Bagi* interpreting the Orang Asli land rights, the future of the Orang Asli rights to land is still indecisive. Case law is classified as unwritten law under the Malaysian Legal System that is flexible and may be subject to changes. In contrast, a statute is a written law that contains express provisions to be readily complied with by anyone. Guidelines on Compensations payable to the Orang Asli should be made available by the relevant authority that conforms with the International and Domestic law requirements to safeguard their rights and welfare.

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## Paper Contribution to Related Field of Study

This study addresses the equitable compensation for the Orang Asli upon eviction in order to ensure that the welfare of Orang Asli is protected and they are able to move forward after the relocation from their former home ground. The interpretation of the court inadvertently assist the future resettlement scheme of Orang Asli in providing an adequate compensation as per the Federal Constitution.

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